



## Articles

### It's not just policy: The role of social facts in judicial reasoning in negligence cases

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*Negligence cases are by nature intimately concerned with the behaviour of people and institutions, and the nature of the world and society. Judicial statements about these matters used as part of judicial law making might be called social facts (SF). Despite apparent widespread judicial use of SF from the earliest of negligence cases, the role of SF in judicial reasoning in negligence cases is relatively unexplored. 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. This article examines more closely how judges use SF in negligence cases. Part 1 of this article identifies the range of roles that SF play in judicial reasoning in negligence cases. It argues that SF are not just used by judges as part of policy reasoning. Part 2 argues that the use of 'common sense' SF in negligence cases may give rise to issues of judicial accuracy and potential judicial error in negligence cases. Part 3 discusses issues of proof in relation to SF in negligence cases and argues that there is a lack of clarity in relation to the legal and evidential basis for judicial use of SF and that reform is required. Finally, Part 4 discusses the need for 'descriptive' theories of judicial negligence decision-making to consider judicial use of SF, and suggests that existing theoretical accounts of tort law, particularly those relating to rights and corrective justice, do not appear to adequately account for judicial use of SF in tort cases.*

### Introduction

Negligence cases are by nature intimately concerned with the behaviour of people and institutions, and the nature of the world and society. Judicial statements about these matters used as part of judicial law making might be called social facts (SF).<sup>1</sup> Cases which consider negligence liability in the context of alcohol consumption discuss how people act when they drink alcohol.<sup>2</sup> Cases concerning sport discuss the nature of sport and why and how

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1 For further discussion of the meaning of 'social facts' (SF) see K Burns, 'The Way the World Is: Social Facts in High Court Negligence Cases' (2004) 12 *TLJ* 215; K Burns, 'The High Court and Social Facts: A Negligence Case Study' in M Bryan (Ed), *Private Law in Theory and Practice*, Routledge-Cavendish, Oxford, 2007, p 85; K Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *FLR* 317.

2 For example, see *Cole v South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469; 207 ALR 52; [2004] HCA 29; BC200403491; *Joslyn v Berryman* (2003) 214 CLR 552; 198 ALR 137; [2003] HCA 34; BC200303073; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; 260 ALR 606; [2009] HCA 47; BC200910034.

people play sport.<sup>3</sup> Cases concerning children discuss how children act and behave.<sup>4</sup> Cases involving accidents<sup>5</sup> on Australian beaches and in Australian water courses discuss the nature and risks of swimming, water sports and Australian beach life.<sup>6</sup> The multitudes of other negligence cases decided in Australian courts discuss the nature of the places where accidents happen in Australia and how people act in those places. This includes accidents from the home<sup>7</sup> to the shopping centre,<sup>8</sup> from the prison<sup>9</sup> to the hospital,<sup>10</sup> from the school<sup>11</sup> to the highway,<sup>12</sup> and from the court<sup>13</sup> to the Australian outback.<sup>14</sup> Negligence cases take place against the back-drop of judicial assumptions

3 For example, see *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145; [2002] HCA 9; BC200200664; *Agar v Hyde* (2000) 201 CLR 552; 173 ALR 665; [2000] HCA 41; BC200004311.

4 For example, see *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801; *New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126; *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161; 216 ALR 415; [2005] HCA 31; BC200503961; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; 198 ALR 100; [2003] HCA 33; BC200303072; *Geyer v Downs* (1977) 138 CLR 91; 17 ALR 408; (1977) 52 ALJR 142; BC7700096; *McHale v Watson* (1966) 115 CLR 199; [1966] ALR 513; (1966) 39 ALJR 459; BC6600450; *Chester v The Council of the Municipality of Waverley* (1939) 62 CLR 1; [1939] ALR 294; (1939) 13 ALJR 129; BC3900018.

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

6 For example, see *Swain v Waverley Municipal Council* (2005) 220 CLR 517; 213 ALR 249; [2005] HCA 4; BC200500186; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; 221 ALR 764; [2005] HCA 63; BC200507888; *The Waterways Authority v Fitzgibbon* (2005) 221 ALR 402; (2005) 79 ALJR 1816; [2005] HCA 57; BC200507469; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; 221 ALR 711; [2005] HCA 62; BC200507887; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; 112 ALR 393; [1993] HCA 76; BC9303587; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; 29 ALR 217; (1980) 54 ALJR 283; BC8000072.

7 For example, see *Neindorf v Junkovic* (2005) 222 ALR 631; 80 ALJR 341; [2005] HCA 75; BC200510492; *Northern Sandblasting v Harris* (1997) 188 CLR 313; 146 ALR 572; [1997] HCA 39; BC9703568.

8 For example, see *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; 69 ALR 615; [1987] HCA 7; BC8701761; *Strong v Woolworths Ltd* (2012) 246 CLR 182; 285 ALR 420; [2012] HCA 5; BC201200949.

9 *New South Wales v Bujdoso* (2005) 227 CLR 1; 222 ALR 663; [2005] HCA 76; BC200510493.

10 For example, see *Rosenberg v Percival* (2001) 205 CLR 434; 178 ALR 577; [2001] HCA 18; BC200101435; *Chappel v Hart* (1998) 195 CLR 232; 156 ALR 517; [1998] HCA 55; BC9804342; *Wallace v Kam* (2013) 297 ALR 383; 87 ALJR 648; [2013] HCA 19; BC201302166 (8 May 2013); *Tabet v Gett* (2010) 240 CLR 537; 265 ALR 227; [2010] HCA 12; BC201002304.

11 For example, see *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161; 216 ALR 415; [2005] HCA 31; BC200503961; *Geyer v Downs* (1977) 138 CLR 91; 17 ALR 408; (1977) 52 ALJR 142; BC7700096; *New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126; *Oyston v St Patrick's College* [2013] NSWCA 135; BC201302671 (27 May 2013).

12 *Commissioner of Main Roads v Jones* (2005) 215 ALR 418; 42 MVR 289; [2005] HCA 27; BC200503224; *Pledge v Roads and Traffic Authority* (2004) 205 ALR 56; 40 MVR 289; [2004] HCA 13; BC200400863; *Brodie v Singleton Shire Council* (2001) 206 CLR 512; 180 ALR 145; [2001] HCA 29; BC200102755.

13 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; 214 ALR 92; [2005] HCA 12; BC200500919.

14 For example, see *Tame v New South Wales* (2002) 211 CLR 317; 191 ALR 449; [2002] HCA

about the nature of modern Australian society — the nature of family life,<sup>15</sup> the nature of marriage,<sup>16</sup> the nature of commercial and government enterprise,<sup>17</sup> the nature of policing,<sup>18</sup> the nature of Australian values, how society cares for the young and for the old,<sup>19</sup> and even how and when Australians eat fast food.<sup>20</sup> Judicial assumptions of SF also appear to be required in contemporary Australian negligence law as part of the application of tort reform legislation. This includes the application of statutory provisions in relation to the proof of breach,<sup>21</sup> causation<sup>22</sup> and defences such as those relating to risky recreational activities.<sup>23</sup> Of course, express judicial statements may only represent a small part of the overall judicial use of SF in negligence cases. Malbon has referred to judicial use of unexpressed extra-legal matters and judicial values in judicial reasoning more broadly as the ‘dark matter’ of judicial reasoning.<sup>24</sup>

Despite apparent widespread judicial use of SF from the earliest of negligence cases, the role of SF in judicial reasoning in negligence cases is relatively unexplored.<sup>25</sup> 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. The term policy is

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35; BC200205111 (the facts of the *Annetts* case); *Commissioner of Main Roads v Jones* (2005) 215 ALR 418; 42 MVR 289; [2005] HCA 27; BC200503224.

15 See, eg, *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801.

16 See *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801; *De Sales v Ingrassia* (2002) 212 CLR 338; 193 ALR 130; [2002] HCA 52; BC200206731.

17 See *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; 178 ALR 634; [2001] HCA 19; BC200101436; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54; BC200207277; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; 205 ALR 522; [2004] HCA 16; BC200401482.

18 See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; 254 ALR 432; [2009] HCA 15; BC200902940; *New South Wales v Fahy* (2007) 232 CLR 486; 236 ALR 406; [2007] HCA 20; BC200703763; *Australian Capital Territory v Crowley; Commonwealth of Australia and Pitkethly* (2012) 7 ACTLR 142; 273 FLR 370; [2012] ACTCA 52; BC201209848 (17 December 2012).

19 See, eg, *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801.

20 *Strong v Woolworths Ltd* (2012) 246 CLR 182; 285 ALR 420; [2012] HCA 5; BC201200949; *Samaan v Kentucky Fried Chicken Pty Ltd* [2012] NSWSC 381; BC201202507 (20 April 2012).

21 Civil Liability Act 2002 (NSW) ss 5B and 5C; Civil Liability Act 2002 (Qld) s 9; Civil Liability Act 1936 (SA) s 32; Civil Liability Act 2002 (TAS) ss 11 and 12; Wrongs Act 1958 (Vic) s 48 and 49; Civil Liability Act 2002 (WA) s 5B; Civil Law (Wrongs) Act 2002 ss 43 and 44.

22 Civil Liability Act 2002 (NSW) s 5D; Civil Liability Act 2002 (Qld) s 11; Civil Liability Act 1936 (SA) s 34; Civil Liability Act 2002 (TAS) s 13; Wrongs Act 1958 (Vic) s 51; Civil Liability Act 2002 (WA) s 5C; Civil Law (Wrongs) Act 2002 s 45.

23 Civil Liability Act 2002 (NSW) s 5L; Civil Liability Act 2002 (Qld) s 19; Civil Liability Act 1936 (SA) s 38; Civil Liability Act 2002 (TAS) s 20; Civil Liability Act 2002 (WA) s 5H.

24 J Malbon, ‘Judicial Values’ in I Freckleton and H Selby (Eds), *Appealing to the Future: Michael Kirby and his Legacy*, Lawbook Co, Sydney, 2009, p 579 at p 581.

25 This article builds on my earlier ‘social fact’ work in this area, see above n 1. See also K Burns, ‘It’s Just not Cricket: The High Court, Sport and Legislative Facts’ (2002) 10 *TLJ* 234.

difficult to define;<sup>26</sup> however, in this article it is used broadly to mean the potential consequences of negligence liability or the prediction or promotion of particular policy or social outcomes. Despite judicial statements which suggest that ‘policy’ (at least when it is not ‘legal policy’) should not form part of judicial deliberations in negligence cases,<sup>27</sup> it appears that public or social policy is widely utilised by judges in the High Court as part of their judicial reasoning in negligence cases.<sup>28</sup> 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.<sup>29</sup> Policy statements are clearly a kind of SF as such statements typically concern the behaviour of people and institutions, and the nature of the world and society. However, SF type statements are also used by judges in their reasoning in negligence cases in other ways.

This article examines more closely how judges use SF in negligence cases. It draws on examples of judicial use of SF in negligence cases in appellate courts such as the High Court of Australia. However, the use of SF by trial judges in negligence cases is also likely widespread. It argues that SF play a range of roles in judicial reasoning in negligence cases and are not only (or perhaps even predominantly) used as part of ‘policy’ reasoning. Judges clearly use SF in a range of different ways including to set background and context, as ‘social framework’ to assess and interpret adjudicative facts<sup>30</sup> at issue between the parties, and to predict policy consequences. This has a number of implications including the accuracy of judicial ‘common sense’ assumptions of SF, issues of reception and proof of SF in negligence cases, and whether current descriptive theories of judicial reasoning in negligence cases properly

<sup>26</sup> See the discussion in C Witting, ‘Tort Law, Policy and the High Court of Australia’ (2007) 31 *MULR* 569 at 571–3.

<sup>27</sup> See the decision of the High Court in *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147 where the High Court 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; 199 ALR 131; [2003] HCA 38; BC200303801, 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’.

<sup>28</sup> H Luntz, ‘The Use of Policy in Negligence Cases in the High Court of Australia’ in M Bryan (Ed), *Private Law in Theory and Practice*, Routledge-Cavendish, Oxford, 2007, p 55 at p 58–60.

<sup>29</sup> For example, see A Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’ in A Robertson and H W Tang (Eds), *The Goals of Private Law*, Hart, Oxford, 2009, p 28; A Robertson, ‘Policy-Based Reasoning in Duty of Care Cases’ (2013) 33 *Legal Studies* 119; Luntz, above n 28; Witting, above n 26.

<sup>30</sup> Adjudicative facts are those facts specific and particular to fact finding about the parties to a particular action — the who, what, where, when. See K Culp Davis, ‘Judicial Notice’ (1955) 55(7) *Columbia L Rev* 945 at 952. The use of SF as part of the interpretation or assessment of adjudicative facts is referred to by Monahan and Walker as ‘social framework’. See L Walker and J Monahan, ‘Social Frameworks: A New Use of Social Science in Law’ (1987) 73 *Virginia L Rev* 559. For further discussion of the distinction between adjudicative facts and ‘lawmaking’ or ‘legislative facts’ (a kind of SF) in Australian courts, see Hon J D Heydon, ‘Developing the Common Law’ in J Gleeson and R Higgins (Eds), *Constituting Law: Legal Argument and Social Values*, Federation Press, Sydney, 2011, p 93 at pp 95–122; and Burns, ‘The Way the World is’, above n 1, pp 87–8. See also B K Grunwald, ‘Sub-optimal Social Science and Judicial Precedent’ (2013) 161 *UP Law Rev* 1408.

account for judicial use of SF in negligence reasoning. Part 1 of this article identifies the range of roles that SF play in judicial reasoning in negligence cases. It argues that SF are not just used by judges as part of policy reasoning. Part 2 argues that the use of ‘common sense’ SF in negligence cases may give rise to issues of judicial accuracy and potential judicial error in negligence cases. Part 3 discusses issues of proof in relation to SF in negligence cases and argues that there is a lack of clarity in relation to the legal and evidential basis for judicial use of SF and that reform is required. Finally, Part 4 discusses the need for ‘descriptive’ theories of judicial negligence decision-making to consider judicial use of SF, and suggests that existing theoretical accounts of tort law, particularly those relating to rights and corrective justice, do not appear to adequately account for judicial use of SF in tort cases.

## 1 The role of social facts in judicial reasoning in negligence cases

### Historical use of SF in 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*,<sup>31</sup> 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<sup>32</sup> . . . It is possible to use almost anything in a way that will make it dangerous if defective<sup>33</sup> . . . 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.<sup>34</sup> (SF in italics)*

In 1932 in *Donoghue v Stevenson*,<sup>35</sup> 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.<sup>36</sup> (SF in italics)*

In 1939 in one of the earliest nervous shock cases in the High Court,

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31 *MacPherson v Buick Motor Co*, 217 NY 382, (NY, 1916).

32 *Ibid*, at 387 (citations omitted).

33 *Ibid*, at 389.

34 *Ibid*, at 391.

35 *Donoghue v Stevenson* [1932] AC 562; [1932] SC (HL) 31; [1932] All ER Rep 1; (1932) 101 LJPC 119.

36 *Ibid*, at AC 583.

*Chester v The Council of the Municipality of Waverley*,<sup>37</sup> 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*’.<sup>38</sup> (SF in italics)<sup>39</sup>

In 1949 in *Deatons Pty Ltd v Flew*<sup>40</sup> one of the earliest, and still much cited,<sup>41</sup> Australian High Court cases on vicarious liability (although in the context of intentional tort) much rested on the juries’ and the court’s own ‘general knowledge’ about the management and bar practises of Australian pubs. The case concerned whether a publican who employed a barmaid could be held vicariously responsible for her actions in throwing a glass at the plaintiff causing him an eye injury. Justice Williams noted that ‘no express evidence was given of the duties that Mrs Barlow was employed to perform so that her authority must be inferred from the whole of the circumstances’.<sup>42</sup> He held that ‘a barmaid who throws an empty glass of beer at a customer is not doing an act which she is employed to do. To throw the beer, much less the glass, at a customer is not a mode, although an improper mode, of serving a customer with a beer.’<sup>43</sup> The barmaid was held solely responsible for what the court referred to as ‘private, but natural spite and rage’,<sup>44</sup> an act of ‘private

37 *Chester v The Council of the Municipality of Waverley* (1939) 62 CLR 1; [1939] ALR 294; (1939) 13 ALJR 129; BC3900018.

38 *Ibid*, at CLR 18 quoting unspecified passages from J Furphy, *Such is Life: Being Certain Extracts from the Diary of Tom Collins*, Bulletin Co, Sydney, 1903. Evatt J also quotes the poetry of William Blake on the same point (at 17). Cf the majority judgment of Latham CJ who held that as a matter of common sense the spectacle of the sudden and distressing death of a child only produces temporary consequences (at 10).

39 See a similar reference to the grief of parents who lose children (in this case while on active service in Afghanistan) by Heydon J in *Monis v R* (2013) 295 ALR 259; 87 ALJR 340; [2013] HCA 4; BC201300755 at [239]–[241] quoting from the poem ‘My Boy Jack’.

40 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; (1949) 23 ALJR 522; (1949) 50 SR (NSW) 50; BC4900430.

41 For example the case was referred to and discussed in the leading High Court case on non-delegable duty/vicarious liability *New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126.

42 (1949) 79 CLR 370 at 385; (1949) 23 ALJR 522; (1949) 50 SR (NSW) 50; BC4900430.

43 *Ibid*, at CLR 386.

44 *Ibid*, at CLR 387.

resentment'<sup>45</sup> and as 'an act of passion and resentment . . . a spontaneous act of retributive justice'.<sup>46</sup> There has been feminist criticism of the reasoning of this case given the barmaid's act had been preceded by abusive and derogatory language from the plaintiff in addition to a possible physical assault by the plaintiff on the barmaid.<sup>47</sup> Webb J rejected the 'barmaid's story' (although it was supported by other witnesses including a police officer who witnessed a bleeding abrasion on her face immediately after the incident) based on the SF about juries that:

*No jury would be likely to award heavy damages to a truculent, foulmouthed ruffian — an expression used by Jordan CJ — who in filthy, obscene language questioned the chastity and parentage of a decent woman, as on the evidence this barmaid appears to have been, even if she retaliated by destroying both his eyes.*<sup>48</sup>

### The role of SF in judicial reasoning: Policy, context, social framework

It might be thought that there is a blunt dichotomy between 'facts' and 'law' in judicial reasoning. Judges find 'adjudicative facts' about the parties and circumstances of a particular litigation and they apply 'the law' to those facts. However, things are of course not this simple.<sup>49</sup> As discussed above, it has long been recognised that in negligence cases judges do refer to 'policy' and make consequence statements. This includes judicial statements about policy consequences of tort liability such as deterrence, effects on administration of justice, effects on insurance or insurability, or effects on business and commerce, and the impacts of a particular finding of liability on society more generally. For a recent example, in *Tabet v Gett*,<sup>50</sup> Crennan J noted in relation to causation in loss of chance medical cases:

Policy considerations which tell against altering the present requirement of proof of causation in cases of medical negligence include the prospect of thereby encouraging defensive medicine, the impact of that on the Medicare system and private medical insurance schemes and the impact of any change to the basis of liability on professional liability insurance of medical practitioners.

Justice Kiefel noted that she was 'unpersuaded that denial of recovery in cases of this kind would fail to deter medical negligence or ensure that patients receive an appropriate standard of care.'<sup>51</sup> Judicial use of 'policy' or consequence SF also appears to have been embedded in Australian tort reform legislation. For example, causation provisions in Australian tort reform legislation provide for the consideration of 'policy' matters in the determination of scope of liability and in the determination of factual

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45 Ibid, at CLR 379 per Latham CJ.

46 Ibid, at CLR 381–2 per Dixon J.

47 Ibid, at CLR 384 and 387 per Williams J. The facts of the case are discussed further in *Flew v Deatons Pty Ltd* (1949) SR NSW 219 at 219–21. See R Graycar, 'Teaching Torts as if the World Really Existed: Reflections on Harold Luntz's Contribution to Australian Law School Classrooms' (2003) 27 *MULR* 677 at 690–2 for a feminist critique of the case.

48 Ibid, at CLR 386.

49 See S Gageler, 'Fact and Law' (2008-9) 11 *Newcastle L Rev* 1 at 1–3.

50 *Tabet v Gett* (2010) 240 CLR 537; 265 ALR 227; [2010] HCA 12; BC201002304 at [102].

51 Ibid, at [151].

causation in ‘exceptional cases’ where factual causation cannot be otherwise shown on the but-for test.<sup>52</sup>

However, even from the earliest negligence cases it has been apparent that judges use SF in ways other than ‘policy’ in their judicial reasoning in negligence and other tort cases. For example, the quotes above from *MacPherson v Buick Motor Co.*,<sup>53</sup> *Donoghue v Stevenson*,<sup>54</sup> *Chester v The Council of the Municipality of Waverley*<sup>55</sup> and *Deatons Pty Ltd v Flew*<sup>56</sup> do not deal with predicting wider social consequences or matters of wider social policy. Rather, they all relate to judicial descriptions of phenomena — the nature of objects, changing social conditions, social beliefs, and human psychology — used by judges as part of their reasoning. These general ‘background’ judicial understandings of the world, institutions and human behaviour provide context and inform the judicial development and application of law, or are used as ‘social framework’<sup>57</sup> to assess or interpret the adjudicative facts of the particular case. Recent empirical study of judicial SF in negligence cases has confirmed that Australian High Court judges do not only refer to ‘policy’ SF but also refer to context and ‘social framework’ SF.<sup>58</sup> It is a mistake to discount the importance of context and social framework SF in negligence cases.<sup>59</sup> They can be critical to judicial reasoning and outcomes of cases. As Orr Larsen has argued in relation to SF (which she refers to as ‘legislative facts’) independently obtained by judges of the United States Supreme Court, such material has ‘authority’ and must add some form of ‘persuasive power’ or it would not be used.<sup>60</sup>

Consider the recent case of *Strong v Woolworths Ltd*.<sup>61</sup> This case concerned a slip and fall in a shopping centre in Taree in a sidewalk sale area outside a Big W store. The plaintiff slipped on a chip on the floor and suffered serious spinal injuries at around 12.30 pm on Friday, 24 September 2004. She was successful in her negligence action at the trial of the matter. The question on appeal in the NSW Court of Appeal was whether, in the absence of direct evidence indicating the length of time the chip had been on the floor, the

52 See above n 22. Hamer has noted the role of ‘values’ in the interpretation of the legislative causation principles in relation to ‘factual causation’ through the construction of counterfactual accounts in the but-for inquiry, in the determination of ‘exceptional’ cases where factual causation can be held to be satisfied in the absence of the fulfilment of the but-for test, and in relation to the question of scope of liability. See D Hamer, ‘Factual Causation: Values and Material Contribution’ (2011) 105 *Precedent* 29.

53 *MacPherson v Buick Motor Co.*, 217 NY 382, (NY, 1916).

54 *Donoghue v Stevenson* [1932] AC 562; [1932] SC (HL) 31; [1932] All ER Rep 1; (1932) 101 LJPC 119.

55 *Chester v The Council of the Municipality of Waverley* (1939) 62 CLR 1; [1939] ALR 294; (1939) 13 ALJR 129; BC3900018.

56 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; (1949) 23 ALJR 522; (1949) 50 SR (NSW) 50; BC4900430.

57 See above n 30.

58 See Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’, above n 1, at 327–9.

59 Cf D Jensen, ‘Theories, Principles, Policies and Common Law Adjudication’ (2011) 36 *Aust Jnl of Legal Philosophy* 35 at 53 where Jensen argues such statements are not ‘especially problematic’.

60 See A Orr Larsen, ‘Confronting Supreme Court Fact Finding’ (2012) 98 *Va L Rev* 1255 at 1282.

61 *Strong v Woolworths Ltd* (2012) 246 CLR 182; 285 ALR 420; [2012] HCA 5; BC201200949

plaintiff could show factual causation pursuant to s 5D of the Civil Liability Act 2002 (NSW). Was the negligent failure to have a proper cleaning system a necessary condition of the plaintiff's harm? If the plaintiff would have likely fallen despite such a system, for example between times when cleaning inspection should have reasonably taken place, then factual causation could not be shown. Much depended upon judicial assumptions about the likelihood or probability of when the chip was dropped. The NSW Court of Appeal, holding that causation could not be shown said:

In this case, the particular hazard that the First Respondent encountered was not one with an approximately equal likelihood of occurrence throughout the day. She slipped on a chip near a food court at lunch time, and the reasonableness of a cleaning system depends on the range of items it is foreseeable might be dropped rather than just on the particular hazard a particular plaintiff encountered . . . There was no basis for any conclusion that the area was less busy in the time immediately before the accident than it usually was (*indeed, one would ordinarily expect an area in which people sold prepared food, including take-away food, to be busier around lunch time than at many other times of the day*). There was no basis for concluding that the chip could have been dropped at any time of the day, or at least for concluding that it was more likely than not that it was not dropped comparatively soon before the First Respondent slipped . . . The site of the accident was very close to the food court. The time the accident occurred, at 12:30pm, *fits comfortably within the range of time at which people ordinarily eat lunch*.<sup>62</sup> (SF in italics)

The findings of the NSW Court of Appeal, on this critical issue of causation, involved applying 'common sense' SF assumptions about when people eat fast food (particularly chips) during the day and when ordinary people eat lunch. In the plaintiff's appeal to the High Court, the majority of the High Court rejected the reasoning of the NSW Court of Appeal.<sup>63</sup> The majority held that there was 'no basis for concluding that chips are more likely to be eaten for lunch than for breakfast or as a snack during the course of the morning' and that 'the conclusion that the chip had been deposited at a particular time rather than any other time on the day of the incident was speculation'.<sup>64</sup> It found that the 'basis of probabilities favoured the conclusion that the chip was deposited' at a time when it should have been detected and cleaned up before the plaintiffs' fall. Accordingly, factual causation could be shown.<sup>65</sup>

In dissent, Heydon J said that in order to resolve the question it was 'necessary to turn to some considerations which do not have to be supported by evidence, but which flow from the common experience of ordinary life'.<sup>66</sup> Heydon J acknowledged this presented some difficulties including that 'common experience of life is a subject on some aspects of which appellate courts are not necessarily well equipped to speak'<sup>67</sup> and that "common sense", "common" experience tends to elicit answers which are not common,

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62 *Woolworths Ltd v Strong* [2010] NSWCA 282; BC201008161 (2 November 2010) at [66]–[68] per Campbell JA (Handley AJA, Harrison J concurring)

63 *Strong v Woolworths Ltd* (2012) 246 CLR 182; 285 ALR 420; [2012] HCA 5; BC201200949.

64 *Ibid*, at [37].

65 *Ibid*, at [38]

66 *Ibid*, at [69]

67 *Ibid*, at [70]. This he said was 'true in relation to common experience of the shopping centres to be found in large country town like Taree'

but diverse'. He went on to state nevertheless that:

As the Court of Appeal correctly noted, the chip on which the appellant slipped was *an item of takeaway food often consumed as, or as part of, lunch*, and the fall took place at lunchtime in an area near a food court. The Court of Appeal also correctly pointed out *that areas in which takeaway food are sold are likely to be busier at lunchtime than at other times. Chips available for sale in a shopping centre can no doubt be eaten at any time from the time when the shops selling them open until the time when they close. But common experience suggests that the numbers of people who walk about eating chips are likely to be greater at conventional mealtimes than at other times.*<sup>68</sup> (SF in italics)

Ultimately Heydon J held that he 'did not subjectively believe that the chip was probably dropped before 12.15' and accordingly the plaintiff had not proved her case on the balance of probabilities.<sup>69</sup> While the plaintiff was ultimately successful, four of the judges who heard the case on appeal (Campbell J, Handley AJA and Harrison J concurring in the NSW Court of Appeal, and Heydon J in the High Court) explicitly utilised common sense SF assumptions as part of their judicial reasoning. The majority of the High Court rejected the SF assumptions made by the NSW Court of Appeal in the particular case as speculative, but made no observations about the permissibility of judicial use of 'common sense' SF in relation to causation or negligence cases more generally. While the nature of the relevant causation enquiry in the case allowed the majority of the High Court to substitute a 'probabilistic' approach for a SF finding, clearly this strategy to fill the judicial 'gap' in knowledge will not be available in all negligence cases. The NSW Court of Appeal has recently held in another slip and fall case, despite the High Court decision in *Strong v Woolworths*, that causation can sometimes be 'inferred as a matter of common sense and common knowledge' even in the context of the statutory causation provisions.<sup>70</sup>

There is a whole range of issues in negligence (and other tort) cases where these 'social framework' SF (whether sourced from evidence or often 'common sense' or judicial intuition) may become critical in judicial reasoning. For example, questions about how a reasonable defendant or plaintiff ought to have acted when considering breach<sup>71</sup> or contributory negligence,<sup>72</sup> once the province of a jury, now require a judge to measure the defendant's or plaintiff's actions against SF assumptions about how 'reasonable' people would have acted in the circumstances. Questions about vicarious liability, particularly whether an employee carried out a tort in the course of employment, requires a judge to compare the employee's tortious actions with the 'ordinary' or 'normal' expectations or duties of employees of

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68 Ibid.

69 Ibid, at [76]. This was the time at which an inspection and clean would arguably have been undertaken if an adequate cleaning system was in place.

70 *Shoalhaven City Council v Pender* [2013] NSWCA 210; BC201310826 at [75]–[76], [88]–[89] per McColl JA (Barrett JA concurring). It was held that in the circumstances of the case causation could not be inferred, and a probabilistic approach was not available to assist the plaintiff.

71 See above n 21.

72 For example, see Wrongs Act 1958 (Vic) s 62; Civil Liability Act 2003 (Qld) s 23; Civil Liability Act 2002 (NSW).

that kind.<sup>73</sup> Consideration of particular kinds of provisions in tort reform legislation, such as those related to ‘dangerous recreational activities’ and obvious risks<sup>74</sup> and intoxication,<sup>75</sup> require a judge to evaluate the activity being engaged in when the plaintiff was injured. Where does such an activity and such a risk fall in the spectrum of activities and risks familiar to the judge? Would ‘ordinary’ reasonable people ‘in the circumstances’ consider it ‘dangerous’ or an ‘obvious’ risk? Can it be said (applying understandings of how people act when intoxicated) that the plaintiff was ‘under the influence of alcohol or a drug *to the extent that the person’s capacity to exercise proper care and skill is impaired*’.<sup>76</sup>

Once it is accepted that there are a variety of roles SF play both in common law negligence reasoning and as part of the application of legislative tort reform, there are inevitably other questions that are raised. This includes where judges ‘source’ SF, whether the SF are accurate, and how broader theoretical conceptions of judicial reasoning in negligence cases account for judicial use of SF.

## 2 Common sense social facts in negligence cases

Judges use SF in their judicial reasoning in negligence cases and they use them not only as part of ‘policy’ arguments, but also as social framework and as part of general background, context and rhetorical reasoning. My recent content analysis study of SF in High Court negligence cases from 2001–5 found that judges did use SF in their reasoning in negligence cases. While generally SF did not predominate over statements of legal principle and adjudicative fact, they did form a part of the judicial reasoning tool box in negligence cases.<sup>77</sup> Most express judicial statements of SF were not sourced in any way and appeared mostly to be drawn from judicial understandings of ‘common sense’ or judicial intuition.<sup>78</sup> Even where judges referred to sources for their SF statements, these sources were predominantly ‘legal’ sources such as case law or legislation, or secondary sources such as legal journal articles or texts.<sup>79</sup> The use of case law as a source for SF can simply result in ‘contagious social facts’<sup>80</sup> — the reproduction of judicial ‘common sense’

73 See the discussion above of *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; (1949) 23 ALJR 522; (1949) 50 SR (NSW) 50; BC4900430. See also *Withyman v State of New South Wales* [2013] NSWCA 10; BC201300521 (11 February 2013) at [132]–[133]. Allsop P at [143] describes the scope of teacher’s duty as follows: ‘But the enterprise of teaching and guiding the young, even using gentle and forgiving familiarity does not create a new ambit of risk of sexual activity. Sexual activity is as divorced and far from the gentle caring teacher’s role as it is from the stern, detached disciplinarian’s.’

74 For example, see Civil Liability Act 2002 (Qld) ss 13, 15, 18 and 19.

75 For example, see Civil Liability Act 2002 (Qld) ss 46 and 47.

76 See definition of ‘intoxication’ in Civil Liability Act 2002 (Qld) Sch 2 (emphasis added).

77 K Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’, above n 1 at 333. The study found that only 315 SF of 1208 (26%) identified in the study had any source.

78 *Ibid.*, at 334–6.

79 *Ibid.*, at 336–9. Only 1.16% of SF had an empirical source. See also the discussion of the use of legal sources as authority for SF in Gageler, above n 49, at 6.

80 A term helpfully suggested to me by my colleague Professor Jeff Giddings. Orr Larsen refers to the use of case law in this way to support SF by American courts as ‘factual precedent’.

from one case to another, particularly where there was no empirical evidence for the 'original' judicial SF. Judicial reference to 'legal' sources such as legislation and legal journal articles can also be problematic to the extent that legislation and journal articles themselves simply base assertions of SF on 'common sense' or common understandings rather than on available empirical material. Legal scholarship 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.<sup>81</sup> This widespread use of 'judicial intuition and 'common sense' as a source for SF becomes more concerning when it becomes apparent that judges appear to use SF more in the most important and influential (what I describe as 'high significance') negligence cases in the High Court.<sup>82</sup> These 'high significance' cases are those that involve novel, difficult and unresolved legal issues and are most likely to be referred to by other judges in subsequent cases, lawyers and the academy.<sup>83</sup>

### The dangers of common sense SF

It is not the case that judges are completely unaware of the potential dangers of relying on 'common sense' or 'common understanding' as a basis for SF in negligence cases. Judges in High Court negligence cases have acknowledged the dangers in judicial application of common sense understandings of the world and common 'social' values.<sup>84</sup> This is consistent with the extra-curial statements of judges that judicial decision-making in negligence cases should not involve the application of personal preference or the application of extra-judicial information.<sup>85</sup> Judicial statements reflective of this view include:

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.<sup>86</sup>

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

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See A Orr Larsen, 'Factual Precedents' (2013) 162 *U Pa L Rev* forthcoming. She argues this practice is unwise and carries the risk of judicial error.

81 See, eg, L Epstein and G King, 'The Rules of Inference' (2002) 69 *Uni of Chicago L Rev* 1; M A Hall and R F Wright, 'Systematic Content Analysis of Judicial Opinion' (2008) 96 *California L Rev* 63.

82 K Burns, 'The Australian High Court and Social Facts: A Content Analysis Study', above n 1 at 330–3. The study found that 74.5% of all SF identified came from 'high significance' cases and high significance cases had on average 56.25 SF/case compared to 12.9 SF for medium significance cases and 4.63 SF/case for low significance cases.

83 *Ibid.* High significance cases typically involve complex, novel or highly disputed legal issues. For further discussion on the coding of high significance cases, see *ibid.*, at 325–6 and for a list of high significance cases identified see App 1 to the article.

84 See the discussion by Heydon J in *Strong v Woolworths Ltd*, above nn 66 and 67.

85 For example, see J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Aust Bar Rev* 1.

86 *De Sales v Ingrilli* (2002) 212 CLR 338; 193 ALR 130; [2002] HCA 52; BC200206731 at [192] per Callinan J.

society values formed in the far-off days of judicial youth, thirty or more years earlier, when social facts were significantly different.<sup>87</sup>

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’.<sup>88</sup>

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.<sup>89</sup>

... 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.<sup>90</sup>

However, despite judicial acknowledgment of these dangers, judges have continued to expressly refer to SF in negligence cases in the High Court of Australia.<sup>91</sup> This practice is preferable to judges simply utilising SF assumptions in their reasoning and then failing to expressly note this in the judgment. At least when judges express the SF they utilise in their reasoning, the basis of the reasoning is clearly apparent and available for critical analysis. However, this does not mean that the use of some ‘common sense’ SF is not problematic.

The use of ‘common sense’ SF by judges may sometimes (and perhaps often) cause little concern. For example, judicial ‘common sense’ statements about everyday matters such as ‘most parents love their children’ can indeed be quite accurate. Judicial intuition can be considered to be a ‘normal’ or natural part of judicial decision-making.<sup>92</sup> However, there are a number of particular dangers that can arise from ‘intuitive’ judicial use of ‘common sense’ or ‘common knowledge’ SF. Feminist scholars have noted judicial invocations of ‘common sense’ notions essentially reflect the ‘private’ and often ‘male’ understandings of a judge.<sup>93</sup> Graycar has powerfully characterised this judicial process of referring to common-sense understandings of the world as resembling:

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87 *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801 at [164] per Kirby J.

88 *Ibid.*, at [242] per Hayne J.

89 *Neindorf v Junkovic* (2005) 222 ALR 631; 80 ALJR 341; [2005] HCA 75; BC200510492 at [9] per Gleeson CJ.

90 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145; [2002] HCA 9; BC200200664 at [165] per Callinan J.

91 See Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’, above n 1 which notes that all of the High Court judges who made these statements did in fact refer to unreferenced SF in negligence cases from 2001–5.

92 See, eg, C Guthrie et al, ‘Inside the Judicial Mind’ (2001) 86 *Cornell L Rev* 777; C Guthrie et al, ‘Blinking on the Bench: How Judges Decide Cases’ (2007) 93 (1) *Cornell L Rev* 1; C Guthrie et al, ‘The “Hidden Judiciary”: An Empirical Examination of the Executive Branch Justice’ (2008–09) 58 *Duke LJ* 1477.

93 R Graycar, ‘The Gender of Judgments: An Introduction’ in M Thornton (Ed), *Public and Private: Feminist Legal Debates*, Oxford University Press, USA, 1996.

a window that judges try to look through, but that has reflective glass in it: so it is really a mirror. When judges look at it, they see what they think is 'human nature', 'human experience' and 'ordinary or reasonable people'. What they are really seeing is the society they know. (And they do not see that they are looking in a mirror).<sup>94</sup>

Judicial use of 'common sense' as a basis for SF can impede the accuracy of judicial reasoning. The first and obvious danger is that a SF might be contrary to existing empirical evidence — unsupported, wrong, incomplete or outdated. 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.<sup>95</sup> 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 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. Finally, 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.

Judicial 'common-sense' SF assumptions which were inconsistent with available empirical material occurred in *Koehler v Cerebos*.<sup>96</sup> This case concerned a female plaintiff<sup>97</sup> 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.<sup>98</sup>

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 so as to be 'far-fetched and fanciful'. 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

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94 Ibid, p 278.

95 See the discussion of 'missing' SF in K Burns, 'The High Court and Social Facts: A Negligence Case Study', above n 1, at 103–10.

96 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; 214 ALR 355; [2005] HCA 15; BC200501749.

97 The gender of the plaintiff is relevant as female workers suffer psychiatric injury in the workplace at rates significantly higher than male workers. See, eg, the relevant statistics covering the year *Koehler v Cerebos* was decided: Australian Safety and Compensation Council, 'Compendium of Workers' Compensation Statistics Australia 2004–5', 2007, at <[http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/423/Compendium\\_Workers\\_Compensation\\_Statistics\\_Australia\\_2004\\_05.pdf](http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/423/Compendium_Workers_Compensation_Statistics_Australia_2004_05.pdf)> (accessed 6 November 2013), pp 72–3.

98 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; 214 ALR 355; [2005] HCA 15; BC200501749 at [34] per McHugh J, Gummow J, Hayne J, Heydon J. See also Callinan J at [57] regarding pressure and stress being a normal part of employment conditions.

major factor in workplace psychological injury. However, a very large and sophisticated body of international and Australian research dating from the 1980s and even earlier documents the role of institutional factors at work (including psycho-social hazards such as work overload and lack of control of workload) in the development of psychiatric illnesses of employees.<sup>99</sup> While individual employee personality and other personal characteristics can be one factor in the development of workplace psychiatric injury, Caufield notes that the ‘dominant view is that work stress and the resulting mental health outcomes are more strongly related to job factors or aspects of the work environment rather than to personal or biographical factors’.<sup>100</sup> 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.<sup>101</sup>

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 determining reasonable foreseeability 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.<sup>102</sup> 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<sup>103</sup> to work excessively in a high pay, high job security, high control job.<sup>104</sup> If looked at this way, it shows how incongruous it was for

99 See, eg, the literature reviewed in C Mackay et al, “‘Management Standards’ and Work-related Stress in the UK: Policy Background and Science’ (2004) 18(2) *Work and Stress* 91; R Cousins et al, “‘Management Standards’ and Work-Related Stress in the UK: Practical Development’ (2004) 18(2) *Work and Stress* 113; A LaMontagne, A Ostry and A Shaw, ‘Workplace Stress in Victoria: Developing a Systems Approach: Report to the Victorian Foundation’, 2006; Comcare, ‘Working Well: An Organisational Approach to Preventing Psychological Injury’, 2005; National Occupational Health and Safety Commission, ‘The NOHSC Symposium on the OHS Implications of Stress’, 2001; E Kendall 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; M Dollard et al, ‘The Australian Workplace Barometer: Report on Psychosocial Safety Climate and Worker Health in Australia’, Safework Australia, 2012.

100 Natasha Caufield et al, ‘A Review of Occupational Stress Interventions in Australia’ (2004) 11(2) *International Journal of Stress Interventions in Australia* 149 at 152.

101 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. The recent ‘Australian Workplace Barometer’ Report, above n 99, indicated (p 6) that depression costs employers \$8 billion per year and \$693 million of that is due to job strain and workplace bullying.

102 Callinan J appears to suggest in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; 214 ALR 355; [2005] HCA 15; BC200501749 at [57], that excessive workload, pressure and stress are in fact normal aspects of the modern workplace and it is for employees as ‘adults’ to leave a position if they are unable to cope in those circumstances.

103 Through accepting appointment as a judge.

104 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

High Court judges to make ‘common-sense’ SF assessments about the foreseeability of psychiatric injury to a 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.<sup>105</sup>

Some ‘common sense’ SF used by judges in negligence cases might be congruent with some aspects of available empirical evidence, but nevertheless are incomplete or reflect outdated empirical evidence. For example, in *De Sales v Ingrilli*<sup>106</sup> 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 included:

Amongst the changes are the following: . . . (3) The growing incidence of female employment and of the economic and social independence of women.<sup>107</sup>

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.<sup>108</sup>

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.<sup>109</sup>

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 remarries 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

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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 99; Mackay et al, above n 99.

105 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, eg, Kendall et al, above 99, and the other reports cited above n 99.

106 *De Sales v Ingrilli* (2002) 212 CLR 338; 193 ALR 130; [2002] HCA 52; BC200206731.

107 *Ibid*, at [153] per Kirby J. Kirby J referred to published literature in support of this SF.

108 *Ibid*, at [12] per Gleeson CJ.

109 *Ibid*, at [23] per Gleeson CJ.

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.<sup>110</sup>

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.<sup>111</sup>

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.<sup>112</sup> However, the judicial SF identified above tend to overstate the employment and financial status of women in Australia, and suggest 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.<sup>113</sup> More women work part-time and in casual jobs (rather than in full-time permanent jobs) than men,<sup>114</sup> and women have on average far less superannuation savings than men to fund their retirement.<sup>115</sup> Particular groups of women, particularly 'elderly single women and female sole parents are over-represented in groups living on low incomes.'<sup>116</sup> Women who separate

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110 Ibid, at [26] per Gleeson CJ.

111 Ibid, at [192] per Callinan J.

112 See, eg, 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 has been mainly in part-time employment'. See also Australian Bureau of Statistics, 'Australian Social Trends 2009', 2009, p 18 which notes that women account for 56% of all casual employees.

113 See, eg, S Austen and G Redmond, 'Australian Bureau of Statistics Australian Social Trends 2008: Women's Income', 2008, which notes that the income received by women in 2005–6 made up only 38% of the total income received by men and women and women's share of income had changed very little in the decade to 2005–6. Women are 'over-represented in the lowest income quintiles and under-represented in the highest quintiles.'

114 See above n 112. See also J Abhayaratna and R Lattimore, 'Productivity Commission Staff Working Paper: Workforce Participation Rates-How Does Australia Compare?', 2006, p 8 which found that in 2005, 72% of part-time employees were women.

115 For example, see Australian Bureau of Statistics, 'Australian Social Trends 2009', 2009, p 42 which notes that although the superannuation coverage of women is improving over time men are still more likely than women to have superannuation coverage. See also Australian Human Rights Commission, 'Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle', 2009, p 1 which notes that 'currently, superannuation balances and payouts for women are approximately half of those of men'.

116 See the discussion in Senate Community Affairs References Committee, 'A Hand up not a Hand Out: Renewing the Fight Against Poverty: Report on Poverty and Financial Hardship', Commonwealth of Australia, 2004, Ch 10. The report noted that there are 'still considerably more poor women in sole parent families than there are men (104,000 compared with 34,000) and there are 106,000 poor single women over 65 as compared with 40,000 men in this group in 2000': p 211. See also S Linacre, 'Australian Bureau of Statistics Australian Social Trends 2007: Low Income Low Wealth Households', 2007; S Linacre, 'Australian Bureau of Statistics Australian Social Trends 2007: One-parent Families', 2007.

from or divorce their partners experience far more significant drops in income than men who separate from or divorce their partners.<sup>117</sup> Far more women than men are carers of people with a disability or who are elderly, and carers experience high levels of financial distress.<sup>118</sup>

An 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.<sup>119</sup> The Productivity Commission research found 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.<sup>120</sup> 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.’<sup>121</sup> At this very low level of workplace participation obviously it is 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’.<sup>122</sup> 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’.<sup>123</sup> 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)<sup>124</sup> have much higher workplace participation rates over their lifetimes than women with lower

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117 Australian Human Rights Commission, above n 115, p 21 which notes that ‘in 2003 men who separated experienced an average drop in their household disposable income by \$4100 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’.

118 See discussion in Binod Nepal et al, ‘Commonwealth Financial Planning Women Carers in Financial Stress Report: Lifetime Health and Economic Consequences of Caring-Modelling Health and Economic Prospects of Female Carers in Australia’, National Centre for Social and Economic Modelling University of Canberra, 2009.

119 *De Sales v Ingrilli* (2002) 212 CLR 338; 193 ALR 130; [2002] HCA 52; BC200206731 at [192] per Callinan J.

120 G Gilfillan and L Andrews, ‘Productivity Commission Staff Working Paper: Labour Force Participation of Women Over 45’, 2010, p XVIII.

121 *Ibid.*

122 Graycar, ‘Gender of Judgments’, above n 93, p 273.

123 *Ibid.* Note Graycar’s example (pp 272–3) 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’.

124 Of course this is in itself a SF assumption.

forms of qualifications or no qualifications.<sup>125</sup>

A further danger of judicial use of ‘common sense’ SF in negligence cases is that these SF may represent only one viewpoint of a particular issue — they may reflect an unconscious bias. Consider the following SF each of which assumes a particular ‘debateable’ 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.<sup>126</sup>

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.<sup>127</sup>

Thirdly, the majority reasoning tends to generate litigation about children capable of causing the children distress and injury if they hear about it.<sup>128</sup>

Each of these SF reflects particular liberal, individualist and traditional values,<sup>129</sup> and there are competing versions of those SF which might reflect different sets of values.<sup>130</sup> 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.<sup>131</sup> The final example, the ‘harm the child’ SF often used in wrongful birth cases such as *Cattanach v Melchior*,<sup>132</sup> appears to be unsupported by empirical evidence. It is also based on assumptions about parent-child relationships and the protection of the

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125 Gilfillan and Andrews, above n 120, p XXI.

126 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44; BC200104558 at [117] per Callinan J.

127 *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801 at [117] per Heydon J.

128 *Ibid*, at [347] per Heydon J.

129 Or ‘cultural worldviews’, as it has been labelled. See D Kahan and D Braman, ‘Cultural Cognition and Public Policy’ (2006) 24 *Yale Law and Policy Review* 147; D Kahan et al, “‘They Saw a Protest’ Cognitive Illiberalism and the Speech-Conduct Distinction’ (2012) 64 *Stanford L Rev* 851.

130 Kahan and Braman, *ibid*, discuss how ‘cultural worldviews’ colour the way in which human beings (including judges) construct and interpret contentious facts about the world.

131 See discussion in K Burns, ‘Distorting the Law: Politics, Media and the Litigations Crisis: An Australian Perspective’ (2007) 15 *TLJ* 1; and R Graycar, ‘Public Liability: A Plea for Facts’ (2002) 25 *UNSWLJ* 810.

132 *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801.

status of the traditional nuclear family unit.<sup>133</sup>

Given that there are some dangers in judicial use of ‘common sense’ SF and that SF can be an important part of judicial reasoning in some negligence cases, particularly in the most important cases, then we should be concerned about where SF come from and how (and if) they have been ‘proved’ to ensure their accuracy. This is discussed in Part 3 of this article.

### 3 Proving SF in negligence cases

One of the aims of evidence law is to ensure accurate facts are used by judicial decision-makers. As discussed above in Part 2 ‘common sense’ SF used by judges can lead to inaccurate fact finding. Some judicial SF statements are based upon evidence (oral, expert or documentary) that has been tendered and accepted as admissible during the trial or appellate process. This gives rise to less difficulty in relation to accuracy.<sup>134</sup> Some SF might stem from written or oral submission of counsel at trial or upon appeal. Some SF are sourced from ‘legal sources’ such as previous reported cases. Sometimes, SF can source from a judge’s own research.<sup>135</sup> However, as discussed above in Part 2, judicial use of ‘common sense’ or ‘common understandings’, as a basis for SF in negligence cases is common<sup>136</sup> and gives rise to potential inaccuracies or errors in reasoning. Much of the time however, when judges refer to SF that have not been admitted at trial in their reasoning in negligence cases, there is little or no consideration of the ‘legal’ basis that permits the reference to the SF.<sup>137</sup> For example, is the judge taking judicial notice of a SF? Does the SF fall outside the doctrine of judicial notice, and form part of the inherent discretion of judicial decision-making in negligence cases? Can judges refer to empirical material referred to in party submissions (although not admitted at trial) or sourced from their own research? At a broader level, as I argue below, the legal and evidential basis for judicial use of SF in Australian negligence cases is unclear and in need of reform.

#### An unclear basis for the reception and use of SF in negligence cases

There has been some limited, and ultimately inconclusive, judicial discussion of these issues in negligence cases in the Australian High Court. As discussed above in Part 1, in *Strong v Woolworths Ltd*, Heydon J argued that judicial reasoning in negligence cases may require ‘common sense’ assumptions to be

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133 See discussion in K Burns, ‘The High Court and Social Facts: A Negligence Case Study’, above n 1, pp 105–8.

134 Although note that judicial use of expert evidence can raise its own set of issues: see G Edmond, ‘Bacon’s chickens? Re-thinking Law and Science (and Incriminating Expert Opinion Evidence) in Response to Empirical Evidence and Legal Principle’ in J Gleeson and R Higgins (Eds), *Constituting Law: Legal Arguments and Social Values*, Federation Press, Sydney, 2011, p 93.

135 This appears to be very common in the US Supreme Court. See Orr Larsen, above n 60.

136 See broader discussion of how the High Court utilises legislative facts in Heydon, above n 30.

137 See discussion of this in Burns, ‘The High Court and Social Facts’, above n 1, at 92–5.

made as part of the judicial decision-making role.<sup>138</sup> Similarly, in *Tame v NSW*,<sup>139</sup> 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.

In *Woods v Multi Sport Holdings*<sup>140</sup> McHugh J and Callinan J both discussed the use of extra-record empirical material in judgments.<sup>141</sup> Justice McHugh made reference in his judgment to a number of empirical reports as part of his discussion of the underlying principle of accident prevention in tort law.<sup>142</sup> He argued this was within the scope of the doctrine of judicial notice and was acceptable based on longstanding authority and judicial 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. This was based on concerns as to the lack of fairness to parties when material is judicially used without notice and the range of different views that might be held in relation to ‘history, policy and social ethics’.<sup>143</sup>

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’.<sup>144</sup> This seems to suggest that Kirby J accepted that judicial use of SF material, including empirical material, in negligence cases was permissible and was 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 supplement the evidentiary record.<sup>145</sup> He cited the

138 See above nn 66–69. However, the majority of the High Court in that case rejected SF assumptions made by the NSW Court of Appeal as part of their reasoning.

139 *Tame v New South Wales* (2002) 211 CLR 317; 191 ALR 449; [2002] HCA 35; BC200205111 at [115]–[116].

140 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145; [2002] HCA 9; BC200200664.

141 See further discussion of this Burns, ‘It’s Just not Cricket’, above n 25.

142 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145; [2002] HCA 9; BC200200664 at [62]–[63] nn 25 and 26. The reports referred to were C Mathers and R Penn, ‘Health System Costs of Injury, Poisoning and Musculoskeletal Disorders in Australia 1993–4: Health and Welfare Expenditure Series Number 6’, Australian Institute of Health and Welfare, 1999, and Australian Bureau of Statistics, ‘National Health Survey: Injuries, Australia’, 1998.

143 *Ibid.*, at 185. See Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’, above n 1, which found that despite his criticism of the use of empirical material in *Woods*, Callinan J did use SF (although mostly unsourced) in his reasoning in negligence cases during 2001–5.

144 *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801 at [152].

145 *Ibid.*, at [153]. He held this material was only admissible in relation to the states’ application

criminal cases of *Mickelberg v R* and *Eastman v R* (prohibiting fresh evidence before the High Court) in support of this proposition.<sup>146</sup> 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 approach to the admissibility of ‘new’ SF material appears to unnecessarily limit the usefulness of interveners.<sup>147</sup> 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 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.<sup>148</sup>

The issue of whether the common law doctrine of judicial notice does govern judicial use of SF is unresolved and controversial.<sup>149</sup> 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

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to intervene. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512; 180 ALR 145; [2001] HCA 29; BC200102755 at [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.’

146 *Mickelberg v R* (1989) 167 CLR 259; 86 ALR 321; 63 ALJR 481; [1989] HCA 35 (in which Kirby J dissented) and *Eastman v R* (2000) 203 CLR 1; 172 ALR 39; [2000] HCA 29; BC200002716. 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; 186 ALR 145; [2002] HCA 9; BC200200664 at [165].

147 See also Kirby J’s more conservative approach to constitutional facts in *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044 at [259]–[260] where he held that, 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.

148 See *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; [2003] HCA 38; BC200303801 at [144] n 226 referring to R Percival and A 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 report was provided and referred to in Appellants’ Submissions and Accompanying Materials (Appellant) Vol 2, Submission in *Cattanach v Melchior*, 24 January 2003.

149 See discussion in Gageler, above n 49; Heydon, above n 30; Z Rathus, ‘A Call for Clarity in the Use of Social Science Research in Family Law Decision-making’ (2012) 26 *AJFL* 81 at 84–9; A Serpell, ‘Social Policy Information: Recent Decisions of the High Court of Australia’ (2011) 21 *JJA* 109.

findings of my content analysis study of negligence cases from 2001–5.<sup>150</sup> Alternatively, judges have interpreted the judicial notice tests of ‘common knowledge’ or notoriety<sup>151</sup> very broadly to include SF, or have proceeded on the basis that judicial notice only applies to matters of adjudicative fact. SF mostly appear, however, to have been considered as part of the application of judicial ‘common sense’ intrinsic to the judicial reasoning role in negligence. As discussed above, not all judges of the High Court have taken the view (at least in theory) that judicial use of SF is completely 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 High Court recently considered the application of the statutory equivalent of the doctrine of judicial notice in s 144 of the Evidence Acts<sup>152</sup> in *Aytugrul v R*.<sup>153</sup> This was not a negligence case, but rather concerned whether empirical evidence about jury perceptions of DNA evidence could be relied on by the High Court in its reasoning in a criminal case.<sup>154</sup> The evidence had not been introduced at trial via expert evidence. Rather, it was introduced in the dissenting judgment of McClellan CJ in the NSW Court of Appeal and was referred to in appellant’s submissions to the High Court.<sup>155</sup> The High Court appeared to interpret s 144 of the Evidence Acts to restrict judicial use of empirical research in support of SF used in the determination of legal principles (as policy or ‘legislative fact’) unless the material has been admitted into evidence at trial, or the material otherwise fulfils the strict requirements of s 144 and notice has been given to the parties.<sup>156</sup>

This may restrict judicial use of published SF material not introduced via expert witnesses in negligence cases subject to the Evidence Acts when the material is being used as policy argument in support of a legal principle. For example, should a duty of care extend to a new and novel category? Should the High Court recognise a new head of damage? However, it does not resolve whether judges could refer to such material in cases not subject to the Evidence Acts, but subject to the common law doctrine of judicial notice. It does not resolve whether such material can be used in support of SF which are used as background or to provide context, or as social framework to assist in the evaluation of adjudicative facts. It does not resolve whether judges can or should refer to ‘common sense’ SF. It may encourage judges to prefer

150 See Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’, above n 1.

151 *Holland v Jones* (1917) 23 CLR 149 at 153; [1917] HCA 26.

152 Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence (National Uniform Legislation) Act 2011 (NT); Evidence Act 2011 (ACT). Section 144 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.

153 (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158.

154 The High Court held that published empirical research regarding jury perceptions of DNA evidence could not be used to support a new legal principle in relation to exclusion of prejudicial evidence *Aytugrul v R* (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158 at [21]–[22] per French CJ, Hayne, Crennan and Bell JJ.

155 See discussion in Rathus, above n 149, at 85–6.

156 See above n 152.

'common sense' SF in their judgments, rather than cite more reliable published empirical material. It might encourage judges to refer to relevant empirical material in the course of considering their judgment, but fail to cite such material in their judgments.<sup>157</sup> It might drive judicial use of SF underground, and encourage judges to omit any reference to SF they actually relied on from their judgments. None of these outcomes are desirable.

### Possible reforms to reception and use of SF: Minimalist and maximalist approaches

What are we to do about all of this? I argue it is simply not an option to suggest judges refer to no SF in their judgments in negligence cases. Pragmatically, it is clear that judges have always used SF as part of their judicial reasoning in negligence cases and we can expect they will continue to do so in the future where there are 'gaps' in knowledge.<sup>158</sup> It is no use putting our collective legal, judicial and academic heads into the sand. Judges in negligence cases in the High Court (and in other courts both trial and appellate) have used SF in negligence cases even though the common law principles which govern judicial use of SF are unclear and the judicial use of 'policy' as part of common law reasoning in negligence cases has been discouraged.<sup>159</sup> In the absence of juries,<sup>160</sup> judges in negligence cases are required (including by legislative provisions) to explicitly consider policy arguments, and to evaluate adjudicative facts by reference to broader SF assumptions about individual, social and professional behaviour and the 'reasonableness' of that behaviour. SF form a part of the judicial reasoning toolkit in negligence cases.

It is true that judges and Australian courts are not currently well equipped to gather and assess evidence about SF. Sometimes the parties will provide good SF evidence through expert evidence at trial, but often they may not.<sup>161</sup> As Godot and Orr Larsen have argued in the American context, it is myth that the current adversarial system is adequately providing (and can adequately provide) judges with the SF they need.<sup>162</sup> One way of dealing with the issue of SF in Australian negligence cases would be for courts to take what Orr

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157 See, Rathus, above n 149, at 89.

158 Gageler makes this same point in relation to the use of 'legislative facts' and 'constitutional facts' (SF used in constitutional cases) more broadly by the Australian High Court. See Gageler, above n 49, at 23–4.

159 See above n 27.

160 See Luntz et al, *Torts: Cases and Commentary*, 7th ed, Lexis Nexis, Sydney, 2013, pp 173–4 in relation to the decline of the role of the jury in Australian negligence cases, particularly following tort law reform.

161 See K Burns and T Hutchinson, 'The Impact of "Empirical Facts" on Legal Scholarship and Legal Research Training' (2009) 43(2) *Law Teacher* 153 for reasons why this may not occur.

162 B Gorod, 'The Adversarial Myth: Appellate Court Extra-Record Factfinding' (2011) 61 *Duke LJ* 1; Orr Larsen, above n 60. 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. Cf Gageler, above n 49, at 28 who suggests that the current adversarial system can be relied on to 'identify relevant legislative fact and to bring forward relevant material'.

Larsen would refer to as a minimalist approach<sup>163</sup>—confining the reach of factual findings in cases to the individual facts as far as possible and avoiding far reaching factual statements. This may be sufficient for many cases which turn on a clear application of legal principle to adjudicative facts. Other minimalist strategies would be for judges to utilise existing adversarial system strategies (like appellate courts referring cases back to trial courts for further fact finding or asking parties for additional submissions) or ‘legal’ strategies. The approach of the High Court in recent causation cases might be considered ‘minimalist.’ For example in *Strong v Woolworths Ltd* the majority of the High Court preferred to adopt a strategy of ‘probabilistic’ reasoning based on the overall time between the opening of the shopping centre and the slip accident rather than make a factual finding based on social framework SF about when people usually eat chips. Alternatively, the High Court could have approached the case by strictly applying the onus of proof on the plaintiff and finding that in light of the evidential gaps the plaintiff was unable to prove her case.<sup>164</sup> In the recent case of *Wallace v Kam*<sup>165</sup> the High Court considered how to interpret the scope of liability causation legislative provisions. The court noted that there were ‘normative questions’ at the heart of the legislative provisions.<sup>166</sup> However, the High Court encouraged traditional ‘legal strategies’ to respond to these ‘normative’ questions such as the use of precedent and the use of ‘legal policy’ rather than the use of SF sourced by judges or submitted by the parties:

in a case falling within an established class, the normative question posed by s 5D(1)(b) is properly answered by a court through the application of precedent. Section 5D guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled.<sup>167</sup>

Despite this, the High Court also appeared to recognise that while the ‘legal’ strategy was preferable, there might be cases where this might prove insufficient such that there still may be some utility in unpacking and explaining ‘common sense’ perceptions in some cases:

In a novel case, however, s 5D(4) makes it incumbent on a court answering the normative question posed by s 5D(1)(b) explicitly to consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party. What is required in such a case is the identification and articulation of an evaluative judgment by reference to ‘the purposes and policy of the relevant part of the law’ . . . Resort to ‘common sense’ will ordinarily be of limited utility unless the perceptions or experience informing the sense that is common can be unpacked and explained.<sup>168</sup>

While the use of these ‘minimalist’ strategies in response to judicial need for SF information in negligence cases might sometimes be appropriate, there are also obvious difficulties. The first (and perhaps most important of these) is

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<sup>163</sup> Orr Larsen, above n 60, at 1305.

<sup>164</sup> This was the net result reached by Heydon J.

<sup>165</sup> *Wallace v Kam* (2013) 297 ALR 383; 87 ALJR 648; [2013] HCA 19; BC201302166.

<sup>166</sup> *Ibid.*, at [22].

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*, at [23].

that these strategies may simply exacerbate current problems with inaccurate use of SF in judicial reasoning. This is because these strategies may simply encourage the use of ‘contagious’ SF from precedent or may lead to judges simply ‘dodging’ the issue of inadequate factual basis for decision. The second difficulty is that the use of ‘legal policy’ may simply become the new version of abandoned concepts such as ‘general reliance’ and ‘proximity’ which camouflage underlying and unexpressed judicial understandings of SF. Reliance on parties to produce necessary SF material may be misplaced given Australian law students and legal practitioners are typically poorly trained and inexperienced in both finding and interpreting empirical material.<sup>169</sup> Judicial use of ‘minimalist strategies’ in response to the need to consider normative concerns required by legislative tort reform causation principles, may well have the result of circumventing the legislative intent of making judges expressly articulate the ‘policy’ basis of their decisions. Finally, the use of minimalist strategies will not assist in all circumstances where judges have a ‘gap’ in knowledge and need to explicitly utilise SF to make adjudicative findings of fact on issues such as reasonable foreseeability.

There are a range of other more ‘maximalist’<sup>170</sup> strategies that might be considered to ‘open up’ the flow of SF information and improve the accuracy of judicial use of SF in negligence cases in Australia. The rules of evidence could be amended to clarify that the doctrine of judicial notice and s 144 of the Evidence Acts do not apply to SF.<sup>171</sup> 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 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.<sup>172</sup> Methods could be considered to improve the flow of quality SF information, particularly to High Court judges in more important high significance negligence cases where it appears that judicial use of SF is most prominent. The *High Court Rules*<sup>173</sup> could be amended to allow High Court 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. In the High Court this could be

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169 See Burns and Hutchinson, above n 161.

170 Orr Larsen, above n 60, at 1309.

171 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, pp 545–6; Australian Law Reform Commission, ‘Uniform Evidence Law: Report 102’, 2005, at [17.26].

172 1 See Gorod, above n 162.

173 High Court Rules 2004 (Cth). See also High Court of Australia Practice Direction 1 of 2013 ‘Authorities’.

done via a dedicated research service or in conjunction with the library.<sup>174</sup> Similar services are available to the Commonwealth Parliament<sup>175</sup> and the Family Court has access to the reports of the Australian Institute of Family Studies.<sup>176</sup> There is clearly a role for expert evidence in providing SF information to trial courts, appellate courts and 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, and how ensure that that expert evidence is properly interpreted and utilised by judges.<sup>177</sup> There is clearly a role for further use of interveners and amicus curiae in the most complex high significance appellate cases to the extent these parties could provide alternate SF information to judges.<sup>178</sup>

It might be necessary to develop guidelines (for example via case law, in legislation, or in judicial ethical guidelines)<sup>179</sup> 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 might be, and what standards ought to apply in evaluating the quality of SF information.<sup>180</sup> Typically lawyers and judges are not well trained in empirical methods or in the importance or use of non-legal materials.<sup>181</sup> This is likely one of the many

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174 For example in the US context see the suggestions of K Culp Davis, 'Judicial, Legislative, and Administrative Lawmaking' (1986) 71 *Minnesota L Rev* 1.

175 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, Research Publications, at <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs)> (accessed 6 November 2013).

176 This body was set up pursuant to the Family Law Act 1975 (Cth) s 114B 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'.

177 See the concerns about judicial misuse of expert scientific evidence in Edmond, above n 134. A recent research paper has been produced by the Federal Parliamentary Library giving guidance to Federal politicians on properly evaluating and utilising expertise in making public policy. See M Thomas and L Buckmaster, 'Expertise and Public Policy: A Conceptual Guide', Parliamentary Library Research Paper, October 2013, at <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1314/PublicPolicy](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/PublicPolicy)> (accessed 6 November 2013).

178 Gorod, above n 162, at 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.

179 See E Thornburg, 'The Curious Appellate Judge: Ethical Limits on Independent Research' (2008) 28 *Review of Litigation* 131.

180 Gorod, above n 162, at 71–3 also notes the necessity to respond to these matters. Orr Larsen, above n 60, at 1290–1305 raises a range of issues that can result from unrestrained judicial use of material located by judges themselves, particularly over the internet. These include systematic introduction of bias, possibility of mistake, and questions of fairness and legitimacy particularly when no notice is given to parties. On the question of properly evaluating and utilising social expertise, see Thomas and Buckmaster, above n 177.

181 See Burns and Hutchinson, above n 161.

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.<sup>182</sup>

### Uncertainty

However, even with improved SF information flow to judges it would need to be recognised that uncertainty is a natural and inevitable part of judicial reasoning in negligence 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 court. This was addressed above. Second, judges may be uncertain because even though SF material is available to the court, judges choose not to access or utilise it.<sup>183</sup> 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 judge to do in those circumstances? As a starting point, judges should be wary of using their 'common sense' 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.<sup>184</sup> 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'.<sup>185</sup> If a judge does intend to rely on an uncertain SF as part of their judicial reasoning then clearly the best course is to candidly acknowledge that SF in their written reasons to enable the SF to be scrutinised.<sup>186</sup>

## 4 Reconceptualising a role for SF in theories about judicial reasoning in negligence cases

This article had argued that SF clearly form a part of judicial decision-making in negligence cases. This section suggests that despite this, the practice of judicial use of SF in negligence cases does not appear to be well recognised or accounted for in current descriptive theoretical accounts of negligence law

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<sup>182</sup> Ibid.

<sup>183</sup> This may occur due to unconscious cognitive biases. See above nn 92, 129 and 130. This may cause motivated cognition which can cause judges to dismiss empirical information which does not accord with their existing value systems and beliefs.

<sup>184</sup> P Cane, 'Consequences in Judicial Reasoning' in J Horder (Ed), *Oxford Essays in Jurisprudence*, Oxford University Press, Oxford, 2000, p 41. Cane also suggests that there should also be a consideration of what good decision-making criteria should be in cases of judicial 'ignorance'.

<sup>185</sup> Ibid.

<sup>186</sup> J Monahan and L Walker, 'Empirical Questions without Empirical Answers' (1991) *Wisconsin L Rev* 569 at 593. Monahan and Walker acknowledge this approach allows for revision in light of future developments in science but may also stimulate future empirical research.

and tort law. 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.<sup>187</sup> These corrective justice and rights based theories share some common features. 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).<sup>188</sup> 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”’.<sup>189</sup> This leaves little (or no) room to recognise judicial assertions of SF, which by definition exclude adjudicative facts and encompass wider ‘facts’ about the world (including matters traditionally considered as ‘policy’ concerns). Judicial acceptance of these corrective or rights based theoretical accounts of tort law also potentially drives judicial use of SF underground, and discourages judges from expressing SF assumptions which form part of their reasoning.

Robertson notes the use of policy<sup>190</sup> arguments in private law, including negligence, has ‘recently come under sustained attack from scholars advocating a strict corrective justice or rights-based approach’.<sup>191</sup> Key proponents of corrective justice and rights based theories of private law include Ernest Weinrib,<sup>192</sup> Allan Beever<sup>193</sup> and Robert Stevens.<sup>194</sup> These

187 For example see E Weinrib, *The Idea of Private Law*, Harvard University Press, Cambridge, 1995; E Weinrib, ‘The Disintegration of Duty’ in S Madden (Ed), *Exploring Tort Law*, Cambridge University Press, New York, p 143; R Stevens, *Torts and Rights*, Oxford University Press, Oxford, 2007; A Beever, *Rediscovering the Law of Negligence*, Hart Publishing, Oxford, 2007.

188 P Cane, ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25(2) *Oxford Journal of Legal Studies* 203 at 204.

189 *Ibid.*

190 A Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’, above n 29. 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 (p 262–3) that it is not possible to draw ‘sharp distinctions’ between these.

191 *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 J Gava, ‘Law Reviews: Good for Judges, Bad for Lawyers’ (2002) 26 *MULR* 560; J Gava, ‘The Rise of the Hero Judge’ (2001) 24 *UNSWLJ* 747; J Gava, ‘Unconvincing and Perplexing: Hutchison and Stapleton on Judging’ (2007) *UQLJ* 67.

192 See above n 187. For a discussion of Weinrib’s approach to corrective justice see J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1. For another American approach to theorising torts based on wrongs see J Goldberg and B Zipursky, ‘Torts as Wrongs’ (2010) 88(5) *Texas L Rev* 917.

193 See above n 187. For a recent critique see M Lunny, ‘Counterfactuals and Corrective Justice: Legal History and Allan Beever’s *Rediscovering the Law of Negligence*’ (2009) 17 *TLJ* 219.

194 See above n 187. For a review and critique of Steven’s book see P Cane, ‘Book Review: Robert Stevens, *Torts and Rights*’ (2008) 71(4) *ModLRev* 641. Cane discusses and critiques Steven’s views on ‘policy’ at 645–6. In particular Cane notes the contestability of Steven’s concept of ‘moral rights’ (which Stevens asserts can be permissibly used by judges because they are ‘deduced from the nature and experience of ourselves, and the world and society in which we live. Rational people can recognise such rights independently of their being given

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’.<sup>195</sup> In addition, they draw a ‘stark dichotomy’ between a law of torts which considers legitimate interests (that is, corrective justice or primary rights), and one which is ‘overrun’ by judicial determinations of policy.<sup>196</sup> 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’.<sup>197</sup> 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 ‘social framework’ to evaluate 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). Jensen suggests that that it is only ‘policy’ SF which are problematic not social framework or ‘context’ SF which draw on judicial common sense assumptions.<sup>198</sup> This is because judges are ‘qualified’ based on judicial knowledge and common experience to make assumptions about such matters.<sup>199</sup> As discussed above, however, clearly judicial ‘common sense’ can be entirely misplaced and inaccurate in relation to both context and social framework social facts and this can significantly impact on judicial reasoning.

This article does not engage in the debate about the extent to which corrective justice and rights-based theories (or other monistic instrumentalist theories)<sup>200</sup> of judicial reasoning in negligence cases are normatively desirable, or ‘ought’ to be aspired to by judges in their judicial reasoning.<sup>201</sup> However, the recognition that judges use (and have always used) SF in their reasoning in negligence cases has ramifications for these theories to the extent

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the force of law.’). For further critical analysis of rights theories by Cane, see P Cane, ‘Rights in Private Law’ in D Nolan and A Robertson (Eds), *Rights and Private Law*, Hart Publishing, Oxford, 2012, p 35.

195 Robertson, above n 29, p 261.

196 Ibid, p 262.

197 Ibid, p 261.

198 Jensen, above n 59, at 53.

199 Ibid.

200 For example, economic theories.

201 Although see critiques of these theories which suggest tort law, including negligence law, is better understood as involving the interaction of a plurality of factors. S Hershovitz, ‘Harry Potter and the Trouble with Tort Theory’ (2010) 63 *Stanford L Rev* 67; T Kaye, ‘Rights Gone Wrong: The Failure of Fundamentalist Tort Theory’ (2010) 79 *Mississippi LJ* 931; J Stapleton, ‘Comparative Economic Loss: Lessons from Case-Law Focussed Middle Theory’ (2002–3) 50 *University of California L Rev* 531.

that they purport to be accurate descriptions of (rather than normative aspirations for) 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’.<sup>202</sup> 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 claims by courts — be a good theory of tort law?’<sup>203</sup> 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’.<sup>204</sup> 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’.<sup>205</sup> 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’.<sup>206</sup>

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.<sup>207</sup> 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’.<sup>208</sup> Stapleton has suggested that ‘high theorists tend to ignore, or dismiss as “wrong”, precedents that do not fit the pure theory’.<sup>209</sup> Stapleton believes that the most ‘illuminating critiques of legal reasoning in case law’ is ‘case-law-focused’ “middle theory”’.<sup>210</sup> This is theory that emerges from ‘the messiness of real-world judicial reasoning from case law’.<sup>211</sup>

Corrective and rights based tort theories have also been criticised on the basis that, while purporting to be neutral accounts of the judicial

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202 Cane, above n 188, at 208.

203 Ibid.

204 Ibid, at 210.

205 Ibid.

206 Ibid. Cane notes that ‘it is only by ignoring the dialectical nature of the common law that austere formalistic, conceptual accounts of private law (of which Weinrib’s is the leading example) can be made to appear at all plausible’.

207 For a defence of such theorising see Jensen, above n 59.

208 Kaye, above n 201, at 934. See his critique of the work of Robert Stevens on these grounds at 959–66.

209 Stapleton, above n 201, at 533.

210 Ibid, at 532.

211 Ibid. She suggests this type of theorising is also more acceptable and useful to the judiciary than ‘high’ theory.

decision-making process, such accounts defend ‘ideologically-right wing’ explanations of tort law.<sup>212</sup> Priel notes that such theories exhibit a particular ‘tort law conservatism’<sup>213</sup> which sees the ‘law’ divorced from the society and human institutions which interact with the law. Priel has ‘serious doubts’ that there is ‘special legal knowledge’ that presents the only ‘viable solutions to certain types of problems’.<sup>214</sup> He notes that tort lawyers ‘repeatedly appeal to broader “policy” considerations in specifying the scope of tort liability and often also its very foundations’.<sup>215</sup> This is often done in an ‘intuitive manner’ which ‘supports the view that experts on these matters should be given a more prominent place in the law’.<sup>216</sup> Clearly this critique accords with the common judicial practice discussed in this article of judges utilising often ‘intuitive’ or common sense SF as part of negligence judgments. Even from the earliest negligence cases, judicial reasoning has not been divorced from social practice as corrective justice and rights theorists might suggest.

Recognition and empirical evidence that judges do in fact use SF in judicial decision-making provides some basis for examining what ‘actual’ features of judicial reasoning need to be accommodated in descriptive middle range theoretical accounts of judicial reasoning in negligence cases. A range of issues need to be considered. These include that 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 should recognise the distinct role of SF in judicial reasoning in negligence cases and the different ways SF are used (that is, as context and background to judicial reasons, as social framework to evaluate adjudicative facts, and as part of prediction of policy consequences). Descriptive theories need to recognise that SF are used by judges in a multiplicity of different way and that there are pluralities of concerns that influence judicial reasoning in negligence cases. 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. To the extent that descriptive theories of judicial reasoning in negligence cases ignore broader empirical work on judicial reasoning<sup>217</sup> they are also incomplete. While there are particular concerns which are ‘special’ to private law and negligence judging, private law and negligence judging should also be seen as a species of judging more generally.

## Conclusion

This article has argued that SF form, and have always formed, a part of judicial reasoning in negligence cases, particularly the novel and difficult cases. The advent of statutory tort reform in Australia has not diminished the

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212 D Priel, ‘Torts, Rights and Right-Wing Ideology’ (2011) 19 *TLJ* 1 at 1. See also discussion of the ideological basis of rights theories in P Cane, ‘Rights in Private Law’ above n 194.

213 *Ibid.*, at 6.

214 *Ibid.*, at 9.

215 *Ibid.*, at 9–10.

216 *Ibid.*, at 10.

217 For example the emerging literature on the effects of cognition on judicial reasoning: see above nn 92, 129 and 130.

need for judges to utilise SF in their reasoning. Statutory provisions, for example in relation to causation, have embedded the requirement for implicit and explicit judicial use of SF. Despite this, Australian courts continue to struggle with how to approach SF in negligence judicial decision-making. Part 1 of this article discussed how SF are utilised in negligence decision-making not just as ‘policy’ but also critically as part of social framework and context. It suggested that we should not assume that the use of SF in this way is without issue and concerns matters which are always within judicial ‘common sense’. Part 2 of the article discussed the dangers of common-sense judicial assumptions of SF and how this can lead to judicial inaccuracy. Part 3 argued that there is a lack of clarity in relation to how SF can be received and used by judges. It suggested that an appropriate response to this cannot be to just ignore the judicial need for SF. Rather, judges need to be more explicit in recognising the need for SF, particularly in difficult cases. A range of both minimalist and maximalist strategies need to be considered to respond to judicial need for SF, including providing a better flow of SF information to judges.<sup>218</sup> Finally, Part 4 argued that current descriptive theories of tort law do not appear to adequately account for judicial use of SF in negligence reasoning. Theories of tort law and negligence which aspire to be descriptive (as opposed to merely aspirational or normative) need to move beyond false dichotomies of legal decision-making centred around formalistic understanding of the application of legal principles to adjudicative facts, with judicial use of policy deemed impermissible.

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<sup>218</sup> I do not suggest that this improvement of SF information flow will be sufficient ‘reform’ on its own to respond to the difficulties associated with judicial use of SF. Other interventions (beyond the scope of this article) are also required as judicial use of SF is a wicked problem involving legal, institutional, individual, cultural and cognitive processes. A wicked problem by its nature is ‘complex, open-ended and intractable’. See B Head, ‘Wicked Problems in Public Policy’ (2008) 3(3) *Public Policy* 101.