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Articles

The way the world is: Social facts in High Court negligence cases

Kylie Burns*

*Negligence cases in the High Court by nature present difficult policy choices and take place against the context of judicial recognition of the nature of Australian society, social values and human behaviour. Judges, inevitably, make assumptions and statements in their judgments about society and social values, the nature of the world, and human and institutional behaviour. This article refers to these statements as social facts. The article analyses the nature of the concept 'social fact', discusses the rules of evidence relating to the reception of social facts in the Australian High Court and presents a study of the use of social facts in High Court negligence cases in 2003. The study discusses the frequency of the use of social facts, the nature of social fact statements made, the source of social facts, the use of social scientific evidence and the use of social facts in **Cattanach v Melchior**. Overall the article argues that there is no coherent method in Australian law for determining reliable social facts and that this results in the adoption of conflicting and potentially inaccurate assumptions in the Australian High Court.*

Negligence cases in the High Court by nature present difficult policy choices and take place against the context of judicial recognition of the nature of Australian society, social values and human behaviour. This has been particularly evident in recent high profile and contentious cases such as *Cattanach v Melchior*.¹ The High Court continues to struggle with its role as policy maker and policy utiliser. Some judges, notably Kirby J, have long advocated a more frank acknowledgement of policy concerns in negligence cases.² However, at least officially, the majority of the High Court have shied away from considering 'public policy' as an explicit factor in determining liability in all negligence cases.³ Whether or not the High Court officially recognises that it explicitly considers policy matters in all cases (be they called

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1 (2003) 199 ALR 131.

2 Ibid, at [121]–[122] and [152].

3 See *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404. However, compare the comments regarding the role of public policy in tort law and the necessity for judges to make choices in *Cattanach v Melchior* (2003) 199 ALR 131 at [65] and [73]–[76] per McHugh and Gummow JJ, [219] and [223]–[242] per Hayne J, [291] per Callinan J. Kirby J at [121] identifies all judges of the High Court in *Cattanach* as making express reference to both principle and policy.

legal policy,⁴ public policy, principle, community values, enduring values or whatever),⁵ it is clear that the judges inevitably in 'hard' cases make assumptions about their society, world and human behaviour. These assumptions flavour the interpretation, creation and adoption of doctrinal principles. They create the background context against which a judge's reasoning and decision are formed. They function as rhetorical devices that persuade the reader that a particular interpretation of the law is correct. This affects not only the manner in which principles are applied to the parties of a particular case, but also the development of the general principles of Australian tort law and perhaps even contributes to the construction of particular general social norms.⁶ In this article these assumptions are referred to as 'social facts'.

This article will explore the High Court's use of social facts in Australian negligence cases to construct the High Court's vision of 'the way the world is'. Part 1 of the article will discuss the meaning of the concept of 'social fact'. Part 2 will discuss the evidential rules relating to the reception of social facts in Australia. Part 3 will provide a case study of the use of social facts in the High Court in negligence cases in 2003,⁷ including the frequency of the use of social facts, the nature of social facts, the source of social facts, the use of social scientific evidence and the use of social facts in *Cattanach v Melchior*. I will argue that this analysis demonstrates that the High Court has frequent recourse to social facts in the determination of negligence cases. This raises questions not only about the place of policy in High Court negligence cases, but perhaps contributes more widely to the refreshed debate regarding legalism and judicial activism in Australian judicial decision-making processes.⁸ Overall, the article will argue that there is no coherent method in

4 The unsatisfactory and misleading description adopted by Lord Millett in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 108; [1999] 4 All ER 961 at 1000.

5 See J Stapleton, 'The golden thread at the heart of tort law: Protection of the vulnerable' (2003) 24 *Aust Bar Rev* 135. I agree with Stapleton's argument that often there is little meaningful difference between the nature of principles and policy as used by judges in tort cases and that often the term 'principle' is used in a misleading way which 'masks the substance of a judge's reasoning process', suggesting that a particular concern is 'trumps' when it may not always be so (at 136). Stapleton advocates using the neutral term 'legal concerns' to describe the concerns taken into account by judges in torts cases (at 137).

6 See, for example, the discussion in B Golder, 'From *McFarlane* to *Melchior* and beyond: Love, sex, money and commodification in the Anglo-Australian law of torts' (2004) 12 *TLJ* 128.

7 The 11 cases considered are *New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412; *Cattanach v Melchior* (2003) 199 ALR 131; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; 198 ALR 100; *Joslyn v Berryman* (2003) 214 CLR 552; 198 ALR 137; *Fox v Percy* (2003) 214 CLR 118; 197 ALR 201; *Shorey v PT Ltd* (2003) 197 ALR 410; *Suvaal v Cessnock City Council* (2003) 200 ALR 1; *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447; *Hoyts Pty Ltd v Burns* (2003) 201 ALR 470; *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139; and *Amaca Pty Ltd v New South Wales* (2003) 199 ALR 596. I do not consider cases in 2003 relating to limitation of actions, insurance, victims' compensation or workers' compensation matters. For a discussion of these cases see H Luntz, 'Round-up of cases in the High Court of Australia in 2003' (2004) 12 *TLJ* 1.

8 See, for example, Stapleton, above n 5; Justice J D Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Aust Bar Rev* 1; The Hon M Kirby, 'Judicial activism? A riposte to the counter-reformation' (2004) 24 *Aust Bar Rev* 1; F Carrigan, 'A Blast from the past: The resurgence of legal formalism' (2003) 27 *MULR* 163; J Gava, 'Another Blast from the

Australian law for determining reliable social facts and that this results in the adoption of conflicting and potentially inaccurate assumptions in High Court cases.

1. The nature of social facts

Traditional categories

The work of Kenneth Culp Davis⁹ is widely referred to as the starting point for a consideration of how legal decision-makers refer to non-legal extra-record facts. His work proceeds on the premise that ‘no judge can think about law, policy or discretion without using extra-record facts’.¹⁰ Davis’s work identifies a distinction between two uses of extra-record facts — as legislative or adjudicative facts.¹¹ Where ‘a court or an agency finds facts concerning the immediate parties — who did what, where, when, how and with what motive and intent — the court or agency is performing an adjudicative function’, so that the relevant facts are ‘adjudicative facts’.¹² Where a ‘court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation’.¹³ The use of facts in this context is referred to as ‘legislative facts’.¹⁴ Legislative facts ‘help the tribunal to determine the content of law and policy and to exercise its judgment or discretion’, are usually general in nature and are utilised ‘in the creation of law or policy’.¹⁵

Davis identified shortcomings in the way judges approach legislative facts, with ‘more conventional opinion purporting to rest exclusively upon the record but which in reality is heavily dependent upon the assumption of unproved facts that are left vague and unidentified’.¹⁶ He also exposed anomalies in rules of evidence, which did not adequately distinguish between the two kinds of ‘facts’.¹⁷

In a series of articles during the late 1980s, Monahan and Walker sought to take the existing scholarship on the use of social scientific material in judicial decision-making further.¹⁸ Monahan and Walker note the influence of Davis’s work, and accept ‘Davis’s insight that empirical information can play *two*

Past or why the left should embrace strict legalism: A Reply to Frank Carrigan’ (2003) 27 *MULR* 186; and A C Hutchinson ‘Heydon’ seek: looking for law in all the wrong places’ (2003) 29 *Mon L Rev* 85.

9 K C Davis, ‘An Approach to the Problems of Evidence in the Administrative Process’ (1942) 55 *Harv L Rev* 364; K C Davis, ‘Judicial Notice’ (1955) 55 *Columbia L Rev* 945.

10 K C Davis, ‘Judicial, Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court’ (1986) 71 *Minnesota L Rev* 1 at 7.

11 Davis, ‘Judicial Notice’, above n 9, at 952–3. The distinction was later drawn on by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145.

12 Davis, ‘Judicial Notice’, above n 9, at 952.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*, at 953.

17 *Ibid.*, at 953–60. As a direct result of his critique the US Federal Rules of Evidence adopted the distinction between adjudicative and legislative facts with the doctrine of judicial notice expressed only to apply to adjudicative as opposed to legislative fact-finding (see r 201).

18 J Monahan and L Walker, ‘Social Authority: Obtaining, evaluating and establishing social science in law’ (1986) 134 *Uni of Pennsylvania L Rev* 477; J Monahan and L Walker, ‘Social

different roles in legal decision-making'.¹⁹ However, they criticise his work on the basis that the adjudicative/legislative fact distinction perpetuated 'the old pre-Realist boundaries of the distinction between "fact" and "law"'.²⁰ They argue that Davis's notion that facts used to create a rule of law should be treated differently from other facts is a 'largely negative proposal'.²¹ It provides no 'clear direction regarding how courts should obtain social science data', evaluate social science data or what 'effect they should give to the evaluation of other courts'.²²

Monahan and Walker categorise the use of social scientific material by judges by considering 'three possible legal functions of any knowledge about how the world works'.²³ The first function, most closely connected to Davis's notion of legislative fact, is the use of facts like legal authority in the determination of legal rules or policy. This is described as 'social authority'.²⁴ Such facts are 'general, apply beyond the case at bar, and often are treated by judges as if they were legal authority'.²⁵ The second function reflects the use of 'social science knowledge' to determine a particular disputed issue in the case at hand.²⁶ The third function reflects the use of social scientific evidence relevant to issues in the case at hand. This is referred to as 'social fact'.²⁷ Monahan and Walker propose a particular process for obtaining and evaluating social scientific material relevant to each function.²⁸ Accordingly, Monahan and Walker present not just a critique of current judicial practices, but a positive reformist 'functional' account of how to address the shortfalls in judicial process.²⁹

While the work of both Davis and Monahan and Walker is useful to provide a background for a discussion of the meaning and content of the term 'social

Frameworks: A new use of social science in law' (1987) 73 *Virginia L Rev* 559; and J Monahan and L Walker, 'Social Facts: Scientific methodology as legal precedent' (1988) 76 *California L Rev* 879.

19 Monahan and Walker, 'Social Authority', *ibid*, at 485.

20 *Ibid*.

21 *Ibid*.

22 *Ibid*.

23 M J Saks, 'Judicial attention to the way the world works' (1990) 75 *Iowa L Rev* 1011 at 1018.

24 Monahan and Walker, 'Social Authority' above n 18, at 488.

25 Saks, above n 23, at 1019.

26 *Ibid*, at 1020; Monahan and Walker, 'Social Frameworks', above n 18, at 559. For example, the use of psychological evidence on the reliability of identification evidence to resolve whether identification testimony should be admitted in a particular case, discussed by Saks, *ibid*, at 1020.

27 Saks, above n 23, at 1021; Monahan and Walker, 'Social Facts', above n 18. Monahan and Walker's use of the term 'social fact' should be distinguished from my more general definition of the term discussed below.

28 For example, they propose that judges should approach social authority in much the same way as they approach legal authority. They argue that evidence of social authority should be presented in a brief rather than given by testimony and judges should be able to source their own research relating to social authority. Monahan and Walker go on to provide extensive guidelines for the methods courts should use to evaluate empirical studies and how courts should approach the evaluation of social authority by other courts. See Monahan and Walker, 'Social Authority', above n 18, at 495–516.

29 Saks, above n 23, at 1027 and 1030–1. For critique of reformist approaches, see A Woolhandler, 'Rethinking the judicial reception of social facts' (1988) 41 *Vanderbilt L Rev* 111.

fact' in this article, ultimately it is unhelpful to be too prescriptive or strictly categorical in searching for meaning. The work of Davis and Monahan and Walker tends to take a categorical approach (for example, Davis's binary approach) to definition, with particular emphasis on the function of such 'facts' or the manner in which ultimate evidential rules should be crafted for particular kinds of social scientific evidence. However, often there is significant difficulty³⁰ in clearly appropriating particular kinds of statements to the existing categories identified by either Davis or Monahan and Walker, with many judicial statements of 'social fact' being mixed statements that could be attributed to more than one 'existing' category or sometimes to none.³¹ In addition, Monahan and Walker tend to focus on social facts supported by social scientific evidence, while in Australia (as will be illustrated below) this is a rarity. The approaches of Davis and Monahan and Walker may be useful when the aim is ultimately to identify new rules of evidence and practice for the reception of social facts. However, this tends to place the cart before the horse when the main aim (as mine is) is to examine more generally the statements judges make about the way they perceive the world to operate, particularly when those statements have no social scientific support.

What is a social fact?

A 'social fact' in this article is not a factual finding that is directly descriptive of the facts of the trial matter.³² A 'social fact' is not a pure statement of law, legal rules or legal reasoning.³³ However, past that point there is a continuum of assumptions about society, the world and human behaviour that courts, including the High Court, make in an appellate case. All of these are 'social facts' within the meaning of this article. At one end of the spectrum, there are general assumptions judges make that allow them to interpret adjudicative facts. For example, assumptions about the effect of alcohol on human beings or how people act when intoxicated may be made to determine the adjudicative fact of how drunk a particular party to an action may have seemed at the relevant point in time.³⁴ Social fact statements may also be made as part of a judge's creation of the background context or social setting of a case. For example, a judge may describe the traditional nuclear family unit as the central and most important foundation group of society.³⁵ At the

30 At least in my own analysis of High Court negligence cases decided in 2003 discussed below.

31 For example, general background statements of social context by judges, although not directly relevant to a legal rule or issue. It is unclear, for example, where the general statement by Gleeson CJ in *De Sales v Ingrilli* (2002) 212 CLR 338; 193 ALR 130 at [26], that 'there are probably just as many work-shy or extravagant, or unreliable men now as there were in 1968', would fit within existing categories.

32 For example, that Mrs Melchior was a 46-year-old housewife is not a 'social fact' for my purposes.

33 For example, it is not a 'social fact' that a cause of action in negligence requires that causation between the breach of duty and the damage be shown.

34 See, for example, *Joslyn v Berryman* (2003) 214 CLR 552; 198 ALR 137 at [75]–[76]. See also the judicial discussion of the effects of alcohol and community knowledge of the effects of alcohol in the recent case of *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 207 ALR 52 at [10], [12], [13], [17], [85], [105] and [131].

35 For example, see *Cattanach v Melchior* (2003) 199 ALR 131 at [35]. Of course, these

other end of the spectrum, social fact assumptions may be made about the wider social effect or consequences of particular findings of liability in a case. These kinds of arguments would traditionally have been described as public or social policy arguments. For example, a judge may make statements about the psychological effects on children born following a failed sterilisation of later learning of litigation against the relevant medical professional.³⁶

As Stapleton points out there is a difficulty in categorising some kinds of statements as either principle or policy.³⁷ These include statements that indicate underlying 'legal values' such as respect for human life or indeterminacy. It is probably also impossible for there ever to be a strict definition of the difference between legal principle (law) and factual finding (fact).³⁸ Many statements made by judges include elements of both. For the purposes of the definition of social fact in this article, statements framed as bare general legal propositions³⁹ are excluded (for example, the law does not encourage indeterminacy or the law values life). However, positive statements of consequence framed in terms of 'values'⁴⁰ are included (for example, legal rules providing for school liability for sexual abuse by teachers will encourage deterrence, due administration of justice, fulfilment of legitimate expectations for compensation and will not lead to an indeterminate number of claims; or society accepts that all human lives have value). So, too, is identification of policy assumptions underlying the law (for example, the underlying assumption of the law is that children will be harmed by litigation).

Social facts have previously been defined by Mullane in a study of 1990 Family Court cases as statements 'concerning human behaviour'.⁴¹ He indicates the basis for 'social facts' may be 'revealed' by social scientific disciplines such as 'history, psychology, sociology, anthropology, political science and related fields'.⁴² I define the term 'social fact' more widely to include not just statements about human behaviour, but also statements about the nature of society and social values and the nature and behaviour of social institutions, including legal institutions.⁴³ In addition, while it is true to say some social fact statements may (at least notionally) have a basis in a social scientific discipline, this is certainly not true of all social fact statements made

'context' social facts are often far from the neutral statements they may seem and arguably can play a crucial role not only in the determination of the case at hand but in the wider construction of social norms and understandings. See, for example, Golder, above n 6. This is significant, as context facts would not usually be considered 'policy' matters or perhaps even legislative facts.

36 For example, see *Cattanach v Melchior* (2003) 199 ALR 131 at [384]–[386].

37 Stapleton, above n 5.

38 Others have long considered the traditional distinction between law and fact to be 'flawed'. See, for example, the discussion in Monahan and Walker, 'Social Authority', above n 18.

39 Even though they may include underlying implicit assumptions of social fact.

40 Even when framed very generally.

41 G R Mullane, 'Evidence of Social Science Research: Law, Practice and Options in the Family Court of Australia' (1998) 72 *ALJ* 434.

42 *Ibid.*

43 For example, I include statements that describe the state of the court system, the general conduct of legal actors such as judges, lawyers, litigants and expert witnesses and the general nature of litigation. I would describe as social facts, statements about the workload of judges, the stressful nature of litigation and the practical benefits trial courts have in scrutinising evidence over appellate courts.

by judges. As will be described below, it is rare for any social scientific evidence to be cited in support of social fact statements; social fact statements made by judges may be highly contentious by social scientific standards or unsupported by available social scientific evidence; statements are most often not stated in a way that is falsifiable in scientific terms;⁴⁴ and there is relatively little evidence of any explicit (or even implicit) interdisciplinary approach in judgments. Finally, social facts in judgments may be sourced or unsourced and may be drawn from submissions of the parties to an action or often from a judge's own experience or intuition.⁴⁵

2. Reception of social facts in Australia

As I have previously argued,⁴⁶ judges appear to adopt three main approaches when they perceive a gap in knowledge (which must be filled to reach judgment) between legal principle and adjudicative facts in a particular case. Frequently there is no explicit reference in judgments at all to the underlying social facts or assumptions which judges have relied on in determining legal principle, or such matters are described as legal principle or legal values. Secondly, judges will make social fact statements which may be unreferenced or referenced only to case law, legislation or general academic articles.⁴⁷ Finally, and far less frequently, judges will cite social scientific material in support of their statement of relevant social facts.⁴⁸ All of these options have their own difficulties.⁴⁹

The use of social fact material whether sourced or unsourced, provided by the parties or found by the judge, and supported by social scientific material, is not adequately provided for in the Australian law of evidence or practice. The reference to such material has apparently developed without any guiding principles as to authenticity, notice or necessary evidential support. The Australian rules of evidence appear to have been designed to support and reflect the adjudicative fact-finding function of judges, without any significant consideration of how to respond to the wider role of social facts in judicial

44 Many social fact statements are probably not capable of being scientifically tested — for example, how could we test a value statement such as 'Human life is inherently valuable'?

45 Or sometimes even from a judge's extra-record research. See, for example, the discussion by McHugh J in *Woods v Multi-Sport Holdings* (2002) 208 CLR 460; 186 ALR 145 at [62] of social scientific research in relation to the frequency of accidents.

46 K Burns, 'It's just not cricket: The High Court, sport and legislative facts' (2002) 10 *TLJ* 234 at 248.

47 For example, see the extensive discussion by McHugh J of the effects of increasing the liability of auditors in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 282–9; 142 ALR 750. Many of the 'auditor liability' social facts referred to by McHugh J were referenced to J A Siliciano, 'Negligent Accounting and the Limits of Instrumental Tort Reform' (1988) 86 *Michigan L Rev* 1929.

48 See, for example, *Jones v Bartlett* (2000) 205 CLR 166; 176 ALR 137 at [106]–[111] per McHugh J, where several references are made to a study of environmental health in the home and a further reference is made to E Cassell and J Ozanne-Smith, *Women's Injury in the Home in Victoria*, Monash University Accident Research Centre, 1999, regarding the incidence of broken glass injury.

49 For example, when there is no statement of the assumptions relied on there is no opportunity to debate or question the underlying premises of the judgment. However, the use of referenced or unreferenced social facts raises evidential issues relating to permissibility and admissibility.

decision-making.⁵⁰ While it may be that after consideration of the issue it will be determined that restrictive evidential rules about social fact reception are inappropriate, on the other hand a totally unregulated judicial use of social facts has many problems.⁵¹

The common law doctrine of judicial notice has traditionally applied to allow the admission of notorious facts, or facts which are so well known that every ordinary person may be said to be aware of them.⁵² It operates as an exception to the general rule of evidence that the parties must prove all facts to a case by means of relevant and admissible evidence.⁵³ Courts may judicially notice a fact either with or without enquiry.⁵⁴ However, the very essence of a social fact seems contrary to the basis of the doctrine of judicial notice.⁵⁵ The vast majority of social facts are not notorious or commonly known.

A number of Australian states have statutory provisions which allow courts to refer to authoritative published works.⁵⁶ In addition, s 144 of the Evidence Act 1995 (Cth and NSW) governs the reception of extra-record material in Commonwealth and New South Wales jurisdictions. 'Proof is not required of

50 The US Federal Rules of Evidence Rule 201 on Judicial Notice was specifically designed to apply only to the traditional category of adjudicative facts with a deliberate decision to leave the reception of legislative facts within the inherent and unfettered discretion of the judicial decision-maker. This was in response to the work of Kenneth Culp Davis discussed above. See the notes to r 201, *Notes of Advisory Committee on Rules*.

51 Interestingly, there appears to be judicial uncertainty about whether social fact material may or may not be admissible before the High Court when not part of the original evidential record of adjudicative facts. In *Cattanach v Melchior* (2003) 199 ALR 131 at [152], Kirby J indicates that if liability 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'. However, at [153] he refers to the social fact material introduced by the State intervenors before the High Court relating to the cost of actions and effect of liability on State health care systems, as not admissible to supplement the evidentiary record, citing the authority of the criminal cases *Mickelberg v R* (1989) 167 CLR 259; 86 ALR 321 (in which Kirby J dissented) and *Eastman v R* (2000) 203 CLR 1; 172 ALR 39. These cases hold that fresh evidence is not admissible before the High Court. See also his Honour's judgment in *Roads and Traffic Authority v Cremona* (2002) 191 ALR 566 (affidavits as to importance of case admissible on special leave application, though not admissible on hearing itself). This appears to greatly restrict the admission of possible social fact material (including social scientific evidence) or arguments by parties before the High Court on the basis that the material is not adjudicative fact introduced at trial, which seems to contradict the 'policy' role of such material encouraged by Kirby J at [152] and to unnecessarily limit the usefulness of intervenors. This raises the important question of whether the authority of *Mickelberg* and *Eastman*, both criminal cases where the particular new evidence sought to be adduced was clearly of an adjudicative kind affecting the substantive issues relating to the accused, extends to disallow social fact arguments and evidence before the High Court when the arguments relate to general law making functions. If so, the quite bizarre situation may arise where the parties themselves or intervenors could not raise such material or refer to relevant social scientific evidence; however, judges could do so independently and unfettered.

52 See J D Heydon, *Cross on Evidence*, Butterworths On-Line <<http://www.butterworthsonline.com>> at [3005] (accessed 26 September 2004); *Holland v Jones* (1917) 23 CLR 149 at 153.

53 *Woods* (2002) 208 CLR 460; 186 ALR 145 at [64] per McHugh J.

54 *Ibid.*

55 Mullane, above n 41, at 441–2.

56 Evidence Act 1929 (SA) s 64; Evidence Act 1910 (Tas) s 67; Evidence Act 1906 (WA) s 72.

knowledge that is not reasonably open to question' and is either 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 reasonably be questioned.⁵⁷ Judges may acquire knowledge of those matters in any way they see fit;⁵⁸ however, judges must give parties an opportunity to make submissions in relation to the relevant knowledge or refer to other relevant information to avoid unfair prejudice.⁵⁹ Once again, however, the very features of s 144 seem to exclude the possibility of application to social facts. Social facts will almost never be matters which are 'not reasonably open to question' or 'capable of verification by reference to a document the authority of which *cannot reasonably be questioned*'.⁶⁰ In addition, it appears that the High Court takes a restrictive view of the operation of s 144, which would appear vastly to restrict its application to social facts. In the recent case of *Gattellaro v Westpac Banking Corporation*,⁶¹ all sitting members of the High Court held that the doctrine of judicial notice encapsulated in s 144 did not allow reception of the fact that banks such as Westpac use a standard form of guarantee.⁶² This was on the basis that such knowledge was not common knowledge in the locality, was not capable of verification by a document whose authority could not reasonably be questioned and it had not been demonstrated that the Court of Appeal had given the Gattellaros an opportunity to make submissions on the question of judicial notice.

Previously, in *Woods v Multi Sport Holdings*,⁶³ McHugh and Callinan JJ debated the use of extra-record social scientific material in judgments.⁶⁴ McHugh J supported his reference to extra-record social scientific materials⁶⁵ on the basis that '[t]hey fall into the class of "legislative" facts that a court may judicially notice and use to define the scope or validity of a principle or rule of law'.⁶⁶ This, he argued, was 'legitimate and in accordance with long-standing authority and practice'.⁶⁷ Callinan J strongly disagreed that it is generally legitimate for judges to refer to statistical extra-record material as

57 Section 144(1).

58 Section 144(2).

59 Section 144(4).

60 Mullane above n 41, at 441–2 (emphasis added).

61 (2004) 204 ALR 258. The case was originally given special leave it seems on the question of whether the doctrine of judicial notice allowed reception of the fact that 'banks such as Westpac used a standard form of guarantee and that it could be inferred that the appellants had signed it', which was held to be a 'far-reaching proposition of great importance in the conduct of commercial litigation': at [55]. This turned out to be of far less importance on the argument of the actual appeal of the matter before the High Court due to concessions made by Westpac.

62 Ibid, at [15]–[18] per Gleeson CJ, McHugh, Hayne and Heydon JJ, [69] per Kirby J. The joint judgment suggested that in NSW where s 144 applied there appeared to be no room for the application of the common law, while Kirby J indicated the result would be the same whether approached by reference to the common law or the statute.

63 (2002) 208 CLR 460; 186 ALR 145.

64 See more detailed discussion in Burns, above n 46.

65 Apparently without notice to the parties: see M Hoey, 'The High Court and Judicial Notice: *Woods v Multi-Sport Holdings Pty Ltd*' (2002) 27 *Alternative LJ* 130 at 132.

66 (2002) 208 CLR 460; 186 ALR 145 at [62].

67 Ibid. McHugh J's comments have since been relied on by Wallwork J, in the determination of a sentencing appeal in *Wood v R* (2003) 139 A Crim R 475, to support reference to extra-record social scientific material in relation to rates of imprisonment.

part of their decision or that the doctrine of judicial notice generally allows the reception of legislative facts.⁶⁸ However, both justifications seem insufficient. As outlined above, traditionally the doctrine of judicial notice has only allowed the admission of notorious or commonly known facts. The reports cited by McHugh J clearly did not fall into that category or even into the statutory categories and on the authority of *Gattellaro v Westpac Banking Corporation* would clearly not satisfy either common law or statutory tests of judicial notice. However, on the other hand a refusal to allow admission of facts on the basis they are not adjudicative facts or that the reception of such material does not come within the traditional ambit of the doctrine of judicial notice is unnecessarily restrictive. It fails to address the fact that judges, particularly of the High Court, perform a law-making as well as an adjudicative role.

As will be discussed below, High Court judges do frequently refer to social facts in their judgments. It appears that, as suggested by Davis and Monahan and Walker in the US context discussed above, there is a need to craft rules which recognise the law-making aspect of judicial decision-making and respond to the needs of judges for social fact material. Given the apparent lack of guiding principles in Australia for the reception of social fact material in the rules of evidence and practice, leaving such matters to judicial discretion, it is unsurprising that there are disparities between the use of social facts by judges, there are often no references provided for social fact statements (particularly contentious statements) and there are often difficulties with the veracity and nature of social facts stated. The relatively rare use of intervenors or amici curiae in the High Court and the lack of any requirement for parties to provide references to any relevant social scientific studies in their appellate briefs⁶⁹ probably also compound the problem.

3. The Australian High Court and social facts in negligence cases in 2003

In the US context Davis identified 'weak spots' in US appellate cases, including 'insufficient factual or scientific base' for legislative facts and 'the lack of a democratic base when one is needed'.⁷⁰ He identified predominantly unsuccessful methods the US Supreme Court had used to address these weak spots, including:⁷¹

- sending the case back to the trial court;
- simply asserting an 'emphatic view of legislative facts with nothing to support its view';⁷²
- relying on 'common experience' with no reference to facts and 'in the face of . . . convincing evidence to the contrary';⁷³
- referring to a published source and finding 'what is not there';⁷⁴

68 (2002) 208 CLR 460; 186 ALR 145 at [165]–[168].

69 As might be done in a Brandeis brief in America.

70 Davis, 'Judicial, Legislative and Administrative Lawmaking', above n 10, at 6.

71 Ibid, at 9–11.

72 Ibid, at 9.

73 Ibid.

74 Ibid.

- completely ignoring the need to address a relevant legislative fact;
- imposing the burden of proof on a party to prove a legislative fact; and
- referring to extra-record research in support of legislative facts without giving the parties a chance to respond to or challenge the research.

My research of the approach of the Australian High Court in negligence cases in 2003 confirms that many of the same things could be said of the Australian High Court.

Frequency of the use of social fact assumptions

Eleven negligence cases were heard by the High Court in 2003.⁷⁵ There were 325 social fact statements made by the judges of the High Court in total in these cases.⁷⁶ Some cases displayed a very low number of social fact statements. For example, the contribution case of *Amaca Pty Ltd v New South Wales*⁷⁷ had only a single social fact statement.⁷⁸ However, this was (unusually) a very short case of only 27 paragraphs and (even more unusually) was a unanimous decision of McHugh, Gummow, Kirby, Hayne and Callinan JJ. Similarly, the relatively short and factually based⁷⁹ case of *Shorey v PT Ltd*⁸⁰ (89 paragraphs) revealed only a single social fact statement.⁸¹ This case also involved a joint judgment (Gleeson CJ, McHugh and Gummow JJ of only 10 paragraphs) with single judgments by Kirby J and Callinan J.

However, at the other end of the spectrum in perhaps one of the most dense examples of social fact use available in Australia, *Cattanach v Melchior*⁸² had 169 statements of social fact. This may be explained on a number of bases. First, the case is extremely long (414 paragraphs and 606 footnotes). Secondly, as is common in the current High Court in more complex cases, the case involved multiple judgments,⁸³ with separate judgments given by Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ and a joint judgment by McHugh and Gummow JJ. Thirdly, the case involved the highly contentious and novel issue of the recovery of the cost of bringing up a child following a

⁷⁵ See above n 7.

⁷⁶ Database on record with author. Social facts statements which fulfilled the criteria discussed in Part I of this article were identified and entered into an access database recording for each social fact statement (among other variables) social fact text, judge(s), case name, paragraph number, whether the social fact was referenced in any way and the references provided. Where a reference was provided for any part of a social fact statement the social fact was counted as referenced even though other parts of a social fact statement were not supported by the reference. Statements which were on the same social fact topic within a particular single paragraph of a judgment were counted and recorded as a single record. Social facts repeated in additional paragraphs of a judgment were counted as new social fact records.

⁷⁷ (2003) 199 ALR 596.

⁷⁸ 'The making of assumptions and the acceptance of concessions for the purpose of litigation is sometimes an appropriate and efficient way to proceed': *ibid*, at [20].

⁷⁹ Focused on the interpretation of trial findings of adjudicative fact.

⁸⁰ (2003) 197 ALR 410.

⁸¹ 'An expert would normally welcome the chance to elaborate the recorded history and to clarify questions and doubts stated, or hinted, in cross-examination': *ibid*, at [40].

⁸² (2003) 199 ALR 131.

⁸³ Six in this case.

failed sterilisation surgery.⁸⁴ This gave rise to significant policy issues with, as Kirby J pointed out, all judges discussing policy matters in their judgments.⁸⁵ Finally, Heydon J made very extensive references to social facts (79 instances) in his judgment,⁸⁶ including:

consideration of matters that would seem better described in moral, social or scientific terms such as: basic legal assumptions about human life in families; the psychology of litigants, parents and children; a parent's moral duties even though these are not enforceable by the law; and the 'disquieting possibilities' in relation to other much more ambitious claims of a type not before the court that might create 'an odious spectacle'.⁸⁷

Overall, the large number of social fact statements in the 2003 cases demonstrates that judges do find the need to refer frequently to knowledge that is neither adjudicative fact nor legal principle.⁸⁸ In other words, judges, particularly in appellate courts, tend to find gaps in the knowledge needed to make a final decision. This is especially so in 'hard' cases where there is not a clear application of legal principle available and where the case turns ultimately on issues of policy and values rather than issues of adjudicative fact.

Nature of the social facts

As outlined above in Part 1 of this article, there is a spectrum of the different kinds of social facts, which range from statements made to assist in the judicial evaluation or interpretation of adjudicative facts, to context statements, to consequence statements, to statements that merge from legal value into social fact. All of these kinds of social facts were identified in the analysis of the 2003 cases. For the sake of brevity, only several examples of each kind of social fact are outlined by way of illustration:

Interpretation of adjudicative fact

In *Joslyn v Berryman*, Kirby J discussed the effect of alcohol on the parties to the litigation (an adjudicative fact) by reference to an assumption about the effect of alcohol on seasoned drinkers: 'Both Mr Berryman and Ms Joslyn were found to have been seasoned drinkers. *This would have reduced somewhat the effect of alcohol consumption on their cognitive and motor capacities.*'⁸⁹

In *Cattanach v Melchior*, Gleeson CJ assessed the parental financial

⁸⁴ Liability was based on a failure to warn. For further discussion of the case see J Seymour, 'Cattanach v Melchior: Legal principles and public policy' (2003) 11 *TLJ* 208; and Golder, above n 6.

⁸⁵ (2003) 199 ALR 131 at [121].

⁸⁶ Somewhat surprisingly given his earlier pre-appointment comments in the article cited above n 8 regarding judicial activism and legalism. See his comments on the excessive use of citations and footnotes and on the expression of judicial opinions on extraneous matters in judicial decisions: *ibid*, at 10–12. See also his warnings about the judicial detection of community values: *ibid*, at 22.

⁸⁷ Stapleton, above n 5, at 133.

⁸⁸ This has also been demonstrated of judges of the Family Court in Mullane's study. See Mullane, above n 41, at 452–4.

⁸⁹ (2003) 214 CLR 552; 198 ALR 137 at [88] (emphasis added).

obligations of the plaintiff parents by reference to an assumption about the obligations of 'ordinary' parents:

They have a loving relationship with a healthy child. It does not involve any special financial or other responsibilities that might exist if, for example, the child had an unusual and financially burdensome need for care. The financial obligations which the respondents have incurred, legal and moral, *are of the same order as those involved in any ordinary parent-child relationship.*⁹⁰

In assessing the accuracy of the recall of the particular events by a party to the action (an adjudicative fact) in *Suvaal v Cessnock City Council*, McHugh and Kirby JJ indicated that:

Common experience teaches that elements in the recall of past events can be accurate even if elaboration (prompted perhaps by subconscious desires or interests) adds detail that is unreliable, incorrect or unprovable. There may remain at the heart of the matters recalled a core of truth that is accurate and sufficiently established.⁹¹

Context statements

The analysis of the 2003 negligence cases revealed a wealth of social fact statements which were used to paint the background context or picture of society, against which the court or judges discussed principle or policy. These included:

The nature of the legal system in Australia

- Litigants are represented in our courts by advocates of differing skills. Litigants are sometimes people of limited knowledge and perception.⁹²
- Litigation beyond a trial is costly and usually upsetting.⁹³

The nature of contemporary Australian society and contemporary Australian social values

- It is a feature of affluent societies that children remain financially dependent upon their parents for longer periods. Many children are supported by their parents well beyond the age of 18.⁹⁴
- In the 1960s, and thereafter, social attitudes to various forms of contraception, including sterilisation, began to change in Australia as in other like countries.⁹⁵
- Such thinking (like the earlier notion of enforced adoption) bears little relationship to reality in contemporary Australia. That reality includes non-married, serial and older sexual relationships, widespread use of

90 (2003) 199 ALR 131 at [36] (emphasis added).

91 *Suvaal v Cessnock City Council* (2003) 200 ALR 1 at [82]. While no doubt common experience may be useful in relation to understanding human memory and recall, this is also an area where equally the process of the construction of human memory is a matter contrary to common experience and where scientific knowledge would prompt that care needs to be taken, for example in such areas as repressed memory and identification testimony.

92 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at [120].

93 *Fox v Percy* (2003) 214 CLR 118; 197 ALR 201 at [29].

94 *Cattanach v Melchior* (2003) 199 ALR 131 at [20].

95 *Ibid.*, at [105].

contraception, same-sex relationships with and without children, procedures for 'artificial' conception and widespread parental election to postpone or avoid children.⁹⁶

The nature of human relationships and human behaviour

- The relationship between two friends who have lived together for many years may be closer and more loving than that of two siblings.⁹⁷
- The value of human life, which is universal and beyond measurement, is not to be confused with the joys of parenthood, which are distributed unevenly.⁹⁸
- But with an ageing population, and increasing pressure on welfare resources, the financial aspects of caring for parents are likely to become of more practical concern.⁹⁹
- For some, confronted with an unplanned pregnancy, there is no choice which they would regard as open to them except to continue with the pregnancy and support the child that is born. For others there may be a choice to be made. But in no case is the 'choice' one that can be assumed to be made on solely economic grounds. Human behaviour is more complex than a balance sheet of assets and liabilities. To invoke notions of 'choice' as bespeaking economic decisions ignores that complexity.¹⁰⁰

Consequence statements

It was common in the analysis of 2003 cases to find classic policy or consequence statements. These included statements about loss distribution, possible deterrent value and the general social effect of liability:

- To hold a school authority, be it government or private, vicariously liable for sexual assault on a pupil by a teacher would ordinarily give the victim of that assault a far better prospect of obtaining payment of the damages awarded for the assault than the victim would have against the teacher.¹⁰¹
- [A]ny deterrent or prophylactic effect that might be said to follow from extending the non-delegable duty of care of a school authority to include liability for intentional trespasses committed by teachers would, at best, be indirect.¹⁰²
- The various assumptions underlying the law relating to children and the duties on parents created by the law would be negated if parents could sue to recover the costs of rearing unplanned children. That possibility would tend to damage the natural love and mutual confidence which the law seeks to foster between parent and child. It would permit conduct inconsistent with a parental duty to treat the child with the utmost affection, with infinite tenderness, and with unstinting forgiveness in all circumstances, because these goals are contradicted by legal proceedings based on the premise that the child's birth was a painful and highly inconvenient mistake. It would permit conduct inconsistent with the duty to nurture children.¹⁰³

⁹⁶ Ibid, at [164].

⁹⁷ *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; 198 ALR 100 at [48].

⁹⁸ *Cattanach v Melchior* (2003) 199 ALR 131 at [6].

⁹⁹ Ibid, at [34].

¹⁰⁰ Ibid, at [222].

¹⁰¹ *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511; 195 ALR 412 at [240].

¹⁰² Ibid, at [267].

¹⁰³ *Cattanach v Melchior* (2003) 199 ALR 131 at [404].

Value statements/mixed principle and social fact statements

The most difficult social facts to identify or analyse are those which embody mixed value statements or mixed fact/principle statements. Examples of statements which were identified as social facts by the definition in Part 1 of this article included statements that predicted consequences such as disrespect for the law, inhibition of the administration of justice, or indeterminate liability, or that indicated the underlying policies of particular legal principles:

- Further, if vicarious liability is to be imposed so that a person is to be held liable in damages for injury suffered without fault on his or her part, it ought to be imposed only in circumstances where it can be justified by reference to legal principle. To do otherwise is to invite disrespect for the law.¹⁰⁴
- If negligence law is to serve any useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of ordinary members of the community or, in cases of expertise, of the experts in that particular community. To hold defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute.¹⁰⁵
- The indeterminate nature of the financial consequences, beneficial and detrimental, of the parent-child relationship has already been noted.¹⁰⁶
- The physical integrity of an individual's person and property has always been treated as of central importance in the law of negligence. Likewise the autonomy of the individual called on to make decisions affecting that physical integrity has been given great weight.¹⁰⁷

Sources of social facts

The majority of social facts stated in the 2003 cases were unsourced. Of the 325 social fact statements made, only 81 were referenced in any way.¹⁰⁸ The references provided were predominantly case citations, with 69 references including case citations. Occasionally references were made to a text, journal article, international instrument or legislation.¹⁰⁹ Only three direct references were made to any form of social scientific evidence to support social fact statements made. These references were all given by Kirby J. In *NSW v Lepore*, Kirby J cited English Home Office statistics in support of the social fact that there had been an 'increase in the reported instances of physical and sexual assaults upon children by employees of organisations to whose care the parents and guardians of the children have entrusted them'.¹¹⁰ In *Cattanach v*

104 *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511; 195 ALR 412 at [128].

105 *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139 at [34].

106 *Cattanach v Melchior* (2003) 199 ALR 131 at [38].

107 *Ibid*, at [190].

108 Statements were counted as referenced where a footnote was provided for at least part of the social fact statement identified.

109 Sixteen references referred to secondary sources (including references which also provided case law or other citations) and eight references included references to legislation or international instruments. For discussion of the use of secondary material citations generally in the High Court see R Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17 *Uni of Tasmania L Rev* 164; R Smyth, 'Other Than "Accepted Sources of Law"? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *UNSWLJ* 19.

110 *New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412 at [276] and see n 301.

Melchior, Kirby J cited the Kinsey Reports¹¹¹ in support of the social fact that social ‘changes have come about as a result of greater knowledge of, and discussion about, human sexuality’.¹¹² In the same case, Kirby J cited an insurance report¹¹³ for the social fact statement that ‘calculation of the cost of rearing a child is, by comparison, relatively straightforward. Such calculations are regularly performed for insurance and other purposes.’¹¹⁴ In addition to these direct references to social scientific support for propositions of social fact, there were three instances where the references indicated that underlying social scientific support may exist for a proposition although the evidence was not directly cited.¹¹⁵

Several conclusions may be drawn from this analysis of the sources cited for social fact statements in High Court negligence cases in 2003:

1. The majority of social fact statements were not referenced in any way and accordingly were probably products of judicial experience, intuition and values, with the limitations this brings.
2. Where references were given, they were predominantly to case law or legal texts and journals. This tends to simply reproduce social facts which are born out of lawyers’ and judges’ intuition, experience and values rather than providing more objective, scientific or diverse bases for social facts.
3. There is very little use of social scientific material to support social fact findings in High Court negligence cases.¹¹⁶ There may be many social facts where social scientific evidence may either simply be unnecessary (for example, where judges draw from their own experiences of litigation and judicial practice to make social fact statements about the litigation process or the experience of being a judge) or unavailable. However, the very low incidence of the use of social scientific evidence does tend to suggest that there are

111 A C Kinsey et al, *Sexual Behavior in the Human Male*, Saunders, Philadelphia, 1948; *Sexual Behavior in the Human Female*, Saunders, Philadelphia, 1953.

112 (2003) 199 ALR 131 at [103] and see n 137.

113 AMP-NATSEM, *Income and Wealth Report*, Issue 3, October 2002.

114 *Cattanach v Melchior* (2003) 199 ALR 131 at [144] and see n 226.

115 Kirby J, *ibid*, at [153], referred generally to evidence given by the State intervenors in relation to the number of failed sterilisation claims in particular States and the possible economic effects of litigation on State health care systems, but dismissed this evidence as inadmissible. See the discussion above n 51. In *Fox v Percy* (2003) 214 CLR 118; 197 ALR 201 at [31], Gleeson CJ, Gummow and Kirby JJ and in *Suvaal v Cessnock City Council* (2003) 200 ALR 1 at [75] and n 55, McHugh and Kirby JJ referred to scientific evidence cited in *Trawl Industries of Australia Pty Ltd v Effen Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 per Samuels JA which threw light on the limitations of making credibility assessments of witnesses based on appearances.

116 Of course, it may be argued that given a larger sample of cases a greater incidence of the use of social scientific evidence may be found. Nevertheless, similar findings were made in Mullane’s study of the Family Court, above n 41, at 453. Mullane noted that his study of the custody cases decided by the Family Court of Australia in 1990 (302 judgments using a 50% sample) showed 65% of social fact statements had no source stated or the source was stated as undefined research, 32% of social fact findings were sourced from expert evidence, 2% from previous findings of the Full Court and 1% from research nominated and specified by the judge. As is discussed in Part 1 of this article, this study also used a much narrower and more specific definition of the term ‘social fact’. The family law custody context and the use of trial judgments may also explain the relatively high incidence of expert evidence findings.

impediments to the use of such material in the High Court where it might be appropriate and available. This may stem from the constraints of the existing rules of evidence which are designed for adjudicative fact finding discussed above; discomfort within the judiciary and the legal profession regarding the use and utility of social scientific evidence, because of lack of experience and training or legalistic views of the judicial decision making process; and from practical constraints related to availability, time and cost.¹¹⁷

The case of the missing social fact

As discussed above, the most prolific 'social fact' case delivered by the High Court in 2003 was *Cattanach v Melchior*.¹¹⁸ As noted by Kirby J,¹¹⁹ despite the currently binding position of the majority of the High Court discouraging explicit reference and reliance on policy matters (at least at the duty stage)¹²⁰ in High Court negligence cases, all members of the court (most prolifically the minority judges)¹²¹ referred to 'policy' matters (or in the context of this article social facts) in the course of their judgments. The nature of the social facts was rich and varied. They included, particularly in the minority opinions of Gleeson CJ, Hayne J and notably Heydon J, statements about the inherent social values of human life, especially the lives of children; the nature of the nuclear family as the central unit of our society; the effects of commodifying children; the nature and incidents of the parent/child relationship in modern Australian society; the possible psychological reactions of parents, children and lawyers involved in wrongful birth litigation; the stressful nature of wrongful birth litigation; and the financial strategies adopted by Australian families.

Many of these social fact assumptions were by their very nature value laden, highly contentious and contestable. For example, Heydon J predicted if such litigation was allowed to proceed, among other things it would encourage

117 For example, see J D Heydon, *Cross on Evidence*, Butterworths On-Line <<http://www.butterworthsonline.com>> at [3200] (accessed 26 September 2004), where the editors argue that, if the general empirical material relied on by judges was not distinct from that which may be judicially noticed, the requirements of s 144(4) of the Evidence Act 1995 (Cth and NSW) and the Evidence Act 2001 (Tas) would result in 'an extremely cumbersome and time consuming process of giving the parties warning as to what material the court was relying on, which is not at present engaged in'.

118 (2003) 199 ALR 131.

119 *Ibid*, at [121].

120 *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404. Compare, however, the comments in *Cattanach* (2003) 199 ALR 131 at [233]–[242] per Hayne J regarding the role of policy in the law. In particular, Hayne J at [242] adopted the words of Pollock LCB, that although judges are 'no better able to discern what is for the public good than other experienced and enlightened members of the community . . . that is no reason for their refusing to entertain the question, and declining to decide upon it'. Similarly, Callinan J at [291] indicated that 'I cannot help observing that the repeated disavowal in the cases of resort to public policy is not always convincing . . . Davies JA in the Court of Appeal in this case was, with respect, right to imply that it would be more helpful for the resolution of the controversy, if judges frankly acknowledged their debt to their own social values and the way in which these have in fact moulded or influenced their judgments rather than the application of strict legal principle'.

121 Gleeson CJ, Hayne J and, particularly, Heydon J.

parents, aided by their lawyers, either to denigrate or to create false expectations for their children as part of the litigation process.¹²² This, it was argued, would result in the emotional bastardisation of children, who would be psychologically damaged upon later learning of the litigation.¹²³ Kirby J, on the other hand, described the ‘notion that parents would be encouraged in court or out, to treat such a child as an unwanted “brute” as a ‘sheer judicial fantasy’.¹²⁴ Apart from the citations by Kirby J of the Kinsey Reports and the AMP report noted above, no social scientific evidence was provided for any social fact statements in *Cattanach* and many statements were made with no reference at all. Those social fact assumptions which were sourced were drawn predominantly from existing precedent, simply repeating previous unsourced judicial assumptions of social fact.

There are real dangers in the use of highly contentious or outdated social fact statements which are stated as proven without adequate acknowledgement of contemporary social scientific material when such material may be available, or alternatively legal statements of social facts which make assumptions about matters which exist outside the realm of law, for example, in psychology. In these circumstances, the danger of judicial error about the accuracy of a social fact statement is magnified. For example, in *Cattanach* Heydon J made the statement that ‘the confidentiality which surrounds adoption suggests a perception by the legislature of the damage which can flow to children from learning that their parents regard them as a burden’.¹²⁵ He sourced this to a 1965 law review article.¹²⁶ Earlier he referred to 1964 Queensland adoption legislation.¹²⁷ This is used as an analogous argument to

122 (2003) 199 ALR 131 at [341]–[346], [363]–[371].

123 *Ibid.*, at [372]–[392].

124 *Ibid.*, at [145].

125 (2003) 199 ALR 131 at [384].

126 R J L, ‘The Birth of a Child Following an Ineffective Sterilization Operation As Legal Damage’ (1965) 9 *Utah L Rev* 808 at 812 n 23. The reasons identified by the author of this article as quoted by Heydon J, (2003) 199 ALR 131 at [384], for secrecy in adoption include to protect the child from public knowledge or their own knowledge of adoption, to assist the child to feel a ‘natural’ child of the adoptive parents, so that the child will not be discriminated against in the adoptive home and will not know he was unwanted by the natural parents.

127 (2003) 199 ALR 131 at [337], referring to the Adoption of Children Act 1964 (Qld). It should be noted that since 1992 Queensland has been reviewing the Adoption of Children Act 1964, with a view to developing new contemporary legislation which better reflects current social views and understandings about adoption. This is the first major review of the legislation in 30 years. The review recognises the significant social changes that have occurred since 1964. Recent consultation with interested groups has shown strong support for the principles the Queensland Government proposes to use to inform new legislation, including that ‘a child has a right to information about family background and cultural heritage and to develop a positive cultural identity’ and that ‘all parties involved in adoption have a right to engage in information exchange and contact’. See *Adoption Legislation Review Public Consultation, Overview of Key Issues*, Queensland Government Department of Families, March 2003, p 2. See also *Adoption Legislation Review Public Consultation Paper*, Queensland Government Department of Families, 2002, Ch 3, ‘The Concept of Adoption and General Principles’, and Ch 4, ‘Open Adoption Practice’, which notes at p 32 that:

since the mid-1970s, there has been a move away from confidential adoption arrangements, closed adoption records and the assumption that such arrangements are in

support a rejection of liability in wrongful birth cases in order to perpetuate secrecy and to protect children from the knowledge that they were unplanned and litigated about. However, this social fact statement is clearly contestable and contentious and reflective of social values of the 1960s as opposed to modern research and practice in adoption services. Modern adoption research and practice recognise the significant damage that old practices of secrecy in adoption inflicted on birth parents and adopted children (including feelings of loss of family and culture) and advocate a more open approach to adoption.¹²⁸ Many Australian legislatures, including Queensland and New South Wales, have either reviewed or are reviewing their adoption legislation in line with modern research and practice in adoption, particularly in relation to the right to knowledge and the damage inflicted on all parties to adoption by practices of secrecy.

In addition, Heydon J referred repeatedly¹²⁹ to the so-called 'emotional bastard' social fact, which in effect states that children will be psychologically damaged by the knowledge that they were not only unplanned by their parents but were the subject of litigation. This social fact appears to have originated in the United States in the late 1950s¹³⁰ and Heydon J referred to a number of US cases in support of it.¹³¹ However, there are a number of major difficulties

the best interests of children requiring adoption and birth or adoptive parents. Adoption practice reflects social, political, economic and moral changes in society and the move towards more open adoption practice is part of a trend towards more openness in society generally.

128 See the discussion in n 127 above of the Queensland review. See also the NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81, 1997. At para 7.1 the commission indicates that 'one of the most distinctive features of recent thinking and practice in adoption is the view that adoption law should not facilitate deception or secrecy, but should promote honesty and openness. This mode of thinking developed from research into the long-term effects of adoption and the needs of consumers of adoption services. Research and experience both in Australia and overseas shows that this is in the best interests of the child and should, therefore be encouraged'. For the background of the outdated social notions (including, for example, the shame of unmarried parenthood and illegitimacy) underlying notions of secrecy, see NSW Law Reform Commission, *Review of the Adoption of Children Act 1990: Summary Report*, Report 69, 1992, Ch 2. The report notes the social changes away from secrecy and that 'at least by the mid-1960s adoptive parents were being advised by adoption agencies to tell children of their adoptive status': para 2.4. In New South Wales 'after 1977 adoptive parents had to agree to tell their children of their adoptive status': para 2.8. In discussing the changes in social values and the incidences of adoption since the 1960s, Graycar and Morgan also note that 'the social and emotional consequences of giving up babies for adoption are now widely discussed': R Graycar and J Morgan, "'Unnatural rejection of womanhood and motherhood': Pregnancy, Damages and the Law' (1996) 18 *Sydney L Rev* 323 at 340. See also the Adoption Act 2000 (NSW) s 7, which provides among other things that the objectives of the Act include '(c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage' and '(g) to encourage openness in adoption'.

129 For example, see (2003) 199 ALR 131 at [372]–[384], [390]–[391], [392], [399], [410].

130 See the discussion in *Sherlock v Stillwater* 260 NW 2d 169 at 173–4 (Minn, 1977), which refers to the 1957 case of *Shaheen v Knight* 6 Lyc 19 at 23; 11 Pa D & C 2d 41 at 45 (1957). The argument seems to have been first rejected in 1967 in *Custodio v Bauer* 251 Cal App 2d 303; 59 Cal Rptr 463; 27 ALR 3d 884 (1967), noting the new 'modern' social attitudes to such matters!

131 For example, see (2003) 199 ALR 131 at [374]–[380], where Heydon J discusses *Sherlock v Stillwater Clinic* 260 NW 2d 169 (Minn, 1977); *Wilbur v Kerr* 628 SW 2d (Ark, 1982);

with this social fact. First, there appears to be no social scientific support for this essentially social scientific fact (knowledge that would potentially stem from the discipline of psychology) either available or stated in the relevant case law sources.¹³² Secondly, a number of the US cases cited by Heydon J¹³³ positively source the veracity of the social fact to two law review articles.¹³⁴ However, neither of those articles appears affirmatively to verify the existence of the ‘emotional bastard syndrome’, simply restating it as a theory referred to in case law as a policy against recovery. Ultimately, both law review authors reject the legitimacy of the argument as a basis for denying liability.¹³⁵ The upshot is that the emotional bastard social fact was probably never a proven psychological effect at all, but rather a construction by judges which reflected and/or constructed the social norms and values at the time of its inception during the 1950s, a time when openness in families was not necessarily encouraged and when fertility issues were clouded in secrecy and shame. Even the use of the term ‘emotional bastard’¹³⁶ in the cases and US law review articles harks back to old attitudes about the stigma of illegitimacy and the lack of control of individual fertility and reproduction. It seems that the very genesis of the ‘emotional bastard’ social fact (and its close relative the secrecy in adoption social fact) in wrongful birth cases is that by analogy with the position of the illegitimate child, the adopted or unplanned child (when the fact of adoption or lack of planning is known) would and should feel social stigma and shame and accordingly would suffer psychological harm. This kind of assumption should not be encouraged today.

Perhaps the most striking aspect of *Cattanach* is not the social fact assumptions made, but the ‘missing’ social facts the High Court never considers. *Cattanach* is a case that essentially concerns the reproductive autonomy of women and the effect on women’s lives of child bearing. The issue of work and family balance, women’s reproductive autonomy, childcare and the effect of bearing children on the lives of women are huge issues affecting Australia’s population. As Lord Bingham recently noted in the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*:

Boone v Mullendore 416 So 2d 718 (Ala, 1982); *McKernan v Aasheim* 687 P 2d 850 (Wash, 1984); *University of Arizona Health Services Center v Superior Court of the Arizona* 667 P 2d 1294 (Ariz, 1983); and *Burke v Rivo* 551 NE 2d 1 (Mass, 1990).

132 See Kirby J’s comments in *Cattanach v Melchior* (2003) 199 ALR 131 at [145] and McHugh and Gummow JJ, *ibid*, at [79]. Certainly, I have not identified any social scientific evidence in support of the social fact either cited in the US cases or in the relevant academic articles.

133 For example, *Wilbur v Kerr* 628 SW 2d 568 at 570–3 (Ark, 1982); *Boone v Mullendore* 416 So 2d 718 at 722 (Ala, 1982); *McKernan v Aasheim* 687 P 2d 850 at 852 (Wash, 1984); and *University of Arizona Health Services Center v Superior Court of the Arizona* 667 P 2d 1294 at 1302 (Ariz, 1983).

134 G Robertson, ‘Civil Liability arising from “Wrongful Birth” following an Unsuccessful Sterilization Operation’ (1978) 4 *American Jnl of Law and Medicine* 131 at 153; B McDonough, ‘Wrongful Birth: A Child of Tort Comes of Age’ (1981) 50 *U Cin L Rev* 65 at 74. Robertson, while disposing of the ‘theory’, does appear to recognise the possibility of some psychological damage to children, though he does not advocate this as a sufficient reason to reject wrongful birth actions, but as reason to provide separate representation for children.

135 *Ibid*.

136 A term used, for example, in quotations from the US cases by Heydon J in *Cattanach v Melchior* (2003) 199 ALR 131 at [375] and [376].

The spectre of well-to-do parents plundering the National Health Service should not blind one to other realities: that of the single mother with young children, struggling to make ends meet and counting the days until her children are of an age to enable her to work more hours and so enable the family to live a less straitened existence; the mother whose burning ambition is to put domestic chores so far as possible behind her and embark on a new career or resume an old one. Examples can be multiplied. To speak of losing the freedom to limit the size of one's family is to mask the real loss suffered in a situation of this kind. This is that a parent, particularly (even today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned.¹³⁷

However, the social facts surrounding these issues are virtually absent in *Cattanach* with only Kirby J generally noting the relevance of the effect of children on Australian women's lives.¹³⁸ For the rest of the court, the role of 'mother' and the effect of children on the lives of 'mothers' is silenced. Mothers are simply considered one half of the generic parental duo and effects on the lives of parents generally (mothers and fathers) are ascribed to women.¹³⁹ However, social scientific research has made it clear that the effects of parenthood are not generic and impact more greatly on the lives and careers of mothers than fathers. There is a rich literature of social scientific material that may have been relevant and accessible to the court.¹⁴⁰ Characterisation of wrongful birth cases as if the birth of an unplanned child has an equal and neutral effect on both mothers and fathers misconceives the very nature of these kinds of cases.

Why was there such silence on such important social facts? Perhaps some mixed gender on the bench or at the bar might have contributed to more discussion in the judgments (or at least some discussion) of social facts applicable to the lives of women.¹⁴¹ All members of the current High Court

137 [2004] 1 AC 309; [2003] 4 All ER 987 at [8]. However, disappointingly, Lord Bingham, joined by the other Law Lords in the majority, Lord Nicholls of Birkenhead, Lord Millet and Lord Hope, thought £15,000 was a sufficient 'conventional sum' to match this 'injury and loss'. It is hard to imagine that this sum even represents one year of the true value of mothering a child.

138 (2003) 199 ALR 131 at [162]. He also noted generally that there have been social changes affecting women and marriage: at [105].

139 See the discussion in *Cattanach* of effects on the lives of 'parents': *ibid*, at [9]; the incidences of the parent-child relationship: *ibid*, at [36]; the effects of parenthood: *ibid*, at [196]; and the consequences of parenthood: *ibid*, at [247]. See also Heydon J's description of fundamental assumptions about 'parenthood' at [323]–[346]. Compare the discussion in Golder, above n 6.

140 See, for example, L Craig, *The Time Cost of Parenthood: An Analysis of Daily Workload*, SPRC Discussion Paper No 117, October 2002; L Craig, *Caring Differently: A Time Use Analysis of the Type and Social Context of Child Care Performed by Fathers and Mothers*, SPRC Discussion Paper No 116, September 2002. Craig notes that her research adds to the body of work that shows that domestic work and the family have different impacts on men and women' (*Caring Differently*, p 18). Her first report finds the time cost of motherhood higher than fatherhood, with mothers working part-time having the highest overall workload (at p 18). Her second report confirms that the nature of childcare is also qualitatively different for mothers with fathers 'more likely to have someone to take over, to be able to avoid the less pleasant and more urgent tasks, and rarely do other tasks at the same time as child care' (p 18).

141 I make this argument cognisant of the fact that membership of a particular gender group does not equate to sharing a viewpoint on all issues or a shared common experience of

are male and all counsel¹⁴² who argued *Cattanach v Melchior* on appeal before the High Court were male.¹⁴³ As Hoyano has recently noted of the judgment of Hale LJ (a female judge) in the English judgment of *Parkinson v St James and Seacroft University Hospital NHS Trust*:¹⁴⁴

In a tour de force, Hale LJ wrote an extended essay on the physical, psychological, practical and legal implications of pregnancy, childbirth and motherhood for a woman's personal autonomy, possibly a deliberate 'reality check' to the panegyrics to parenthood in which all of the (male) Law Lords indulged in *McFarlane*.¹⁴⁵

In addition, reliance on the rule that the court should focus on legal principle only, or at the most legal policy, may have had the effect of discouraging the use of relevant social facts generally, including those relating to the effect of children on women's lives.¹⁴⁶ Senior counsel for the plaintiff respondent, for example, when making submissions during the hearing of the High Court appeal responding to judicial questions relating to the relevance of particular matters of 'public policy', commented that:

In our submission, if public policy is to be used from time to time in the shaping of the common law . . . then it ought never to be by choice of a kind which could realistically and fairly be called partisan during a current or raging controversy. In our submission, that is exactly what would be happening in this case. And all the judges, or most, regardless of the side they line up with on this issue, observe that there is much to be said on either side.¹⁴⁷

Of course, it is clear that judges in *Cattanach* clearly did make reference to an array of social facts — just not to those relating to the specific and relevant life experiences of women. It would appear that recognition of social facts relating to the effect of parenting children on the lives of women would have

gender with other members of that gender group. There are many factors including culture, race, education, sexuality, religion and social status that influence and shape life experience. Mixed gender on the bench should not automatically equate to a change in overall judicial perception of a particular social fact. On the other hand, a total lack of one gender on the bench of the High Court and in any speaking roles before the High Court certainly diminishes the opportunity for developing an understanding of social facts, perceptions and life experiences directly connected to the female gender — for example, birth and motherhood and the effects of mothering on a woman's life and career.

142 Except for one junior counsel appearing for one of the intervenors, the Attorney-General for Western Australia: see *Cattanach v Melchior* B22/2002, HCA Transcript (11 February 2003).

143 For a discussion on the necessity for reform of judicial appointment procedures to allow more female appointments to the bench, see R Davis and G Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *MULR* 820. See also the authors' discussion at 828 of the fact that women are 'largely absent from the ranks of lawyers who appear and speak before the High Court'. Davis and Williams refer to speeches given by Kirby J that estimate that only 2–3% of the total number of counsel appearing before the court (during the periods discussed in the speeches) were women in speaking roles. See Justice M Kirby, 'Women Lawyers — Making a Difference' (1998) 10 *Aust Feminist LJ* 125 at 129–34 and Justice M Kirby, 'Women in the Law — What Next' (2002) 16 *Aust Feminist LJ* 148.

144 [2002] QB 266; [2001] 3 All ER 97.

145 L C H Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 *MLR* 883 at 897.

146 Although, of course, it did not discourage reliance on other social facts such as those relating to the importance of children and the nuclear family unit.

147 Mr B W Walker SC, *Cattanach v Melchior* B22/2002, HCA Transcript (12 February 2003) at 55.

supported a policy argument in favour of the recovery of damages in the case. While I do not argue here that social facts concerning the effects of children on the lives of women are necessarily trump arguments in wrongful birth cases, they do at least warrant some attention and recognition particularly in preference to unproven social facts like the emotional bastard argument.

4. Summary and conclusion

Social facts are very commonly used by judges in High Court negligence cases. This, of itself, appears to throw doubt on the proposition that judges in the High Court do not or should not refer to explicit policy matters in negligence cases. However, the use of social facts in the judgments demonstrates much more than this. Many social fact statements are used to provide a background social context for judgments. This contextual use of social facts falls outside the traditional understanding of ‘policy’ and perhaps is not considered by judges to be caught by ‘anti-policy’ rules. Yet, the setting of the background context to a judgment can be a very powerful persuasive and rhetorical device in justifying the adoption of particular legal principles. In addition, in a wider context the extensive use of social facts in judgments tends to throw doubt on any description of judicial decision-making that describes the process of decision-making as one that rests only upon strictly applying legal principles to adjudicative facts. As a result of this, there is a strong argument that as a starting point to better use of social facts in legal decision-making, we need to accept that there is often a ‘gap’ in judicial knowledge that judges need to fill and will fill in order to reach a judgment.

The social facts referred to by judges in High Court negligence cases are generally unsupported by any citation of references at all or, when references are provided, they are most often to existing case law, which simply reproduces judicial experience and intuition. This may often be of little consequence, for example, when judges are describing social facts (as they frequently do) within their own special expertise such as the nature of legal institutions, litigation or legal actors. However, there are very significant issues raised where the social fact statements are highly contentious and debateable or involve the discussion of ‘facts’ that are inherently outside the knowledge of the law and which ostensibly draw on the expertise of other disciplines. In these circumstances, there is a clear potential for the greater use of reliable social scientific evidence in the High Court.¹⁴⁸ There appears to be no clear rationale either in individual judgments, or among the High Court as a whole, as to when the use of social facts may be acceptable, where restraint ought to be adopted, or what evidence should support social facts. This demonstrates the need not only for a greater acceptance that judicial gaps in knowledge occur, but also the need to consider how judicial practice, legal professional practice and the rules of evidence ought to respond to these gaps in some coherent fashion.

¹⁴⁸ This could occur for example, by the greater use of intervenors or amici curiae (although see above n 51 above regarding the admission of fresh evidence) or a requirement that parties provide a summary of relevant social scientific evidence in their appellate briefs in a similar manner to what is done in the United States in a Brandeis brief. There are advantages and disadvantages of all of these options, but these will not be discussed in this article.

Finally, we need to acknowledge that social facts used by judges may not just reflect society and social values (if indeed they do) but rather they may contribute to the construction of social norms. Perhaps, it is here that the most damage may be done, when the social facts referred to by judges are incorrect, incomplete, out of date or tell the story of some members of society, but shut out the reality of the lives of others.