

1443

THE UNIVERSITY OF MELBOURNE

MONASH UNIVERSITY

LAW SCHOOL 4 JULY 1997

LAW AND ECONOMICS - IS THERE HOPE?

The Hon Justice Michael Kirby AC CMG

THE UNIVERSITY OF MELBOURNE

MONASH UNIVERSITY

LAW SCHOOL 4 JULY 1997

LAW AND ECONOMICS - IS THERE HOPE?

The Hon Justice Michael Kirby AC CMG^{*}

LAW AND ECONOMICS

Long years ago - years that the cobwebs have overgrown - I studied economics. I completed an undergraduate degree in the discipline. I added it to my law degrees, studying part-time when I was a young solicitor. I was always late for lectures, squeezing them into an expanding professional life. Alas, I must confess to a most ignoble motivation for these studies. At least initially they were undertaken to afford an air of verisimilitude to my progression as a student politician.

* Justice of the High Court of Australia. President of the International Commission of Jurists. Text of a commentary given on 4 July 1997 at the Law School of the University of Melbourne on a paper by Dr Gillian K Hadfield, "The Second Wave of Law and Economics: Learning to Surf".

It was in that role that I first visited the University of Melbourne. The then President of the Students' Council was a young firebrand - Garry Evans (as he then was). Learning of my avid pursuit of economics, he accused me - with that candour which a nation has come to know - of concentrating, in my accumulating qualifications, upon quantity rather than quality. Yet I never regretted my undergraduate study of economics. Now, it is much more common for Australian law students to combine their law degree with a Bachelor of Economics or Bachelor of Commerce. This fact holds out promise for a future in which lawyers and judges will be interested in, and knowledgeable about, economics.

Of my generation, there are few indeed who studied economics. Yet amongst some of those who now hold (or have held) senior judicial office, there is occasionally an uncomfortable feeling that the economic implications of judicial decisions ought to be given more attention than they typically are. This thought is sometimes expressed in the context of the growing attention by the Australian judiciary to issues of court administration and judicial efficiency¹. But, beyond this, judicial voices are

¹ G J Samuels, "The Economics of Justice", Address to the 19th Conference of Economists (Australia), 24 September 1990, University of New South Wales, unpublished. Cf

occasionally raised: calling for something more substantial. Thus, Sir Ivor Richardson, now President of the New Zealand Court of Appeal, has demanded an increasing emphasis on rigorous analysis of the economic, social and administrative costs of decisions which courts are asked to make. In particular, analyses of the "potential effects on behaviour in cost/benefit terms of" imposing duties of care in negligence. Justice Richardson suggests that all too often, when it comes to costs, judicial assumptions "tend to be intuitive and are often not articulated"².

I am an unfeigned admirer of Sir Anthony Mason, the former Chief Justice of Australia. My last public lecture at Melbourne University afforded me the opportunity of paying him an extended tribute³. His willingness to confront and welcome new ideas and to nudge the Australian legal system in new directions is legendary. Yet in the matter of law and economics

J L Holdings Pty Ltd v State of Queensland (1997) 71 ALJR 294; 141 ALR 353.

- 2 I L M Richardson, "Changing Needs for Judicial Decision-making" (1991) 1 *Journal of Judicial Administration* 61 at 65. See by same author, "Lawyers and Economic Consequences" NZ Law Conference Papers (Wellington 1993), Vol 1, 351.
- 3 M D Kirby, "Sir Anthony Mason Lecture 1996: A F Mason - From *Trigwell* to *Teoh*" (1996) *Melbourne University Law Review* 1087.

his published utterances are extremely cautious. The problem, as he saw it, was the methodology of our legal system and the way by which substantive non-statutory law develops "pragmatically, incrementally, even fragmentally"⁴. It distains a grand social or economic approach. Sir Anthony Mason expressed anxiety at the possibility that courts might divert themselves from the corpus of legal authority, which gives them their legitimacy, into social and economic argumentation in which their personnel have questionable authority and little expertise⁵.

"The dilemma we face is this: if we seek to make judges more aware of the implications of economic analysis and of the potential use of economic information, how can they then conceive of it in any but an instrumental or normative way? If counsel present an argument based on economic analysis which suggests that judgment for the defendant would lead to wealth maximisation for society, how does a court take account of this if previous authorities or considerations of justice or morality point in the other direction? ... Economic analysis is another voice questioning tentative conclusions and suggesting possible alternatives. But that is all. Beyond that, the issues presented by economic analysis are essentially issues that have been resolved, according to our tradition, by the political process".

4 A F Mason, "Law and Economics" (1991) 17 *Monash Uni L Rev* 167 at 178.

5 *Ibid*, at 181. See also J A Smillie "Fairness and Efficiency: Civil Adjudication in New Zealand [1996] *NZ L Rev* 254 at 270-271 where the author makes the point that the judge will rarely if ever be sure that he or she has all relevant cost-benefit data.

In her paper "The Second Wave of Law and Economics"⁶ Dr Gillian Hadfield accepts, in part, the realities within which the legal discipline must operate, noted by Sir Anthony Mason. In this regard, she is rather critical, rightly in my view, of the "first wave" of the movement for economics in law. As other writers have done⁷, she has pointed to the failure of the "first wave" to take sufficiently into account the complexities of the problems which courts are called upon to solve and the difficult-to-measure moral dimensions of many of those dilemmas. It is that moral component, and the community's sense of justice, together with the emotions that flow from it, that prevent adoption of some of the extremes of economic analysis offered by proponents of the "first wave".

Dr Hadfield is insistent that there is greater potential utility in the more realistic "second wave" which is coming. This will be more modest in its demands and in its conception of the part which economic analysis may take in legal decision-making. It

6 G K Hadfield, "The Second Wave of Law and Economics: Learning to Surf", Address to the Australia Law and Economics Association Annual Meeting, University of Melbourne, 4 July 1997, as yet unpublished.

7 Cf J J Donohue and I Ayres, "Posner's Symphony No 3: Thinking About the Unthinkable" 39 *Stanford L Rev* 791 (1987).

will, in the words of Robert Ellickson, shift the law and economics scholarship away from exclusive reliance on conventional economic premises about behaviour towards a model of behaviour more attuned to human frailty, as seen in the courts, and to the role of culture⁸. In this more modest guise, economic analysis will provide a filter through which some legal decision-making will, at least, be expected to pass. If this comes about, it would be good for both disciplines. It would go beyond the limited prediction which Sir Anthony Mason made. Above all, it would open the eyes of judges and lawyers to the economic consequences of their decisions.

Especially in a federation and particularly in a country so permeated by law as Australia is, that would be no bad thing. So I start my remarks with an endorsement of the approach which Dr Hadfield has favoured. In this matter at least, Sir Anthony Mason displayed the excess of caution which was more a feature of his early judicial decisions⁹ than of his bold and later ones¹⁰.

8 R C Ellickson, "Symposium on Post-Chicago Law and Economics: Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics", 65 *Chicago-Kent L Rev* 23 (1989).

9 Such as *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633-634 per Mason J.

10 Collected in M D Kirby, above n 3.

POSNER AND POST-POSNER

I recently attended a dinner with medical experts from all over the world. They were in Sydney for an oncology conference. Doing this provides a relief from a life spent with lawyers. By chance, I was sitting next to a cancer specialist from Chicago in the United States. Naturally enough, my conversation turned to Chief Judge Richard Posner of the Seventh Circuit of the United States Court of Appeals. He is, with Professor Calabresi¹¹, the doyen of law and economics. He has been talking and writing about the subject for decades. He is famous throughout the world, wherever lawyers turn their minds to this topic. I asked my companion what she thought about Posner? What she thought about the "second wave"? Would Posner - acknowledged by Justice William Brennan of the United States Supreme Court, for whom he clerked, as one of the two geniuses he had known - ever make it to the United States Supreme Court¹²? It was a sobering discovery that my distinguished dinner companion had never heard of Posner. So much for judicial fame.

11 G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1990) Yale, 17-20. See Mason, above n 4 at 170.

12 A Wald, "Paper Trailblazer" *ABA Journal*, April 1997 at 68.

Yet she should have known of this man. His productivity has been "truly breathtaking: about 1400 judicial opinions since 1981, 25 books, and nearly 300 articles, essays and reviews on topics ranging from anti-trust to aging, healthcare to homophobia, literature to sex"¹³. According to a recent issue of the *Journal of the American Bar Association* he has an enormous appetite for work. He is the author of all of his own writing. He attracts the praise and calumny usual to such a person. For some he is a Renaissance man. For others, he is shallow, overly ideological and intellectually mischievous. A law review article has compared him to the composer Franz Liszt¹⁴. Great technical brilliance. An obsession with virtuosity leading him astray at times. A flashiness sometimes exceeding the bounds of the aesthetically pleasing, sometimes descending to the unpleasant or even unlistenable¹⁵. As I read all of these reviews, I found myself warming to Posner.

In fact, years ago, I met this most influential jurist. It was in Chicago and we talked of his theories of law and economics.

13 *Ibid*, at 68.

14 Donohue and Ayres, above n 7.

15 *Ibid*, at 791..

Upon my return to Australia, I determined to endeavour to interest my judicial colleagues and the legal profession of New South Wales in the potential importance of economic analysis for common law elaboration. I was then President of the New South Wales Court of Appeal. I was in a position to prod the law and economics debate forward a little.

Before long an opportunity arose. It happened in this way. A prisoner, Mr Terrence Johns, had been convicted of murder and sentenced to life imprisonment¹⁶. After serving many years in prison, in accordance with law, he applied for a licence authorising his conditional release from custody. It was granted on condition. He was to enter the employment of a Mr Madden in Berrima, New South Wales. Later, for reasons which are unimportant, that employment fell through. The prisoner moved to Sydney. However, he kept the prison authorities fully aware of his whereabouts and activities.

The Release on Licence Board, without hearing from him, cancelled Mr John's licence. The prisoner asserted that it had done so in breach of the common law requirement of procedural

16 See *Johns v The Queen* (1980) 143 CLR 108.

fairness. His complaint was upheld at first instance¹⁷. He was released but re-arrested a day later. Again, he complained about the procedures followed by the Board in conjunction with his return to custody. The matter came before the Court of Appeal. The requirements of procedural fairness were argued, as usual, by reference to Australian and English case law. The starting point, as it common in such cases, was *Cooper v Wandsworth Board of Works*¹⁸. So here we were, three judges of New South Wales, Australia, seeking to express what the common law of Australia required in 1987 by reference to reasoning in different cases, many of them decided long ago and in another country. Not a word was mentioned during argument about the costs of providing the facilities which the prisoner claimed to be his right. When the generalities left the Court unsatisfied, the parties were sent away to secure further evidence concerning alternative procedures to afford procedural fairness to Mr Johns and the costs and suggested inconvenience of each of them.

I wrote the opinion of the Court of Appeal¹⁹, in which Justices Hope and Priestley concurred. A passage of the Court's

17 *Johns v Release on Licence Board* (1986) 7 NSWLR 133 (SC).

18 (1863) 14 CB (NS) 180 at 194; 143 ER 414 at 420.

19 *Johns v Release on Licence Board* (1987) 9 NSWLR 103 (CA).

reasons is titled "The Economics of Procedural Fairness"²⁰. The Court referred to the analysis which had been performed in like cases in the United States Supreme Court:

"In the Supreme Court of the United States and other Federal courts, decisions have been made on whether the due process requirement of the Constitution necessitates a trial-type hearing or would be satisfied by less expensive procedural safeguards, by taking into account the previous rate of error, the direct costs of hearings, and the fiscal and administrative burdens which additional or substitute procedural requirements would entail: see eg *Matthews v Eldridge* 424 US 319 (1976); cf E Gellhorn and B B Boyer, *Administrative Law and Process*, 2nd ed, West (1981) at 143f. The conclusions of the Supreme Court have been criticised. So have the techniques adopted by it: see eg J L Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication", 44 *Uni of Chicago L Rev* 28 (1976); H P Green: "Costs-Risk-Benefit Assessment and the Law" 45 *George Washington Uni L Rev* 901 at 910 (1977). But no one in that country would now suggest that courts are not engaged in problems such as the present, in a form of cost benefit analysis. In Australia, the tendency has been to do no more than to take unspecified costs into general account, among the "practicalities" to be weighed in determining what procedural fairness requires".

The opinion of the Court in *Johns* proceeded to identify the costs and other difficulties of responding to the demand of Mr Johns for an oral hearing. In the end, the decision was not made on a pure cost-benefit analysis. But into the scales on the

²⁰ *Ibid*, at 113.

side of the prisoner was placed a discovery made during the court hearing. In the course of my reasons, I remarked with uncharacteristic sharpness²¹:

"A summary ... prepared for the Board members [contained] a statement that Mr Madden ... had been imprisoned for five years. This statement was incorrect. Mr Madden had some very minor convictions, mostly associated with SP betting. He had never been in prison. He had been in the army, not prison, for five years".

The Court of Appeal was persuaded that procedural fairness in such a case required notification to a licensee of possible revocation; notification of the material relied upon, save for confidential material; provision of the facility to make written submissions and provision to be heard orally in defence of the continuation of liberty. There is nothing particularly unusual in the case. But what was new was an express acknowledgment of the importance of securing detailed information on the costs of various options which the Court was considering in establishing its requirements for procedural fairness and in drafting its orders in that case.

It was my hope, at the time, that this new approach would attract the interest of the Bar and lead to a string of cases in

²¹ *Ibid*, at 116.

which cost-benefit analysis and argument would be brought to bear in court proceedings. My hopes were dashed. They are yet to be fulfilled²². However, I remain optimistic. There is nothing so powerful as an idea. At about the time of the *Johns* case, I introduced another idea into judicial reasoning. It concerned the use which might be made of international human rights norms in the elaboration of the Australian common law and in the elucidation of ambiguous statutes²³. This notion, regarded as unorthodox or even possibly heresy, at the time and after²⁴ has gained increasing acceptance as a natural and appropriate development of our law²⁵. But if Australian lawyers feel increasingly comfortable in the world of universal human rights, they remain distinctly uncomfortable in the unfamiliar territory of law and economics. We must set out to cure this.

22 Another venture was in *Cekan v Haines* (1990) 21 NSWLR 296 (CA). That was a case involving an allegation that the Government owed a duty to alter the physical arrangements of a prison to allow continuous surveillance of prisoners against the risk of self-injury by intoxicated or otherwise incompetent prisoners. The countervailing considerations of cost and of marginal utility were discussed by me. See *ibid*, 306-309. See also *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 (CA).

23 See eg *Gradidge v Grace Bros Pty Ltd* (1988) 93 Fed LR 414 (NSWCA).

24 See eg *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (CA).

25 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42. For discussion see M D Kirby, "International Law Comes Down to Earth" (1997) 9 *Judicial Officers' Bulletin* at 35.

A FEW CASES

A glance at a few cases in which I have been involved, judicially, over the past decade or so, chosen at random, demonstrates the potential importance of economic choices for the decisions of the courts. The decisions in question were made, almost without exception, by reference to Australian and overseas judicial authority. Almost never are the issues of economic costs and benefits raised, still less examined.

Take *Public Service Board of New South Wales v Osmond*²⁶. There the question was whether administrators, who were the donees of a statutory power, were obliged, by the modern development of the common law, to give reasons for decisions adverse to persons affected. Would it not have been relevant to take into account the economic costs and benefits of such a rule for the common law? The costs are obvious enough. The preparation of reasons, however brief, will take time and effort. But the benefits would also have an economic component. The avoidance in some cases of unnecessary disputation and even litigation. The establishment of express

26 (1986) 159 CLR 656 reversing [1984] 3 NSWLR 447 (CA).

principles which could lead to consistent and efficient decision-making in the agency concerned. The efficient arrangement of the affairs of parties, and future parties, by reference to the given reasons. The improvement in the quality of administrative decision-making consequent upon the obligation to justify the decision. These are amongst the reasons commonly given for the new statutory administrative law of the Commonwealth. The efficiencies, as well as the justice, of an accountable administration must be kept in mind in evaluating current proposals to remove or modify statutory mechanisms of accountability in Australia.

Like considerations might have been raised by an economic analysis of some of the issues presented in *Breen v Williams*²⁷. That was a case involving an asserted right by a patient to have access to medical records held about her by her medical practitioner. In that case, in the Court of Appeal, I was in dissent. The majority opinion that there was no such general right in Australian law was upheld by the High Court of Australia²⁸. Once again, it is obvious that the provision of the facility of access would have had direct economic costs. The

27 (1994) 35 NSWLR 522 (CA).

28 *Breen v Williams* (1996) 186 CLR 71.

economic benefits might be harder to quantify; but they would be real. Needless to say, there was no analysis by counsel of the issues for decision by reference to economic considerations. The law on the topic was not entirely clear. To fill the gaps, the courts proceeded, in the orthodox lawyerly way, to examine the reasoning of other courts in England, Canada and the United States. Economic costs and benefits played no direct part in the judicial reasoning.

Another case heard in the New South Wales Court of Appeal in my last days as President would obviously bear economic analysis. I refer to *CES v Superclinics (Australia) Pty Ltd*²⁹. A young woman had thrice been misdiagnosed and assured that she was not pregnant. When pregnancy was eventually confirmed, beyond a time when she could have sought termination, an issue arose as to her entitlement to financial compensation. There was no doubt that the birth of her child had serious and disruptive consequences for her life. Some of those consequences were economic. She ceased her studies and commence a life as a single mother. She sought to shift the economic costs of this dislocation to those whom she considered responsible for it: the negligent doctors. I upheld her claim.

29 (1996) 38 NSWLR 47 (CA).

Justice Meagher in the Court of Appeal rejected it. He endorsed the opinion of an English judge³⁰ that such a claim for damages was "utterly offensive; there should be rejoicing that the ... mistake bestowed the gift of life upon the child". Justice Priestley agreed that damages were recoverable; but only those flowing from the negligent advice³¹. He held that the mother could have arranged for the child to be adopted. Her decision to keep it carried with it the obligation of bearing the resulting costs. To secure a majority order of the Court, I was obliged to agree with Justice Priestley's proposal because it represented the highest common denominator of agreement between us³². But I suggest that it was scarcely satisfactory from a legal, moral or economic point of view. Little wonder that an appeal was lodged to the High Court of Australia. In the event, the appeal was settled with the result that the Court of Appeal's decision stands as a statement of the law.

Even Sir Anthony Mason, generally a sceptic about the utility of economics in law, was willing to concede its potential

30 At 86 citing *McKay v Essex Area Health Authority* [1982] 1 QB 1166 (CA) at 1193 per Griffith LJ.

31 At 84.

32 *Ibid*, at 78.

importance in setting the boundaries of liability in negligence³³. Needless to say, there was no economic analysis offered to the Court in the *CES* case. However, I sought to respond to Justice Meagher's suggestion that the birth of a healthy child was such a blessing as to deny economic recovery to the mother³⁴:

"To assert that the mother suffers no damage on the birth of a healthy child, if her own health is also unthreatened by the birth, is completely to misapprehend the nature of the case argued for the appellants. The respondents, through their negligence, caused the first appellant to lose the opportunity to undergo a lawful termination of pregnancy. The damage incurred is that damage, mental, physical and economic, associated with having to carry a child to term and give it birth when such a pregnancy was unexpected and unwanted. It is simply incorrect to state that, if there were no serious impact on the mother's health on the birth, there was no damage at all. That assertion ignores not only the practical realities of childbirth, but also the actual evidence called in this case ... [I]t is unconvincing (at least to me) that to deny recovery from the undoubted economic loss that accrues would demean the sanctity of human life, whatever the circumstances of the case. The inadequacy of such reasoning is highlighted by the fact that the parents themselves have already, in a case such as the present, assessed the situation. They concluded that the child would, in fact, be a greater burden than a desired 'blessing'. This conclusion was manifested by the steps taken, or desires expressed, to secure a termination of the pregnancy at a time when this could have been safely done. The widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily

33 Mason, above n 4, at 179.

34 (1996) 38 NSWLR 47 (CA) at 72-74.

be considered an unavoidable blessing. Sentiments which permit a judge to proclaim that a conscious decision or express desire not to have a child is an 'unnatural rejection of womanhood and motherhood' are out of harmony with the modern Australian society in which the common law must operate".

Economic analysis of the issues in that case might have included consideration not only of the redistributive function of tort law but also its function to discourage carelessness in the medical procedures adopted so as to promote the conduct of pregnancy diagnosis with greater care and accuracy.

If I pass from the decisions of the Court of Appeal, it is even more obvious that decisions of the High Court of Australia commonly have large economic implications. Such implications are typically ignored in argument or glossed over by counsel's generalities. Thus, the arguments in the *Mabo*³⁵ and *Wik*³⁶ cases were confined to legal and historical material. That there were potentially very large economic implications of those decisions was obvious enough. However, no attempt was made by counsel to analyse these. They were simply regarded as irrelevant to the Court's function. That is the conventional and traditional way of our system.

35 (1992) 175 CLR 1.

36 (1996) 187 CLR 1.

In another field, where the principles of the common law have been developed by the courts, there are equally clear economic implications, yet no real attempt to quantify the costs and benefits involved. I refer to the series of decisions relating to the common law right of an accused, facing trial on a serious criminal charge, to have the assistance of legal counsel. Such a right had been denied by earlier authority of the High Court: *McInnis v The Queen*³⁷ (Justice Murphy dissenting³⁸). However, the Court altered course in *Dietrich v The Queen*³⁹. This was not without the strongly voiced dissent of Justice Brennan. He addressed, in a general way, the substantial economic consequences of the rule established by the majority⁴⁰:

"The courts do not control the public purse strings: nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with commission of serious offences is a function which only the legislature and executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available. If the limitation is severe, the administration of justice suffers. ... The courts cannot compel the legislature and the executive

37 (1979) 143 CLR 575.

38 *Ibid*, at 580.

39 (1992) 177 CLR 292.

40 (1992) 177 CLR at 323.

government to provide legal representation. Nor can this Court declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. In my opinion, to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion of legislative and executive function".

There seems little doubt that concerns about the economic implications of *Dietrich* were woven *sub silentio* through the arguments of the appellant from the New South Wales Court of Appeal decision in *Cannelis v Slattery*⁴¹. The High Court there reversed a determination of that Court, of which I had been part. That determination had upheld the right of a person, accused of involvement in the murder subject to enquiry, to have publicly funded legal aid within the inquiry to ensure that his interests were properly protected⁴². The full implications of *Dietrich* have yet to be fully explored. Do they, for example, extend to support an appeal to a Court of Criminal Appeal? Do they support an application for special leave to appeal to the High Court? Behind such questions necessarily lie the unspoken economic consequences of such decisions. They whisper to the courts, operating in times of severe restraints on public spending determined by the elected government.

41 (1994) 33 NSWLR 104 (CA).

42 *Sub nom State of NSW v Cannelis* (1994) 181 CLR 309.

Many of the cases in the High Court of Australia have obvious economic significance. Several raise, directly or indirectly, significant economic concerns. The scope of the constitutional excise power⁴³ is one such case. There, at least, the Court was taken by counsel to some economic material and argumentation. However, most of it was concerned with economic theories which prevailed at the time of the making of the Constitution when the words of s 90 were first penned. The meaning of s 90 was the question before the Court. In another case, it must be decided whether the guarantee of just terms applies to government acquisitions of property in the territories⁴⁴. Self-evidently, the answer to that question has very large economic implications. Yet the case was argued conventionally as a matter of textual analysis and past legal authority. I make no criticism of the parties. This is just the way of our system. But is there any room for an interpretative principle of the Constitution favouring the adoption of a construction which advances economic efficiency over one which burdens the nation with economic inefficiency which is then very hard to correct? That is a question which one day may have to be answered.

43 *Ha & Anor v State of New South Wales & Ors*, High Court of Australia, unreported, 5 August 1997.

44 *Newcrest Mining (WA) Ltd & Anor v Commonwealth of Australia & Anor*, unreported, High Court of Australia, 14 August 1997.

In two cases argument about the content of the common law presents issues having clear economic ramifications. One of them concerns the liability of landlords to tenants. It relates to whether such liability has passed in Australia from one simply founded in contract⁴⁵ to one of strict liability of the kind held to exist in *Kondis v State Transport Authority*⁴⁶. Is a change of that character, having important implications for landlords and tenants throughout the nation, such that a court should receive (as the High Court and courts below did not) evidence or submissions concerning the economic results of alternative decisions? Evidence and submissions about the shortage of rental housing, of housing of particular classes? Evidence about the availability and cost of insurance for landlords, the patterns of insurance coverage and the economic costs of placing such burdens on landlords and tenants generally⁴⁷? In another case an issue was presented as to the liability of a local government authority for a fire said to have arisen after a defect discovered by a council officer was notified to the then occupier but not to

⁴⁵ *Cavalier v Pope* [1906] AC 428 (HL).

⁴⁶ (1984) 154 CLR 672.

⁴⁷ *Northern Sandblasting Pty Ltd v Harris*, unreported, High Court of Australia, 14 August 1997.

all of those who were liable to suffer loss⁴⁸. Decisions in such cases may have economic implications for local authorities generally. Yet, within existing court techniques, such decisions are invariably made without evidence or argument focussed upon the economic consequences of the available legal options which compete for judicial acceptance.

Such a profound silence on economic matters does not occur in the other branches of government. Yet it is common, even invariable, in the judicial branch. If jurists object to Richard Posner's attempts to analyse, in purely economic terms, rape⁴⁹, adultery⁵⁰ or shortage of children for adoption⁵¹, some judges feel disquiet that other legal decisions, apparently more susceptible to economic analysis, have very little of it in the courts of Australia. The outcome of such analysis, as Dr Hadfield points out, need not necessarily be an endorsement of

48 *Pyrenees Shire Council v Day* (decision reserved 3 June 1997). Cf *Stovin v Wise* [1996] AC 923 (HL) at 944 where Lord Hoffmann refers to economic analysis of liability for allegedly negligent omissions as distorting the market.

49 R A Posner, *Economic Analysis of Law* (3rd ed) 1986 at 202. See *Donohue and Ayres*, above n 7, at 792-793.

50 Posner, above n 49, at 133; *Donohue and Ayres*, above n 7 at 802-803.

51 Posner, above n 49 at 141; *Donohue and Ayres*, above n 7 at 793.

the status quo or of a minimisation of cost burdens on the state or other powerful economic interests. To make decisions knowing that there would be significant and differentiated costs in the available choices, but in ignorance of what those costs might be, may not always be efficient or just.

IMPLICATIONS FOR THE JUDICIAL METHOD

Sir Anthony Mason, in his essay on this topic, made the point that the methodology of the common law, especially in Australia, constrains the use to which economics and notably economic analysis, can be put in deciding cases⁵². That is undoubtedly true. Involved is not only a conception of the limitations on the proper function of judicial decision-making. There is also the procedure by which such materials are placed before a court and the persons who will be heard to support such materials. In Australia we do not have the facility of the *Brandeis* brief. That facility is used in the United States, particularly in the Supreme Court, to place before the judges information about the economic and social consequences of potential decisions⁵³. The established authority of the High

52 Mason, above n 4 at 172.

53 *Ibid*, at 174. Cf *Breen v Williams* (1995) 35 NSWLR 522 (CA) at 532-533. The Public Interest Advocacy Centre applied for leave to be heard as *amicus curiae* but, by

Footnote continues

Court of Australia is generally unfavourable to the expansion of the right of intervention which would permit individuals and organisations, having an interest and expertise in such matters, the opportunity to place them before the Court. Authority, both old⁵⁴ and new⁵⁵, stands in the way of the ready acceptance of interveners by the Court. Obviously, such interventions add to the costs and duration of the hearing of cases. It may be that the avenue to expanding the receipt of such data, if that is desired by the courts, lies in the participation of *amici curiae* rather than of interveners. Yet some judges have a more fundamental objection. They reject the expansion of any such procedures. They are concerned both with the appearance and the reality of judicial policy debates taking the place of familiar legal disputation involving the steady application of settled legal authority. There is legitimacy in this fear. However, the fundamental problem which we must face, sooner or later, is

majority (Mahoney and Meagher JJA; Kirby P dissenting) this was refused. *Ibid*, at 533, 569.

54 See *Australian Railways Union v Victorian Railway Commissioners* (1930) 44 CLR 319 at 331 per Dixon J; *R v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 182; *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 399-400. But see *Rushby v Roberts* [1983] 1 NSWLR 350 at 354; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184 at 199; 82 ALR 509 at 522; *R v Cook*; *Ex parte Twigg* (1990) 147 CLR 15 at 17 ff.

55 *Kruger v Muir*, unreported, 12 February 1996 per Brennan CJ.

that, with the demise of the declaratory theory of the judicial function in Australia⁵⁶, now generally regarded as a "fairytale"⁵⁷, we have failed to develop an accepted alternative theory. More pertinently, we have failed to develop curial procedures appropriate to the post-declaratory era. Once it is acknowledged that judges, especially of the highest courts, have choices to make and that they are not engaged in a purely mechanical function, the procedures of the courts need to be adapted to help the judges to make those choices in a rational and informed way. This does not mean a neglect of legal authority and the "skeleton of principle which gives the body of our law its shape and internal consistency"⁵⁸. But it does mean that, where the law is uncertain, the Constitution is obscure, the statute is ambiguous, the common law has no precisely analogous case - then, the judge should have appropriate tools to elucidate the applicable legal principle and legal policy in a rational way so that they will help to provide the best available solution. Including, where appropriate, tools of economic analysis.

56 M H McHugh, "The Law-making Function of the Judicial Process" (1988) 62 ALJ 15, 116 ff.

57 Lord Reid, "The Judge as Law Maker" (1992) 12 *Journal Soc Public Teachers of Law* at 22.

58 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29 per Brennan J.

What I am saying is not revolutionary. After all, in the United States of America the Supreme Court has had *Brandeis* briefs for ninety years⁵⁹. As usual, we in Australia hanker for the certainties of the past. We know that the declaratory theory has collapsed. But we still cling on to the methodology to which it gave birth. We shrink in fear from alternative methodologies which would respond more candidly to the actual task which appellate judges in Australia must often perform. Sometimes, legal authority is clear and yields a single result. In such a case the duty of a judge is plain. He or she must apply the settled law. However, it is often the case that the law is unclear, necessitating choice and the elucidation of a new principle of law. The common law has been doing this for seven centuries. It is then that the obligation of legal development falls inescapably upon the judge. Within that task, a "filter" of economic analysis might, at least on occasion, be useful⁶⁰.

59 As counsel in *Muller v Oregon* 308 US 412 (1908) Mr Louis D Brandeis (later Brandeis J of the Supreme Court of the United States) submitted a brief supporting the constitutionality of an Oregon statute limiting the hours per day that women could work in laundries and other industries. It was this brief which led to important changes in legal analysis in the Supreme Court of the United States. The Brandeis brief has been used "in contexts far removed from economic regulation and thus has become a staple of litigation before the Supreme Court". J W Johnson, *The Oxford Companion to the Supreme Court of the United States*, OUP, 1992 at 82.

60 The limitations of such a "filter" are suggested by Professor Stephen Todd in "Negligence Policy" in P Rishworth (ed) *The Quest for Simplicity Essays in Honour of Lord Cooke of*

NEED FOR A WIDER PERSPECTIVE

I conclude with a reference to the need for a wider focus for the debate about economics and law debate. My work in Cambodia as the Special Representative of the Secretary-General of the United Nations taught me the vital importance of economics for a healthy legal system. The real growth of demands for human rights in Cambodia will only come when the economy has revived. The importance attached to economic and social rights - sometimes seen in developing countries as priorities more urgent than civil and political rights - convinced me of the close relationship between respect for human rights and economic development. It is no coincidence that the countries which are most concerned about human rights, and

Thorndon (forthcoming, NZ 1997) where Todd claimed that a cost benefit analysis in negligence cases raises problems which: "verge on the insuperable. Professor Smillie has noted that a judge can never be sure that all relevant material is before him and that the analysis is both complete and accurate. Any assessment of the likelihood of an accident occurring will necessarily be speculative, a prediction of the impact of a decision must extend beyond the parties before the court to all who will be affected by it, and concentration on questions of efficiency overlooks the human dimension in determining who should bear the cost of an accident. Further, if moral values also come into play, predictability and efficiency is compromised and the very substantial effort and expense which may be involved in formulating a cost-benefit analysis may, in any event, be wasted. In short, the game is unlikely to be worth the candle".

insistent about their observance, tend to be those of the developed world with advanced economies. It is important in an economic analysis of law to remind Judge Posner and ourselves that the theories must work not only in a developed society such as Australia or the United States, but also in developing countries where people also yearn for a better life. There is a tendency to discuss law and economics as if it were only a matter for advanced economies. It is not. If the application of the economic "filter" to legal decision-making is appropriate, it must be universally so. The lessons must apply to legislators, judges and other rule-makers in developing countries where the urgent priorities may be different.

My experience in the application of universal human rights has also taught me to be sceptical about a purely economic interpretation of matters so fundamental to human identity and dignity. Thus, when Judge Posner talks of rape in economic terms, he is, in my view, at his most unconvincing. Take this illustration of his reasoning⁶¹:

"Suppose a rapist derives extra pleasure from the coercive character of his act. Then there would be no market substitute for rape and it could be argued therefore that rape is not a pure coercive transfer

61 Posner, above n 49, 202.

and should not be punished criminally. But the argument would be weak:

- (a) The prevention of rape is essential to protect the marriage market ... and more generally to secure property rights in women's persons. Allowing rape would be the equivalent of communalising property rights in women ...
- (b) Allowing rape would lead to heavy expenditure on protecting women ...
- (c) Given the economist's definition of value ... the fact that the rapist cannot find a consensual subject does not mean that he values rape more than victim disvalues it".

This analysis of such a deep affront upon human dignity and privacy will be unpersuasive, even offensive, to many. It overlooks certain fundamental and universal features of human rights. These may strike some economists as irrational. It may be intensely annoying that such questions cannot be reduced to a purely economic calculus. But the worlds of human rights and law abound with issues which resist economic formulae. I leave aside a traditional question such as whether capital punishment is consistent with universal human rights. I address instead coming human rights issues of the greatest importance: the human rights of future generations⁶². My work with the Ethics Committee of the Human Genome Organisation teaches me that

62 K Vasak, "The Universal Declaration of Human Rights of Future Generations" (1994) 1 *Law and Human Genome Review* 211, 218.

the next century will present lawyers and ethicists with quandaries of great delicacy in which large economic advantage may not necessarily answer human objections. I refer, for example, to such questions as cloning of the human species, the development of human beings with "super" genetic qualities, the removal of genetic "defects" and experimentation with half human hybrids⁶³. There may indeed be economic markets for such developments, or some of them. But whether they should occur at all, and if so under what conditions, will not be decided by economic analysis alone. In the end, the law (at least in a society such as Australia) is answerable to the people. Some of the people's values are non-economic.

I present this commentary on 4 July 1997. It was for this day in 1776 that Thomas Jefferson, in a lonely hotel room in Philadelphia, penned the *Declaration of Independence* of the United States of America. That country has been inspired by his formulation of the objectives of good government, being to protect and uphold "life, liberty and the pursuit of happiness". In a sense, we are all beneficiaries of Jefferson's vision. Now we

63 F Mantovani, "Genetic Manipulation, Legal Interests Under Threat, Control Systems and Techniques of Protection" (1994) 1 *Law and the Human Genome Review* 91, 95. See also *Bilbao Declaration* of International Workshop on Legal Aspects of the Human Genome (1994) 1 *Law and the Human Genome Review* 205 at 209.

are also children of the age of universal human rights. But we are, as well, profoundly influenced, in our daily lives, by the economic realities which surround us. Each of these phenomena - human rights and economics - displays different aspects of law. Each has an important part to play in legal elaboration. The one reminds us of the elements of morality and justice which lie at the heart of many of the purposes of law. The other reminds us of the practical world in which, inescapably, law, must operate: maximising benefits and minimising costs. Each of these elements of our discipline has a legitimate voice. The voices are not necessarily disharmonious. Economic efficiency is itself commonly an attribute of justice.

The challenge for Australian judges and lawyers in the coming decades is to reconcile the universal human rights movement in the law with the "second wave" of the law and economics movement. It is to do this in the context of legal authority, and with methods apt to the work of judges who are not legislators and who should not set out to be so. The eyes have been opened to the problem. Now we must address the solutions.