LAW AND ECONOMICS

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Economics has become the dominant theme in the public affairs of this country. In an era of recession, economic considerations are the centrepiece of current political debate. The fortunes of the major political parties are said to hinge upon the success or acceptance of their economic policies. The media bombard us daily with the latest economic statistics and commentary on the significance of those statistics. The comparative advantages and detriments of competing economic philosophies are expounded at length in the newspapers and the electronic media. Economic rationalism which, we have been told, alone will save us from sinking into the abyss, is now challenged by the adherents of selective protection. The free trade/protection debate which flourished at the time of Federation shows signs of coming to the fore once again.

That this should be so is not surprising. Technological advance has emphasized the interdependence of national economies and the fact that our national economy is but one piece in a worldwide mosaic. Ability to compete and efficiency are essential to economic well-being.

In the light of these developments, one might have expected that by now economics would have had a marked impact upon the law and our legal system. Because both law and economics are disciplines concerned with the techniques and methodology of decision-making, economics has a capacity to contribute to legal decision-making, including the judicial process.[1] The expectation that economics would make a significant contribution has been reinforced by the fact that law and economics and law and commerce have been courses studied in tandem by Australian law students for upwards of several decades now.

The dictates of economics in the form of the new managerialism have had a marked impact on the administration of justice. Insistence on economic efficiency has streamlined the court system and elevated judicial administration to a position of great importance, even to the heights of an academic discipline.[2] But the impact of economics on substantive law, especially judge-made law — which is the principal subject of my address — has been less than many supporters of the law/economics school would have predicted.

By way of contrast, in the course of this century, the developing common law has brought important economic consequences in its train, some of those

[1] Guest, S F D 'The Economic Analysis of Law', (1984) 37 *Current Legal Problems* 233.

[2] Mr Justice Samuels, 'The Economics of Justice', an address delivered to the 19th Conference of Economists (Australia) on 24th September 1990 at the University of New South Wales.

consequences being so significant that the question is asked whether the community can afford them. That is not a question which the courts have been asked to answer, nor is it a question that has been debated before the courts, though judges do not consciously formulate principles of law which would impose unwarranted or unrealistic burdens on the community. But judges cannot foretell the future and the basic principles of common law liability were formulated long before anyone predicted the upsurge in civil litigation which has occurred in recent years.

The expansion of the duty of care in negligence flowing from Lord Atkin's famous 'neighbour' principle in *Donoghue* v *Stevenson*,[3] in combination with the emergence of liability for negligent mis-statement[4] and the overthrow of the old rule that damages were not recoverable for economic loss occasioned by negligence,[5] has had remarkable ramifications, which have contributed to the present plight of the insurance industry and the crisis which confronts Lloyds. It has been suggested by *The Economist*[6] that it is the award of punitive damages by juries in the United States that is partly responsible for the problems of Lloyds and the insurance industry. Indeed, the claim is made that stability in the industry will not return until the award of punitive damages is eliminated, but that I suspect is only part of the problem.

Expanding liability in negligence has had other consequences. Malpractice suits have had significant economic effects in the United States.[7] Premiums have risen dramatically. Doctors have withdrawn from medical practice due to apprehensions about malpractice litigation and the cost of adequate insurance. It is also said that doctors engage in 'defensive medicine' in order to avoid or reduce the risk of being sued. To what extent these developments affect the availability and the quality of medical services provided to the public is somewhat uncertain.[8] But there can be little doubt that, in North America, they have had an impact upon the cost of medical services at a time when the cost of those services has become a critical problem in the western world.

There are many other illustrations. There is the rising cost of automobile insurance, with compulsory third party insurance linked to registration. And there is the problem confronting professional advisers — auditors, accountants, financial consultants, architects, engineers and solicitors — who are confronted with the spectre of potential liability in amounts far exceeding the amount of insurance cover which, it is claimed, they can reasonably afford to maintain.

Outside the field of negligence, the emergence of administrative law as a

[3] [1932] AC 562, 580 et seq.
[4] *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465; *San Sebastian Pty Ltd* v *The Minister* (1986) 162 CLR 340.
[5] *Caltex Oil (Australia) Pty Ltd* v *The Dredge "Willemstad"* (1976) 136 CLR 529; *Hawkins* v *Clayton* (1988) 164 CLR 539.
[6] 18th January 1992, p 14.
[7] Partlett, 'Professional Negligence in America', in Finn (ed), *Essays on Torts* (Sydney, Law Book Company, 1989), p 98.
[8] Dickens, 'The Effects of Legal Liability on Physicians' Services' (1991) 41 *University of Toronto Law Journal* 168.

major branch of our law may well have added to the costs of government. Much of our federal system of administrative review rests on statute, but common law judicial review has advanced with giant strides. Part of that advance has been associated with an insistence on compliance with the requirements of natural justice. Just how effective that insistence is in securing a favourable reconsideration of the administrative decision under challenge is a matter of speculation. What a cost/benefit balance sheet of our present system of administrative review would reveal is likewise a matter of conjecture. I am not suggesting that it would be unfavourable. I merely make two points: first, that we do not precisely know, and that, so far as development of the common law is concerned, as in the case of negligence, we have proceeded without taking precise account of the costs. Whether the courts can take account of the costs is another question and to that I shall return. That question is very much bound up with the question why economics has not made a greater contribution to the formulation of the legal principles which have generated these consequences.

The Claims made for Economics

It has long been recognized that economic analysis has a valuable contribution to make in the legislative process. In that context, the object of economic analysis is to 'provide an objective framework against which the economic impact of various policy options can be assessed'.[9] The policy options are evaluated according to an economic standard: which option produces the desired outcome at lowest cost to society, the term 'cost' being used in an all-embracing sense. Economic analysis enhances our understanding of how existing laws work and measures the consequences which each alternative proposal for reform will generate. The joint Report of the Law Reform Commission and the Law Reform Commission of Victoria on *Product Liability*[10] is a striking example. The economist generally seeks to identify the policy which achieves the highest level of social welfare or the maximum level of community wealth. For that reason, it is right to speak of economic analysis as being instrumental. That characteristic has implications for the use of economic analysis in the judical process.

It has also been acknowledged that economics can make a contribution to the interpretation and application of statutes and to the elaboration of the common law in the judicial process. However, there is no consensus about the potential scope of that contribution. That an understanding of economics and economic models will assist in the interpretation of statutes which seek to achieve an economic purpose or speak in economic terms is not in dispute, though the extent of that assistance is a matter of debate.[11] Similarly, economic literacy facilitates the understanding and evaluation of economic evi-

[9] The Law Reform Commission, *Product Liability* Research Paper No 2, January 1989, p 1.
[10] The Law Reform Commission, Report No 51 and The Law Reform Commission of Victoria, Report No 27, (1989).
[11] Guest, op cit, p 234.

dence and statistical materials and even facilitates the determination of economic issues, though once again there is room for disagreement about the extent or value of that contribution.

But the larger claims for economics centre upon the writings of Professor Calabresi and Professor Posner (now Judge Posner). Calabresi, unlike Posner, rejects the idea of an economic law that would dictate the way in which to allocate losses.[12] Instead, he sees the role of economics as identifying the proper goals of society and the means by which they are to be achieved. That entails 'careful empirical research in each area'; only that 'can reveal the system that is best for it'. Because Calabresi acknowledges that justice is the object of any legal system, notions of maximization of wealth and efficient allocation of resources have a subsidiary role, being means, if appropriate to the circumstances, of attaining that goal.

But, as Calabresi himself concedes, the choices to be made, involving as they do fundamental policy questions of great importance, must often be resolved by the political process or, to the extent that they are made by the courts, in conformity with authority conferred by the legislature. Consequently, Calabresi does not offer a charter according to which courts can presently act. And, in any event, in the absence of the complex analyses which are required as the foundation for the operation of his prescription, the courts cannot derive much assistance from it. Furthermore, the analyses, if undertaken, would serve to make the process of judical decision-making more complicated.

Professor Posner[13] asserted that the courts, in elaborating the common law, should make decisions and articulate legal principles which maximize community wealth in the sense of generating the most cost-effective outcomes viewed from the perspective of the community as a whole. He states that:

> the goal of such action is to bring about the allocation of resources that makes the economic pie as large as possible, irrespective of the relative size of the slices. It means in other words using cost benefit-analysis as the criterion of social choice, where the costs and benefits are measured by the prices that the economic market places on them or would place on them, if the market could be made to work.[14]

Further, he asserted that the common law, as it presently stands, can be reinterpreted in economic terms and, as so interpreted, can provide a valuable and instructive foundation for future development of the common law by the courts. According to this view, past judicial decisions are capable of analysis in economic terms with a view to ascertaining whether they conform to the

[12] Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven and London, Yale University Press, 1970), pp 17–20; see also Calabresi and Klevorick, 'Four Tests for Liability in Torts' (1985) 14 *JLS* 585, 608, 612, 621, 627; Calabresi, 'About Law and Economics: A Letter to Ronald Dworkin' (1980) 8 *Hofstra L Rev* 553, 557–62.

[13] *Economic Analysis of Law* 3rd ed. (1986); *The Economics of Justice* (1981); Posner, R A 'Wealth Maximization and Judicial Decision-Making', (1984) 4 *International Review of Law and Economics* 131.

[14] 'Wealth Maximization', op cit, p 132.

goal of wealth maximization. If a decision conforms, then it constitutes a sound platform for further judicial development.

Professor Posner sought to disarm those who think that economic analysis of past decisions would throw a shadow of uncertainty over much of the corpus of judge-made law, by predicting that an economic rationale could be given for it. It is as if the judges, like M. Jourdain in Moliére's *Le Bourgeois Gentilhomme*, spoke prose without knowing it. It is impossible to vindicate this thesis. Like Lord Atkin's 'neighbour' principle in *Donoghue* v *Stevenson*,[15] many fundamental common law principles have been fashioned according to notions of justice, fairness, even of morality (though subject to some limitations) and do not reflect concepts of economic utility, efficient use of resources and maximization of wealth. No doubt some principles, particularly those casting duties on employers, such as the concept of non-delegable duties elaborated in *Kondis* v *State Transport Authority*[16] may be reconciled with efficient loss distribution. But, when regard is had to the impact of the 'neighbour' principle on the duty of care and the modern day ramifications of liability in negligence, it is not easy to think of Lord Atkin's statement as having a compelling rationale in economic terms. In the upshot, discussion of the thesis is mainly confined to the law of contract and torts which are more closely associated with economic transactions and rest on general principles that may be expected to have economic consequences.

The Impact of Economics on Law in the United States

It is significant that the approach to judicial decision-making taken by Judge Posner has differed from that proposed by Professor Posner and even more significant are the reasons advanced by the Judge for the difference in that approach. It has been said that the reasons rest upon two major grounds: the institutional and the practical constraints of adjudication.[17] The Judge himself has stated that a judge will forfeit the respect of his colleagues if he uses his position to peddle his academic ideas . . . he will find that a judicial opinion is an inefficient vehicle for developing complex ideas. . . . The role of a judge is deciding cases, and then giving the reasons for the decision.[18]

He has also said, more recently, that 'the vocabularly of economics is designed for the use of scholars, not judges'.[19] Some years earlier, he said:

> We recognize that the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive.[20]

These comments are consistent with the conclusions reached by Professor

[15] [1932] AC 580 et seq.
[16] (1984) 154 CLR 672.
[17] Englard, I 'Law and Economics in American Tort Cases: A Critical Assessment of the Theory's Impact on Courts, (1991) 41 *Uni. of Toronto Law Journal* 359, 366.
[18] Posner, R A 'Wealth Maximisation' op cit, pp 131–2.
[19] Landes, W M and Posner, R A *The Economic Structure of Tort Law*, (Cambridge, Harvard University Press, 1987) p 23.
[20] *O'Shea* v *Riverway Towing Co* (1982) 677 F 2d 1194, 1201.

Englard in his article, 'Law and Economics in American Tort Cases: A Critical Assessment of the Theory's Impact on Courts':[21]

> [A]mong the presumably thousands of tort cases published during the nearly three decades covered by this analysis, only a small fraction made explicit use of the economic approach. Moreover, even in those opinions where Calabresi's or Posner's writings are mentioned, the reference is often made perfunctorily without real significance in terms of judicial process.

At the same time, the author says:

> There can be no doubt that the modern economic approach to law has left its mark on judicial reasoning in a considerable number of tort opinions. However, the reformatory effect of 'explicit' economic analysis has been limited, if not completely absent.[22]

Judge Frank H Easterbrook, another distinguished American commentator on law and economics, has expressed much the same view about the impact of economics on judicial decision-making in the United States, drawing attention to the inherent limitations upon the use to which it can be put.[23] It is, however, important to note that Judge Easterbrook sees economics as having potential to make a significant contribution to judicial decision-making. That is because economic analysis is a disciplined method of testing propositions, identifying consequences and measuring their costs. On the other hand, because economics is instrumental reasoning, the judicial authority for using it is limited in scope.

The Limitations upon the Use of Economics in the Judicial Process

The nature of the judicial process constrains the use to which economics, notably economic analysis, can be put in deciding cases. I shall deal with those constraints shortly. However, some of the constraints upon the use of economics for legal purposes arise also from the limited focus which economics itself has. It is one thing to say that economics is the study of rational behaviour. But it is a study which is primarily concerned with analyzing and measuring human behaviour in the conditions in which it has occurred, or in conditions in which it may be expected or supposed to occur, for various economic purposes. These purposes may include the measurement of efficient use of resources, resource allocation, loss distribution and others. There are three important points. One is that what economics offers to the law is a method of providing relevant statistics and data and a means of testing and evaluating propositions. Economic analysis enables one to gauge the consequences of a general proposition. The second, which flows from the first, is that economic analysis of that kind has no contribution to make when the legal issues are non-economic or do not lead to possible propositions which require that kind of testing. The third point, which is closely linked with the

[21] op cit, p 369.
[22] Id p 428.
[23] 'The Inevitability of Law and Economics' (1989) 1 *Legal Education Review* 3.

others, is that economics is unlikely to provide assistance except in a proportion of the cases in which a court is concerned with formulating a general proposition.

Acceptance of the last point just made has led some to think that economics, being concerned with the validity of general rules or propositions, is not well suited to contribute to the judicial process. That process, it is said, is designed to resolve a particular dispute between the parties to that dispute with the consequence that the court will have its primary focus on what is just or fair *as between those parties* rather than on what is for the benefit of society. The thinking has some substance, even if the reference to what is 'just' or 'fair' is not an entirely accurate summary of the criteria applied in the judicial process. This thinking draws a clear distinction between the very significant contribution economics can make to the legislative process and the slighter contribution that it can make to the judicial process. Nonetheless, it is a mistake to treat all judicial decision-making as falling within the narrow description stated above. Plainly enough, appellate courts are often, and courts of original jurisdictions are sometimes, confronted with the task of formulating, qualifying or extending a rule or proposition of general application and, when that happens, economic analysis may conceivably be relevant.

In this respect we need to bear in mind the Janus-like quality of the judicial process. It seeks to determine the rights and liabilities of the parties with reference to past events and transactions, that is, events and transactions that have taken place. And, for the most part, it makes that determination by applying a rule that has been established by statute or settled by existing authority. But, in some cases, the appropriate rule to be applied itself may be in question. In these cases, the court is in truth formulating a rule to govern future conduct, though in the traditional manner of judicial evolution of the common law, the rule necessarily governs past conduct as well. Because the new or varied rule will have a general application in the future it may be relevant to identify and test its consequences, thus providing potential scope for economic analysis in much the same way as a legislative proposal provides similar scope.

Sir Ivor Richardson,[24] a judge of the New Zealand Court of Appeal, has called for 'an increasing emphasis on rigorous analyses of the economic and 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. As things stand, judicial assumptions 'tend to be intuitive and are often not articulated'.

In enunciating a general principle, courts must have an eye to a utilitarian object in the broad sense and in this respect there is some similarity between the end purposes of the law and such broadly described end purposes of economics as wealth maximization, efficient allocation of resources and highest level of social welfare. However, paradoxically, the focus of the judicial process is both wider and more constrained than economics. Doing justice between a plaintiff and a defendant, between one class of persons and another

[24] *Changing Needs for Judicial Decision Making*, p 8.

class, may require a court to bring down a decision or formulate and apply a principle which proceeds along lines which are at variance with such economic objects as those which I have mentioned. In formulating and applying principles, judges take account of many considerations such as precedent and history as well as morality, culpability, justice and fairness, and do not regard themselves as being at liberty to subordinate these considerations to the dictates of economic goals. In interpreting the Constitution and statutes and in construing written instruments, the courts are bound to strive to ascertain the intent of the framers of the Constitution, the legislature and the parties to the instrument, as the case may be. In these areas of the law the courts have no charter to shape what is best, simply viewed from an economic perspective.[25]

Curial procedures in Australia are also an obstacle to the use of economic analysis. Our version of the adversary system has not devised procedures to facilitate the use of such materials.[26] Unlike the United States, we do not make use of the Brandeis brief procedure. And there is a strong apprehension that a contest and debate about economic issues will add to the length and cost of litigation (already a matter of great public concern) without any confident assurance that the result will be worthwhile.

If we suppose that the High Court were to be confronted with the question whether there is a general principle of the common law governing liability on the part of a manufacturer for defects in its products, would the Court be able to receive, act on or adopt an economic analysis of the kind on which the Law Reform Commission Reports on 'Product Liability' proceed? And, if the Court were to do so in a determinative way, what would be the public reaction to the Court undertaking that exercise?

It is convenient to discuss the use of economics in the spheres of constitutional law, statute law and the common law.

Constitutional Law

Recently there has been much discussion of the economic aspects of Australian federalism.[27] Federalism is seen as offering the advantage of decentralization of some public services and thus satisfying a more diverse set of preferences for service levels and standards. Federalism is also seen as offering competition within and between different spheres of government. This competition in turn operates as a mechanism to restrain the coercive power of government and to encourage creative policy-making.[28] But these economic

[25] Guest, S F D op cit, p 235.

[26] The inadequacies of curial procedures was a reason assigned by the High Court in *State Government Insurance Commission* v *Trigwell* (1979) 142 CLR 617 for refusing to reconsider the common law rule in *Searle* v *Wallbank* [1947] AC 341 that a landowner is under no prima facie legal obligation to highway users to fence his or her land to prevent animals from straying onto it. See per Mason J at pp 633–34. Such a reconsideration would involve questions of policy and competing economic interests which, in the opinion of the Court, were appropriate to be considered by Parliament: per Stephen J at p 629.

[27] See Galligan, B *Australian Federalism* (Melbourne, Longman Cheshire, 1989).

[28] See Galligan, B and Walsh, *Australian Federalism Yes or No*, Federalism Research Centre Discussion Papers No 9 (November 1991), p 11.

aspects of the Australian federal model, though they illuminate its operations and the possibilities for constitutional reform, have very limited utility for particular questions of constitutional interpretation and judicial decision-making.

Of all areas of law, interpretation of the Constitution offers less scope for decision-making by reference to economic analysis and economic considerations than any other. The High Court's charter is to divine the meaning of the provisions as expressed in the the instrument itself guided by reference to the materials classified as legitimate. Of course, that does not mean that a judge does not have an eye to consequences, for consequences may throw some light on what was intended or what was not intended when the meaning of the words is not plain. And, in any instance where economic consequences become relevant to interpretation, then economic analysis may have a role to play.

Although the Constitution offers very limited scope for reference to economic considerations or economic analysis, criticism has been made in the past of the Court's failure to take account, or correct account, of economic considerations in interpreting important provisions of the Constitution, notably ss 90, 92 and 117. This criticism has a particular edge to it, to the extent that it is directed to ss 90 and 92. Section 90 refers to an economic term 'duties of excise', while s 92, in providing that 'trade commerce and intercourse betwwen the States shall be absolutely free', evokes economic notions of free trade or, at least, absence of discrimination or protection.

It is convenient to begin with s 92. Evatt J thought that the section enshrined the well-known economic doctrine of 'free trade' which insisted on the free flow of goods interstate. But that view of the section did not find favour.[29] Instead the Court adopted the view expounded by Sir Owen Dixon, namely, that s 92 protected the freedom of the essential attributes of 'trade, commerce and intercourse among the States'.[30] This interpretation turned not on any economic notions but on the legal and artifical distinction between an essential attribute of interstate trade and something that was incidental only to that trade.

Sir Garfield Barwick's view of s 92, which differed from that of Sir Owen Dixon in two main respects, would, to that extent, be supported by economists. First, Sir Garfield considered that the first sale in a State of goods imported from another State was part of interstate trade. Secondly, he thought that s 92 invalidated a law that had the *practical* or *legal* effect of imposing a burden on an individual's interstate trade. His Honour's view was that free trade in the traditional economic sense could be preserved only by ensuring free markets and such markets were at risk because State governments, being willing to enhance the interests of their people as against others, erect protective barriers against interstate trade in the guise of protection of

[29] *Peanut Board* v *Rockhampton Harbour Board* (1933) 48 CLR 266.

[30] *O Gilpin Ltd* v *Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189, 205–6. *Hospital Provident Fund Pty Ltd* v *State of Victoria* (1953) 87 CLR 1, 17–18.

health, safety and conservation. Only rigorous attention to the practical effect of a law would safeguard free trade from disguised protection of this kind.[31] Sir Garfield's view, which attracted some acceptance,[32] was known as 'the individual rights' theory.[33]

The problem was that the theory did not obtain the whole-hearted endorsement of the Court and, though erected partly on economic foundations, it also provoked criticism. That criticism was based principally on the argument that the theory effectively restricted the capacity of legislatures to regulate trade in the interests of the community and consumers. In the upshot, the long-standing controversy about s 92 was settled by the unanimous decision in *Cole* v *Whitfield*[34] in favour of an interpretation which offers a guarantee of freedom from discriminatory burdens on interstate trade of a protectionist kind. That, on the face of it, is an interpretation which evokes economic concepts and considerations. However, a reading of the Court's judgment makes it very clear that economic arguments did not play a significant part in determining the interpretation which the Court accepted. That impression is reinforced by an examination of the arguments actually presented to the Court. The judgment turned on the techniques of legal and constitutional interpretation, making use of history and, for the first time, of the *Convention Debates*. It is something of a irony that a decision that does not turn on economic analysis or economic reasoning has not excited economic criticism.

This is not the occasion to review the later decisions, though I suppose that economists would not approve of *Bath* v *Alston Holdings Pty Ltd.*[35] That is because the legal distinction on which the majority decision turns does not amount to a difference from an economic perspective. The subsequent decisions in *Castlemaine Tooheys Ltd* v *South Australia*[36] and *Barley Marketing Board (NSW)* v *Norman*[37] call for little comment. The first was, and the second was not, an illustration of discriminatory protection of the domestic trade. What is significant about the judgments is the absence of any discussion of economic writings upon the topic. None was presented in argument despite a request from the Bench for references.

The interpretation of s 90 is in an unsatisfactory state, to use the language of euphemism. I need only refer to the divergent opinions in the most recent decision, *Philip Morris Ltd* v *Commissioner of Business Franchises (Vict).*[38] The problem with s 90 lies in its use of the expression 'duties of excise' which is a term having economic significance. The central difficulty is that the term

> has never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application,

[31] *Samuels* v *Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 17–20.
[32] *Northern Eastern Dairy Co Ltd* v *Dairy Industry Authority of NSW* (1975) 134 CLR 559.
[33] See Zines, L *The High Court and the Constitution*, 3rd ed (Sydney, Butterworths 1992), Ch 7, p 109 et seq.
[34] (1988) 165 CLR 360.
[35] (1988) 165 CLR 411.
[36] (1990) 169 CLR 436.
[37] (1990) 171 CLR 182.
[38] (1989) 167 CLR 399.

to repeat the words of Sir Owen Dixon.[39] And, so far, agreement has not been reached on what was the purpose of the section. The irony is that, in this situation, economics is unable to offer much illumination of a question which has arisen as to the meaning of a term having economic significance. No doubt an economist could bring to bear a view of the section's purpose which coincides with, or gives effect to, the economic philosophy of the speaker. But that is scarcely of much assistance in resolving the issue.

Section 117, which is designed to give out-of-State residents the same rights as in-State residents, does not have its primary focus on economic matters or purposes. Nevertheless, the operation of the section has economic significance. If it be given a narrow construction, as it was in *Henry* v *Boehm*,[40] then the section enables a State to place its residents in a privileged or preferred position vis-à-vis out-of-State residents. The exclusory qualifications for admission to legal practice in Queensland, supported by *Henry v Boehm*, were strongly criticized on the ground that they protected the local profession from interstate competition. *Street* v *Queensland Bar Association*[41] adopted the broad interpretation and exposed the local profession to such competition. But the decision did not turn on economic arguments and there was no legal reason for it to do so in the absence of any indication that s 117 was designed to serve a particular economic purpose. Of more interest from an economic viewpoint was the argument that the guarantee of freedom of interstate trade contained in s 92 applies to the legal profession, an argument rejected by Dawson J, who was the only Justice to deal with it. If and when that argument ever comes to be considered by the Full Court, it might be relevant to consider the economic conceptions of trade and interstate trade.

Economics and Interpretation of Statute Law

An understanding of economics has assisted lawyers and judges in interpreting and applying those statutes which seek to effect economic regulation of business or business activity. The *Trade Practices Act* 1974 (Cth) and the merger provisions of the current Corporations Law serve as examples. But even here a reservation needs to be made. It is rather in the *application*, than the *interpretation*, of the statute that economic understanding provides assistance. The interpretation of statutes consists in ascertaining the meaning of the words used in the context in which they are to be found and in the light of the scope and purpose of the statute. Generallly speaking, the statutory purpose, if economic, will be comprehensible by those who do not have a profound grasp of economics, as will its language. Occasionally, economic understanding can assist in matters of interpretation, just as scientific knowledge will aid a lawyer in construing a patent specification more readily. A profound understanding of economics is not necessary to enable one to grasp the lan-

[39] *Matthews* v *Chicory Marketing Board (Vict)* (1938) 60 CLR 263, 293. See also *Philip Morris Ltd* v *Commissioner of Business Franchises (Vict.)* ibid, per Mason CJ and Deane J at p 425.

[40] (1973 128 CLR 482.

[41] (1989) 168 CLR 461.

guage or purpose of any statute. For the most part, questions of interpretation of statutes with a specific economic purpose are determined by recourse to traditional legal interpretive techniques in the application of which economic understanding provides no insights. That was the situation in *Devenish* v *Jewel Food Stores Pty Ltd*[42] which held that conduct which prevents the supply of goods by a target corporation, without more, does not amount to the hindering or prevention of acquisition of those goods from a corporation, within the meaning of s 45D(1)(b). You might perhaps think that the decision does not make economic sense. But that is scarcely to the point as the question was one of statutory intention in relation to a particular provision. The provision proscribes conduct which hinders or prevents *supply* to a target corporation or which hinders or prevents *acquisition from* a target corporation; it does not proscribe conduct which hinders or prevents *acquisition or supply by* a target corporation.[43]

The *application* of a statute which operates to achieve economic regulation is a different matter. Then an understanding of economics facilitates appreciation of economic data and expert evidence and, ultimately, economic analysis. The judgments in *Queensland Wire Industries Pty Ltd* v *Broken Hill Proprietary Co Ltd*[44] illustrate that. The interpretation of the expression 'take advantage' in s 46(1)(b) of the *Trade Practices Act* did not require any economic expertise. In reaching the conclusion that the expression meant 'use' and did not call for proof of hostile intent, the Court resorted to the ordinary principles of legal interpretation. On the other hand, in deciding whether BHP was in a position 'substantially to control' the relevant degree of market power and had 'a substantial degree of power' in the market for steel products, the Court had regard to a variety of economic considerations.

Economics and the Common Law

The common law (and I include all non-statute law in that expression) has developed case by case, pragmatically, incrementally, even fragmentally. In the course of that development, principles have been formulated and accepted. But, partly by reason of the case by case mode of development and partly because the common law has developed in compartments — property, contracts, torts, criminal law, etc — the principles have a limited area of application. The consequence is that the law has not expanded outwards in conformity with a central core of overarching concepts and principles. In recent years Australian courts have been consciously endeavouring to eliminate and reduce anomalies and to bring a greater coherence and consistency in principle to the common law. But the compartmentalized nature of common law principles arising from piecemeal development makes it extremely difficult to interpret or re-interpret the principles in a way that enables them to serve a particular economic purpose. That difficulty is compounded by the various factors which have been taken into account by the courts in formu-

[42] (1991) 172 CLR 32.
[43] Id p 47.
[44] (1989) 167 CLR 177.

lating existing common law principles. The solution that is just, fair or equitable, to use terms that do not precisely express relevant legal criteria, does not necessarily correspond with what is economically efficient. The doctrine of precedent is another obstacle to the redefinition of existing principles with a view to the achievement of economic goals.

In any event, judges have no charter to redefine the common law in that way. No judge is entitled to depart from the settled corpus of the common law and replace it with principles designed to attain a particular economic goal or goals. Moreover, even if one or more judges took that view of judicial responsibility, the vast majority would not. Judges reject the notion that they are at liberty to give effect to personal preferences or to predetermined ideologies in deciding cases. To do that would imperil the rule of law and undermine public confidence in the judiciary. And, the underlying notions of the law/economics school — maximizing wealth, efficient allocation of resources or achieving a high level of public welfare — are ideologies in the relevant sense. What is more, if these notions were to become the decisive or dominating legal criteria, *Donoghue* v *Stevenson* and *Waltons Stores (Interstate) Ltd* v *Maher*[45] might well cease to be part of our law. Economic rationalism is by no means synonymous with our ideas of justice.

Two recent advances in the common law have economic significance. The so-called rule that pure economic loss could not ground an action for damages in negligence did not prevent recovery of economic loss in *Caltex Oil (Australia) Pty Ltd* v *The Dredge 'Willemstad'* or *Hawkins* v *Clayton*. The reason often given for the traditional reluctance to allow damages for pure economic loss was the apprehension that, allied with the criterion of foreseeability, liability for pure financial loss would impose on an individual defendant a liability 'in an indeterminate amount . . . to an indeterminate class', in the words of Cardozo CJ in *Ultramares Corporation* v *Touche*.[46] Behind this stated apprehension is an important economic consideration. Fleming[47] points out that 'it would clash with paramount policies of a free market economy if the prospect of economic loss to a competitor should impede one's commercial activities'. On the other hand, in some situations, the common law has allowed the recovery of pure economic loss. Both in Australia and the United Kingdom difficulty has been experienced in articulating the principles according to which pure economic loss will be recoverable.[48]

[45] (1988) 164 CLR 387.
[46] (1931) 174 NE 441, 444; 74 ALR 1139, 1145.
[47] Fleming, J G *The Law of Torts*, (7th ed, Sydney, Law Book Co 1987), p 161.
[48] Compare the various approaches in Australia (*Caltex Oil (Australia) Pty Ltd* v *The Dredge "Willemstad"*; *Sutherland Shire Council* v *Heyman* (1985) 157 CLR 424; *Hawkins* v *Clayton*), the United Kingdom (*Junior Books Ltd* v *Veitchi Co Ltd* [1983] 1 AC 520; *Muirhead* v *Industrial Tank Specialists Ltd* [1986] 1 WLR 1380; *Murphy* v *Brentwood District Council* [1991] 1 AC 398. In Australia, it has been accepted that recovery depends upon the existence of a duty of care which, it is now settled, rests on the concept of proximity. In *Hawkins* v *Clayton*, Deane J concluded that the critical factors of the relationship between the testatrix and the firm of solicitors which satisfied the criterion of proximity with respect to the relevant economic loss were the related elements of assumption of responsibility and reliance, along with the foreseeability of a real risk of economic loss.

The significant feature of the discussion in all the recent cases in Australia and the United Kingdom concerning the recovery of pure financial loss is the absence of any examination of the general economic consequences of allowing the recovery of such loss. Equally significant is the absence of any argument directed to those consequences. Neither in Australia nor in England was there any discussion of economic considerations in the cases involving the question whether a local authority is liable for a negligent failure to inspect a building in the course of erection.[49] If exposed to liability, would the authority increase fees and, in consequence, construction costs or rates? Again, in *Baltic Shipping Co Ltd* v *Dillon*, a case in which the Court has reserved judgment on the question whether a plaintiff can recover 'disappointment' damages for breach of a contract for a holiday cruise, argument was not directed to the economic aspects of such an award of damages. In Australia, for the most part, it appears to have been tacitly assumed that economic consequences are irrelevant to the formulation of the principles governing the recovery of damages, including economic loss, for negligent acts and omissions.

The second matter to be mentioned is the departure from the so-called rule that interest could not be awarded by way of damages for late payment of damages. In *Hungerfords* v *Walker*,[50] the High Court held that expenses incurred and opportunity costs arising from money being paid away or withheld as a result of breach of contract or negligence were pecuniary losses suffered by the plaintiff as a result of the defendant's conduct and were therefore an element of the loss for which the plaintiff was entitled to be compensated by an award of damages. The damages resulting from the loss of the use of the money was a foreseeable loss, necessarily within the contemplation of the parties and was directly related to the defendant's breach of contract and negligence. Once again the question was neither argued nor discussed in the judgments in economic terms. In essence the case was argued and decided within the framework of traditional legal principles, the Court concluding that the relevant award of damages accorded with the principle governing the award of damages for breach of contract in *Hadley* v *Baxendale*[51] and the measure of damages in tort.

Conclusions

The larger claims of the law/economics school cannot be supported. The courts have no charter to articulate legal principle in order to serve particular economic goals. Nor are curial procedures adapted to achieving those goals. At the same time, there may be cases such as *Shaddock & Associates Pty Ltd* v *Parramatta City Council [No 1]*[52] where it might be profitable to have evidence of the availability of insurance in order to confirm judicial assumptions and support the decision on the footing that it efficiently distributes the loss.

[49] *Sutherland Shire Council* v *Heyman*; *Anns* v *Merton London Borough* [1978] AC 728; *Murphy* v *Brentwood District Council*.
[50] (1989) 171 CLR 125.
[51] (1854) 9 Ex 341 [156 ER 145].
[52] (1981) 150 CLR 225.

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?[53] If counsel present an argument based on economic analysis which suggests that judgment for the defendant would lead to wealth maximization for society, how does a court take account of this if previous authorities or considerations of justice or morality point in the other direction? As I have already said, there is the possibility that courts would set at risk their own standing were they to decide such cases on the basis of the economic approach. That said, what benefit is to be derived from the presentation of the economic arguments if the court decides in the contrary manner?

I must confess to serious misgivings about the prospect of courts proceeding to make or adopt economic analyses, including cost/benefit analyses, for the purpose of *determining* whether it is proper to impose a liability on a defendant, that is, hingeing the decision on a judgment that the community or a section of the community can or cannot afford that liability. In essence, the problem is one of reconciling two contradictory approaches. The first approach is that in some cases, few though they may be, the courts should receive material which enables them to assess the economic implications of alternative decisions. The second approach is that judges are not at liberty to decide cases on the basis of the predetermined ideologies, but must decide according to law and justice. It is possible to reconcile the two approaches by treating economic analysis as providing a means of testing legal propositions and principles, either confirming them or leading to a review and potential redefinition of them. 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. The fact that the issues have been left unresolved, even neglected, by the political process does not seem to be a particularly persuasive reason for expecting the courts to undertake the role of government and legislature. Primarily, it is for the political process to decide whether the community is unable to afford the dictates of justice as enunciated by the courts.

[53] Englard, op cit, p 365.