

LAW MAKING JUDGES

by

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I do swear that I will well and truly serve our Sovereign Lord the King in the office of a Justice of the High Court of Australia and I will do right to all manner of people according to law without fear or favour affection or ill-will.†

Introduction

Most judges are nowadays committed to the belief that their job occasionally requires them to make new laws, and, in recent years, there has been a growing tendency for British and Commonwealth judges to comment on this aspect of their work, both in public speeches and in their judgments. The theme of this comment is by now familiar: judges are pre-eminently administrators of the law, dispensing justice by applying rules. But sometimes these rules will be inadequate, unclear or perhaps intolerable, and in such cases judges must draw on their professional experience and common sense to make new rules, which they then apply back to the parties.

At this point, judges divide into two general camps, according to the balance they strike between the desirability of reform, and their concern for the theory of precedent and the considerations on which it is based. Conservative judges of the first camp will stress their lack of a mandate to make law, as well as the injustice of its retrospective application. They may also acknowledge their lack of competence to assess social and economic policy, and will remind us that the case for reform generally comes without notice, and that the new rule cannot easily be retrieved if unsatisfactory. 'Activist' judges from the opposed camp agree on these matters, but believe that the need to keep the law up to date is more often worth such cost. Each camp finds its view consistent with the common law; when the activist judge appeals to its history to argue that judicial conservatism is something of a modern fashion, his protagonist will reply that this is because most of the necessary law making has now been done. Both camps thus agree in principle that they have a power to make or change the law, they simply disagree as to how it should be used.

This results in a more or less continuous argument about the appropriate degree of conservatism to maintain, and sometimes an attempt is made to settle this argument by stating a legal doctrine in order to define and limit the occasions for law-making, or at least to proscribe some areas as beyond reach of this power. This may confuse the picture if

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the majority judges in an appellate court attempt to entrench such a doctrine, because their interpretation of conservatism will have force of law by authority of their office. However, because the history of precedent seems capable of supporting both camps, their view will remain authoritative only until the activist camp becomes more popular, and we cannot conclude that this doctrinal statement really ends the matter. In fact, the social and political debate which surrounds this jurisprudential argument is largely confined to assertions of the respective benefits of each view, in order to influence popular and professional opinion on the matter. Academic comment, when it is not participating in this debate, usually takes a socio-historical stance, reminding us that the judges' views have changed over periods of time, and discussing the cultural and sociological reasons behind these changes.

Despite uncertainty about the proper use of this law-making power, the profession has generally welcomed its acknowledgment as a refreshing change from those days when the 'declaratory' theory held sway, and judges claimed their job was to declare and apply, but not to make, the law. This older, and now-discredited, view has a long and respectable history, having been championed by such eminent jurists as Bracton, Hale, Coke and Blackstone. It was generally maintained by nineteenth century judges against criticism from the great analytical philosophers of English law, John Austin and Jeremy Bentham, part of whose concern was that, unless judges were more candid in admitting they made law, they were less likely to do so properly, and much bad law might result. But over the past fifty or so years, the general positivist assumptions of Austin and Bentham, sometimes augmented by American 'realist' offshoots, have become widely accepted by the judges so that the judicial, academic and practitioner elements of the legal profession are now virtually united in these views.

Our High Court judges have become vigorous exponents of this general philosophy, with the majority presently in strongly conservative mood in their attitude to the common law. Moreover, in recent cases, this court has formulated a doctrine of precedent which says that a 'settled rule' of the common law cannot be changed, even if circumstances show that its rationale no longer exists, and despite that it may be inconsistent with principle. In the most important of these cases, *State Government Insurance Commission v. Trigwell & Ors.*,¹ the High Court applied this doctrine to decide that the universally criticised non-liability rule of *Searle v. Wallbank* still applies in Australia, without considering the quality of reasoning in that case, or the argument that the case was itself inconsistent with the general principle of *Donoghue v. Stevenson*.

1 (1979) 26 A.L.R. 67.

I have elsewhere argued² that this settled rule doctrine itself reflects a quite fundamental assumption of law-making power, such that it could not be defended were that assumption to be given up. The gist of this argument is that the High Court did not (because it could not) defend *Searle v. Wallbank* by an appeal to the law, but by an appeal to the House of Lords' power to state the law, and the same judicial power could have allowed liability if that had been the Court's preferred result. Accordingly, this extreme conservative ruling is also a high-water mark of the idea that a superior court can ignore questions of legal principle because it has the power to make the law conform to a conservative policy. The underlying assumption that such a power exists is nowadays so entrenched that the intellectual and moral problems which beset this theory are rarely seen as constituting evidence against the theory itself; until very recent years no intelligible alternative has been seriously discussed in the literature.

Wholly opposed to this conventional view, is the philosophy of rights and principles which Ronald Dworkin, Professor of Jurisprudence at Oxford University since 1969, has developed through a series of articles, culminating in his recent book *Taking Rights Seriously*.³ Dworkin has challenged the philosophical assumptions of Austin, Bentham and later positivists that the law of a society is confined to the rules its courts apply. To do this he has drawn attention to the role of legal principles as standards which define legal rights, and has stated a theory of the relationship between these principles and rights, and the rules and doctrines which in his view express their requirement in more explicit and practical form. In particular, he has argued that these more general standards and values remain 'obligatory' on judges no less than clear rules, despite their generality of statement, their often highly implicit nature, and their distinctive logical role, *viz.*, that they *incline* towards a decision rather than compel it in the manner of a rule.

According to Dworkin's philosophy, there will always be sufficient of these principles available in the common law to resolve the difficult cases without having to make new law. Such principles can provide a coherent method of resolution because they are not just general values exemplified in the law, but have a status and relationship determined by their institutional significance in past cases. Because each such principle must be respected according to its comparative influence in the body of common law rules, the judges' duty in the hard case is to state that rule which gives the most accurate account of the institutional role of those principles relevant to the dispute. Taken in this sense, Dworkin's writings

2 'Trigwell in the High Court', to be published in *University of Sydney Law Review* 1981.

3 Duckworth (1977).

constitute an original and highly sophisticated philosophical defence of the older, declaratory theory of the common law.⁴

But an appreciation of the intellectual power of this defence requires consideration of a formidable set of ideas and arguments. Moreover, Dworkin's general theoretical views about the nature of law can be both mystifying and traumatic in their initial impact. This is because they reach beneath much conventional thinking to challenge quite deep assumptions about the adequacy of evidence and the nature of argument in the social sciences. In particular, he challenges the idea that correct solutions to controversial issues must be demonstrable in principle in order to justify the claim that they exist. This absence of 'measuring rods' provokes a number of adverse reactions; for example, because the correct law in hard cases becomes a matter which can only be argued for, never verified, his theory is especially provocative to the central positivist concern that the law itself must be kept separate from arguments as to what it ought to be. For the theory's claim, that the law for the hard case is implicit in the principles relevant to it, leads to a form of approach which seems to blur this distinction: the judge pursues and counsel argue for the correct rule by spelling out the requirement of such principles as to what such a rule should be.

But the positivist suspicion seems unwarranted, for the fact that the required decision is to be governed primarily by the legal principles themselves, rather than by past judicial opinions of what they require, does not give the judge freedom to interpose his own preference; it merely reflects the claim that the relevance and requirement of such principles can be determined on their own account, by considering their institutional role, and that this determination may differ from interpretations supplied by past judges. The fact that a duty to undertake this principled analysis in hard cases will be more compelling than the duty to respect their views (because such views are only part of the evidence) does not mean that the judge can shrug off this task and apply his personal opinion of what the law ought to be.

Secondly, there is the assumption that, if a principled solution cannot be verified, then no solution can have better legal credentials than an-

4 It will be apparent by now that Dworkin's judge can also be described as 'making law', in the sense that he must from time to time fashion new rules to conform to the requirement of underlying legal principles. It is therefore tempting to present the general debate as an argument about judicial method rather than as a major clash of philosophical ideas. But despite the simplicity evident in this approach, it would seem that the philosophical differences are too deep and too radical to warrant this reductionism, and that it will in the end serve only to obscure the problem. Accordingly, the text conforms to the conventional characterisation of the debate as one between 'law making' and 'declaratory' theories, whereby 'law making' implies the claim of a judicial discretion to choose rules in the manner of a legislator, with freedom to appeal to a wide range of social values, and to draw on the judge's personal moral convictions as to what the law should be. This characterisation does not deny that a declaratory theorist could intelligibly claim that judges necessarily 'make law' in his sense of the phrase; but it does highlight the crucial fact that such a theorist emphatically rejects the theory of 'legislative' discretion, and insists that the judge remains obligated by relevant legal principles.

other. Those who share this view are not impressed by the claim that the obligatory force (institutional importance) of different legal principles will be reflected in the history of their competition for influence in determining past claims of legal right. If they concede this evidence any relevance, they remain reluctant to assess it for lack of any measure of exactitude. The effect of this scepticism is to beg the quite fundamental question whether correct legal solutions must also be *clearly* correct *i.e.*, must be susceptible to some clear, decisive test.

Thirdly, the fact that subjective factors will inevitably influence any such analysis is sometimes confused with the sceptical claim that in difficult cases judges invariably 'choose' the solutions they argue for. But a judge can be intellectually committed to the general standards he applies and to his interpretation of their requirement, whatever his critics may suppose. The fact that perceptive observers may plausibly 'explain' his judgment by pointing to the influence of innate preference cannot collapse the distinction between a reasoned decision and a rationalization.

Although these controversial aspects of non-demonstrability are merely one source of a continuous and expanding critical literature, there is little sign that judges and practising lawyers have had much acquaintance with the debate. For despite Dworkin's impressive ability to sustain and defend his central thesis, the declaratory theory remains so out of fashion as to be regarded with a kind of amused intolerance, and no extra-judicial speech is now complete without some acknowledgement of the law making power. One reason for this is the past reluctance of judges to explain the declaratory theory in light of its manifest difficulties, a reluctance widely seen as confirming its role as either propaganda or myth. But judges of the calibre of Hale, Coke, Bracton and Blackstone, as well as those enterprising nineteenth century judges who developed so much of the common law, are unlikely to have been more gullible or less perceptive than their modern counterparts. Their intuitive appreciation that they lacked any right to 'make law' cannot be dismissed simply because the theory needed to explain it had not been coherently stated: for no critic has yet shown that the common law does not generate intelligible principles which operate in the way Dworkin supposes.

The present paper argues in support of Dworkin's thesis by re-considering the defects of the law making theory against some of the difficulties posed by a theory of principles. This inevitably risks yet another interpretation in a developing series of contentious accounts of what Dworkin 'really means'. But this preliminary argument is itself presently inextricable from the question whether his theory makes more sense than that of the positivist, so that this risk cannot easily be avoided.

Since no methodology of 'proof' exists for resolving the conflict between two such theories in the social sciences, the line of argument will be that, once the *modus operandi* of Dworkin's theory is grasped, its defects will seem much less formidable than those of the positivist theory, whether viewed as a practical method for dealing with hard cases or as a description of how good judges intuitively approach them; but not

least when seen as a more authentic expression of the ideal of the Judicial Oath, that the duty of the judge is to dispense justice according to the law.

Judges as Deputy Legislators

The positivist philosophy has its own version of the constitutional doctrine of separation of powers. It sees judges as normally administrators of rules, but as occasionally complementary legislators, attending to details parliament cannot be expected to cope with. In difficult cases where the law is either unclear, or unsatisfactory from some social moral standpoint, the judge is said to have inherent power to exercise a discretion to make new rules. Although he is expected to use his common sense and professional experience in making these rules, his discretion is complete in that whichever rule he introduces will be correct law within the system.

Although this claim of a judicial power to make law is now entrenched in Anglo-American legal philosophy, and although the exercise of this power is crucial to the litigants and others, it is usually treated as a private matter for the judge. Characteristically he neither canvasses the policy reasons in his judgment, nor allows the parties to participate in these deliberations; until recent years, most judges have been reluctant even to acknowledge this aspect of their work. Although the question is rarely discussed, it is assumed that some residual force in the separation of powers doctrine prevents the judge from trying to ascertain the government's policy on the kind of rule to be introduced.

This picture of the judge as a kind of lesser legislator, selecting and favouring social policies in order to make better rules for difficult cases, is responsible for his characterisation as 'naive instrumentalist',⁵ since he normally justifies such rules by an appeal to their instrumental benefits to the society. His decision is naive because he lacks the professional competence, which government agencies have, to formulate, test and discipline his opinions about such matters. Although well aware of this, he believes he has no other choice. However, within the general positivist camp there exist different views as to how he should exercise his power, reflecting different responses to the intellectual and moral problems which confront this philosophy. Thus an important, recent account tells us the judge must try to apply a 'community consensus' in the difficult case, insisting that respect for democratic theory must be kept up by pursuing its version of a popular solution, rather than one which the judge believes is beneficial. Both of these interpretations must be considered in the light of the problems which arise out of the positivist's belief that a judge must have such a power because he cannot do his job without it.

When the positivist judge decides he is at the threshold where the routine work of applying law gives way to the challenging task of making

⁵ *E.g.*, R. S. Summers, 'Naive Instrumentalism and the Law' in *Law, Morality and Society* (O.U.P., 1977).

it, he must face the familiar charges that he lacks both professional competence and an electoral mandate. To defend himself against the criticism that law should not be made by dilettantes acting contrary to democratic theory, he may claim that many judges appear to have done this in the past and that some of them are unquestionably great judges, revered in the common law itself. He may try to mitigate the first difficulty by reading widely in economics, sociology and other disciplines, and may even allow counsel to discuss these matters in his courtroom. As for the problem posed by democratic principle, our law-making judge will usually just answer that his approach seems the lesser of two evils.

Somewhat surprisingly, one rarely finds much consideration given to the bearing this law-making claim will have on the parties who bring their dispute to his court. No doubt this is at least in part because by comparison with the above objections their complaints seem less compelling. A judge who has long harboured the ambition to reform some difficult area of law, and has studied law reform reports and relevant moral and social implications, might be impatient to an objection from this perspective; his concern is now with the future welfare of the community as a whole.

He will, nevertheless, appreciate their concern that it is unfair to resolve their dispute other than by reference to the present law each party is claiming to rely on, and will be aware that behind them stand others in the community committed to the law he proposes to change. We must therefore ask what a conscientious judge might say to these parties to justify his decision temporarily to give up his judicial oath, and allow their dispute to be resolved as an incidental consequence of his pursuit of a better law for future parties. We should test his answer against the most favourable case we can put for his theory, *viz.*, where the rules seem chronically unclear as to what the correct decision should be. For although we may have our misgivings about a claimed right to ignore law he finds morally objectionable, we can hardly blame him for not applying the law if this law is itself indeterminate.

Before considering his position we might distinguish stronger and weaker versions of this judicial agnosticism. First, the judge may firmly believe that there are disputes for which no study of the past cases could ever furnish a legal solution (because no rule governs the dispute or because no clear procedure exists to say which rule applies) and conclude that, because the present case is of such a kind, he has no other choice than to devise a policy solution and enforce it as if it were a legal one. Secondly, he might subscribe to this general idea of legally indeterminate disputes without being very confident whether the present case is one impossible to resolve, or is merely very difficult. Thirdly, he may have an open mind on the general question and so remain uncertain whether a particular dispute can be resolved in principle, without going beyond the law. In the first and strongest case, the judge concludes, in effect, that there is simply no law governing the plaintiff's claim of a right to sue, because the defendant has not failed to meet any *known* legal obliga-

tion. However, because of the moral appeal of the plaintiff's argument that he should be permitted to sue, the judge is persuaded to create such an obligation and apply it retrospectively. In the latter two cases, a conscientious diffidence can extend the range of this assumed law-making power. For, even where the judge believes that one interpretation of precedent is more convincing than another, he may still see that the latter is backed by arguments sufficient to support a respectable dissent. In such a case he may think it wiser to discount his own opinion in favour of some appropriate policy solution. Because he is open to the belief that some legal issues cannot be resolved by legal standards, the fact that good arguments can be put on both sides may become more important than the fact that he thinks one is stronger; for he has no sufficient reason to suppose that his opinion, in a seriously disputed case, is a more reliable guide to the law. He might therefore prefer to pursue a decision which favours some widely approved social goal, about whose merits he will have less doubt than he has as to the requirement of precedent.

It is interesting to note that the first of the above cases leaves the positivist judge on the more dubious ground. For he has ignored his professional opinion that the plaintiff has no legal basis to sue, in favour of a personal view that he ought to have one. However, in each of the other cases, he can at least argue the following line: because the law on this matter is fundamentally unclear, two conscientious judges can arrive at different decisions as to what the law is. But if two such judges can disagree, then one judge could as well rule one way as the other. Therefore, as far as the parties are concerned, a decision either way would be just as fair. In fact, it could not be unfair to resolve the issue by tossing a coin, since neither party could claim to have had any verifiable 'right' to the decision. Hence the judge should do the sensible thing and apply the best rule he can think of with an eye to future cases and general welfare. Since one party had to win and the other had to lose, and since this choice was always indeterminate, the retrospective application of this rule can hardly be unfair.

Of course, a non-positivist judge could affect a similar line. Although believing that in principle a legal solution is always available, he might be similarly concerned at the thought that good judges will disagree on what it is. But the difference is important, because here it makes sense to insist that the judge apply his professional opinion of the law's requirement, for this will still constitute the best evidence available to him as to what this law is. If he does his best to evaluate the difficult arguments, then he is entitled to assume that the opinion which results is the closest he can get to the correct law on the matter, just as a conscientious jury can assume that their considered view of the facts is acceptable no less because the facts remain arguable. In both cases alike, the belief that one correct answer exists prevents this awareness of fallibility constituting a reason for giving up the task. Furthermore, if the professional difficulty of ascertaining the law *was* such a reason, then much less of the

law would end up being applied in difficult cases. Although the eventual ruling in a particular dispute might seem to the parties no more predictable than tossing a coin, the practical result of a belief that correct solutions exist will be to maximise the application of correct law within the system.

If we now return to the positivist judge, who claims he must sometimes make new law because its indeterminacy in principle leaves him no other choice, we will find some serious problems of respect for and candour to the parties. First, should he inform the parties of his general philosophy of law, that mostly he will apply past law but that in difficult cases he may make new rules, unknown to their legal advisers? If so, will he give them a chance to argue their view of when this threshold arises at which law-making should start? Will he allow them to participate in the latter process by canvassing law reform reports, economists, sociologists, gallup polls and so on? At the very least, should he inform the parties when he has reached the stage where he will stop trying to apply the law and create a new rule? Has he any answer to their claim for candour on this matter other than the tactical point that so forewarned they are likely to settle the case? It seems clear that the positivist judge must be less than candid to the parties in order to use their dispute for purposes irrelevant to their arguments, and perhaps contrary to both their interests. For his ability to play this legislative role depends on their voluntary cooperation; they must agree either to chance the result as a lottery, or give up their interests in aid of some social goal they may eventually read about in his judgment.

The failure of positivist theorists to face this question seriously is worth some reflection. For if the parties themselves would generally prefer to move on to settlement or arbitration, it can hardly be claimed as necessary for the administration of the common law. All of these law-making claims can simply be regarded as a special area within the overall category of social disputes where P's claim to protection or compensation has no established legal basis. There is really no more reason to give judges the power to create this legal basis than in all the other areas where some people may object to the effect of others' legal conduct on themselves, without going to court over it.

All this adds up to a rather dismal picture for our law-making judge. First he is not competent to do the job; secondly he lacks any democratic right to enforce his self-made rules on others against their will; thirdly he must treat the parties with such little respect as to practise a virtual deception to have his way; fourthly he must sacrifice the interests of parties who have come to him on the understanding that he will protect them; not to mention those others caught by his retrospective rulings. Finally, on the reasonable assumption that the parties would normally prefer either to settle or arbitrate, such a law-making power is hardly a 'necessary' evil. Given all this, one can only conclude that he sees no intelligible alternative to this philosophy.

Before considering his position some account should be taken of a contemporary attempt to strengthen this positivist philosophy by an interpretation of law-making which claims some respect for democratic theory.

Lord Devlin's Judicial Populism

Although the majority of judges who believe their duty includes making new law tend to adopt instrumentalist criteria of general welfare, and do so along familiar utilitarian lines, this is not the only available approach. Lord Devlin, an eminent contributor to the subject, has recently stated an alternative approach which is designed to meet the objection that the judge has no democratic basis for this legislative work.⁶

Instead of trying to formulate social policy, Lord Devlin requires the law-making judge to look for and apply a consensus of community opinion. He assumes that some such consensus will exist as to what the law should be in difficult cases. The judge, he cautions us, must not assume he has a right to make 'dynamic' decisions which would change or improve this consensus, for that would be a 'partisan' support for some minority group. Rather, the judge must get his mandate from the prevailing consensus, such as it is, on the matter. Like many judges who expound legal philosophies, Lord Devlin's conviction has an almost theological ring of confidence: 'All this seems to me so obvious that rather than elaborate upon it, I prefer to search for an explanation of how it can be that wise men apparently think differently'.⁷

In order to apply this in practice, Lord Devlin does not allow the consensus to be treated as an issue of fact. Presumably to avoid parties producing commissioned opinion polls, sociologists or politicians (who may have some professional sense of what the consensus is) in court, he treats the matter as a private and somewhat mysterious one for the judge. He has a kind of prerogative to say what the facts on consensus are without appealing to any tangible evidence about them. In accordance with his earlier views on moral populism in the famous Hart-Devlin debate, Lord Devlin believes that the judge develops, chiefly through his professional life on the bench, a special insight into the sort of values the ordinary man holds, and it is through this insight that the good judge will arrive at his understanding of the relevant consensus. As with Lord Devlin's earlier views on the enforcement of morals, his civilized and scholarly style and his deep moral concern with such matters may easily blind us to just how absurd is this claim, and how prejudicial his unargued commitment to it.

For while sympathising with Lord Devlin's attempt to answer responsibly the charge that judicial law-making is undemocratic, we must still ask ourselves why a community consensus should have anything to do

6 *The Judge* (O.U.P., 1977), Ch. 1.

7 *Ibid*, at pp. 5, 6.

with the matter. If there is a discernible majority view, then to apply this is really no less partisan, from the parties' standpoint, than to appeal to some more progressive outlook which may become tomorrow's consensus. For there is no warrant for treating a prevailing public opinion as indicative of any serious commitment, much less as evidence of agreement that a judge can treat it as law. On reflection the public are more likely to condemn such an approach as both superficial and irrelevant.

In reality, our populist judge has no more reason to suppose he has a mandate to impose a 'consensus' view on the parties than the instrumentalist judge has to impose a policy goal on them. When he further interprets this consensus as a matter to arrive at by introspection rather than observation, then he has come perilously close to claiming a mandate to make law according to his discretion, limited only by his conservative instincts and perhaps guided by his strategic sense of what he can get away with.

What Lord Devlin has proposed is really no more than a rhetoric for discretion, and the reason we should be concerned is his apparent faith that it amounts to a rational means for decision-making in hard cases. His central distinction between the 'dynamic' judge, who seeks to change the consensus, and the 'activist' judge who is content to apply it, collapses when we learn that the judge gives himself discretion to say which is which, and does not allow this decision to confront relevant factual evidence.

It is interesting to consider how strange these legal philosophies of the instrumentalist and the populist would look in a simpler social practice governed by a system of rules. As with most games, some of the rules of cricket give rise to controversy in their interpretation and application, and in particular cases the correct decision may be unclear such that two good umpires can disagree. Where the correct ruling is difficult in this sense, these philosophies would agree in their right to look beyond the rules for a solution, according to their respective assumptions. The instrumentalist, in his concern for general welfare, will have a strong case for a doctrine that gives all disputed decisions to the losing team, thus maximising both the competitive efforts of the players and the general excitement and fun for spectators. The populist will be hard put to avoid giving the decision to the team with the biggest fan club, whether he decides this factually or by some intuitive means.

No doubt we would reject the absurdity of these procedures, not just because their appreciation by the players would turn even clear decisions into disputable ones and eventually ruin the game for all, but also because of the belief that something vital is lost if the umpire gives up his responsibility to apply the rules in such cases. For it is really only in the disputed cases that his decision is necessary. In other cases, the players can apply the rules to themselves, and many games are based on this assumption. In practice, the difficulty in applying such rules is not considered a sufficient reason for giving up the task. If the rule is vague in its statement, the players would reasonably insist that the

umpire consider the essential point of the rule and decide accordingly. If two rules seem to conflict, they would expect him to consider their respective purposes and to determine, in the most fair and rational way he can, which must take precedence. Although the authority for this procedure will not be stated in the constitution setting out the rules, players and others will simply take this for granted, just as they take for granted the exclusion of any right to make new rules during the game's progress. These assumptions will constitute their 'jurisprudence' for the game of cricket.

The question arises whether any similar assumptions about judges could make more sense than the law-making theories of the positivist. To answer this, we have to consider how else the judge might resolve the hard case.

Judges as Arbitrators

If the positivist judge claims he cannot find a solution through indeterminacy of the law, the question arises why he should assume that the only alternative is to *legislate*. For if the parties were to have any say, they would surely be reluctant that he might introduce a new law rather than try to resolve the dispute according to its merits. It is much more likely, if they are not permitted to withdraw their dispute from his jurisdiction, that they would want him to act as an *arbitrator*, and seek a solution he believes to be the fairest overall to both parties. The advantage of this approach is that the parties' interests are still paramount; no arbitrator assumes nor is given by the parties authority to resolve their dispute by appealing to grounds as extraneous as general welfare, or the interests of future disputants.

But even though his concern for fairness to the parties would be in their interest, an arbitrator's approach would be hardly less problematical. His finding would be just as unpredictable as that of the legislating judge because the appeal to considerations of fairness would seem hopelessly vague. This is not just because of the generality of any fairness test, but because numerous ideas of fairness would come to mind. For example, an arbitrator might think that personal generosity or intolerance in the parties' behaviour was a relevant factor or he might believe that, if D's blameless act caused P's loss (or if both were at fault) then the plaintiff should be awarded some compensation. Alternatively, he might consider such personal matters irrelevant, and ask what general rule would be most fair for cases of this kind. Thus, in *Trigwell*, he might believe that it is unfair for landowners to carelessly allow stock to wander onto public roads and put motorists at risk: on the other hand, he might think it unfair that a depressed rural industry should be made financially responsible for more secure fencing and/or liability insurance; he might urge instead that motorists should drive more carefully and take out their own insurance.

But if we could imagine a preliminary discussion of his terms of reference, we could understand the parties' apprehension that he might

thus pursue whatever notion of fairness attracted his sympathy. For the distinctive fairness of a resort to conventional legal process is found in the judge's responsibility to treat like cases alike, by treating precedents as exemplifying rules governing *classes* of disputes. Our parties may, accordingly, prefer that their dispute be resolved by continuing to pursue this same notion of comparative fairness; that is, by seeking that rule which would appear most consistent with the overall law of negligence. This would be undertaken by asking what notional rule would best conform to whatever general values can be discerned behind those negligence rules not presently in dispute. For, in seeking the rule which best 'fits' this case-law, the judge-arbitrator is in effect pursuing a deeper version of the fairness ordinarily inherent in applying settled rules; he is trying to ensure that the parties' dispute is governed by the same general standards as have shaped past rules which are now accepted law.

In pursuing this kind of institutional fairness, he would consider what a rational, impartial person would think the law was, if it were to be as consistent as possible with all the settled cases and doctrines dealing with negligence liability. This is no doubt very close to the kind of intellectual exercise required of the judge, before he concluded that this material could not furnish a legal answer. However, our judge-arbitrator has a distinct advantage because his responsibility is not to apply the law (because it seems inconclusive) but to act fairly according to the law, to the extent that it is clear. Hence, just as the judge treats past judicial opinions as exemplifying rules of law, our judge-arbitrator will treat such rules as exemplifying the requirement of the more general values they endorse, and try to act consistently with them.

However, the preference for such an 'institutionally appropriate' decision may not increase the arbitrator's confidence in finding it. For disputes will arise where an appeal to this evidence provides no convincing answer. If he is nonetheless bound to resolve the case, then the less clear the evidence that one solution is a better fit than others, the more his eventual proposal will tend towards an intuitive judgment of its intrinsic merits. But this tendency to 'creep' outside the institutional framework (because its boundaries lack precision) does not undermine the distinction between an arbitrator judging with broad discretion and our judge arbitrating in the way described. For the latter can be expected to test his intuitions against the common law at least to the point where his sense of what best fits this law blurs with his personal sense of what is fair. So long as he *tries* to act in this manner, the parties may accept this procedure. They may not think it ideal, but they may prefer it to possible alternatives.

Finally, because his uncertainty as to which rule makes most sense of the past law can lead to a conviction that no rule makes more sense than another, the parties might concede a last resort test of general fairness. But such a test will inevitably reflect views based on a comprehensive study of the rules and principles governing comparable cases, and is therefore more likely to conform to values implicit in them, than the

opinions of those who lack this scholarship. For example, an arbitrator's intuitive sense that it is unfair to subject road users to the risk of wandering animals, will be guided by his understanding of the basis on which exceptions have been justified to allow such risks in the past.

Considering how reasonable this suggestion seems, and the crucial underlying fact that one or both parties have come to court because they wish the judge to use his authority to enforce a solution, it is surprising this arbitration model is not a more serious competitor to the legislative theory. This is perhaps because an arbitrator's ruling is essentially *ad hoc*, devised for one dispute and one set of litigants. But it would be a mistake to assume that such *ad hoc* rulings, given in the institutional context described, could not be assimilated within a body of precedent just because they have not been deliberately fashioned with a regard to future parties. For, even in those cases where the judge seems to venture outside the common law experience, his ruling will reflect a view of the relative importance of whatever general fairness arguments he applies, and this assessment, implicit as it must often be, can be accorded institutional respect within the system no less than a highly explicit judicial ruling. In this way, a respect for his professional opinion as to their relevance and weight can be formalised, alongside that respect required by conventional precedent theory for his particular ruling. Those who follow this approach in future cases where the law is unclear will inevitably review his interpretation of the relevance or requirement of such general values, and may reject it where the required respect for his judgment is overborne by a better understanding of what these values would require.

Over a period of time, the above procedure would see the institutionalisation of numerous general values, exemplified in all the arguable cases. Although none of them might be decisive in any particular case, all would become respectable reasons to support solutions to difficult cases, notwithstanding arguability as to their interpretation and relative importance. Such values would in fact be legal principles, not intrinsically different from those general values we might appeal to to justify much of the established, non-controversial part of the common law. A judge who thus seeks to resolve the difficult case by appealing to his sense of the most rational, consistent requirement of such judicially endorsed values, is in fact doing very much what Dworkin's theory would expect of a common law judge faced with a hard case; he is the judge we would naturally describe as practising principled decision-making. Because he is now respecting institutional values, he can claim to be 'applying' rather than 'making' law. Although he must use his judgment of such legal principles to make a new rule, his duty is still to assess their institutional relevance and importance. The fact that this may be controversial does not lead him to conclude that he must at some stage give up the task and fall back on an assumed discretion to pursue some social policy or welfare goal.

For, if fair treatment of the parties is to be his underlying responsi-

bility, then a maximum adherence to the legal standards governing past disputes is more likely to achieve this than an intuitive judgment which lacks this experience or treats it as irrelevant. The standing risk that this will sometimes throw up decisions which seem to stand on no more than a personal sense of what seems fair does not undermine the procedure, because the injunction can be followed until it ceases to be intelligible. Moreover, because his duty is to try to find that solution which is fairest because it most accords with the settled law, he cannot simply sift through the history of precedent to find support for his proposal; he must assess this evidence in order to know what he should propose.

An 'Arbitrated' Solution to Trigwell

If such an approach were suggested for *Trigwell*, a preliminary objection might arise that the context in which it would make sense has been importantly changed. For we can hardly present *Trigwell* as a case of 'unclear law' without seeming to take sides in this dispute between the two philosophies of law. For the rule in *Searle v. Wallbank* seems admirably clear to the positivist, who sees the law as a set of rules applied by authoritative courts. But the principles theorist sees this rule in the light of legal principles which appear to have determined its acceptance by past courts, in particular the risk principle of *Donoghue v. Stevenson*. Thus the positivist will treat the no-duty rule as clear law whereas the principles theorist is likely to find the rule invalid; he will think it at least arguable whether this rule is a valid exception to the principle or is inconsistent with it. Hence we have no agreement that the relevant law is unclear, simply disagreement as to whose view of the clear law is to be preferred. Nevertheless the end result is essentially the same, because what remains unsettled is the actual decision as to whether Trigwell had a right to sue. Moreover, this decision has been unclear even on the positivist philosophy, as the variety of opinions given by State Supreme Courts has shown. We might therefore merely caution our arbitrator-judge that his pursuit of the fairest solution in the institutional context is likely to be taken as favouring one philosophy over the other, and ask him to try to ignore this in his task.

Such a judge will now face competing arguments appealing to institutional fairness: First that he act consistently with the *Searle v. Wallbank* rule; secondly that he act according to the risk principle of *Donoghue v. Stevenson*. For each of these represents a formula for treating like cases alike, and it is this ideal of fairness he seeks to maximise. In order to choose between them, he will have to consider which approach would be more consistent overall with *all* the past law dealing with negligence liability. He must therefore consider not just whether P comes within the class to which this rule applies, but also whether the designation of this class is consistent with the treatment of like classes subject to such liability rules and immunities.

In the end, the judge seeking the most coherent account of past de-

cisions by reference to this notion of fairness, cannot avoid the crucial question whether the rule is itself exceptional to the general risk principle or is simply inconsistent with it. His answer to this question cannot be concluded by citing an authoritative opinion that the rule is valid, for no such opinion could *guarantee* the rule's consistency with the institutional picture described by such general principles. It is precisely the belief that judges in hard cases must seek this more comprehensive account of fairness to the parties, which gives such principles a higher status than the judicial opinions which characteristically invoke them to define rules for particular cases.

Although the above procedure might be accepted in theory as an alternative method for resolving cases where the rules are unclear, it might seem to some extravagant to describe it as a principled decision-making approach. For it will often remain contentious whether values so appealed to are sufficiently exemplified in past decisions as to warrant any claim of institutional endorsement. Further, it would be apparent that their interpretation would tend to blur with the judge's personal sense of what would be a fair solution, and the more general the principle the more risky this might seem. For such reasons we might leave this for the present as an illustration of a method of approach which tries to combine a maximum respect for the parties with an arguably more profound respect for the past law. Instead, we could return to a classic example of a legal argument expressly based on a once-controversial but now universally acknowledged legal principle, and consider its status against the positivist claim that judges necessarily 'choose' solutions for difficult cases.

Donoghue v. Stevenson: The Use and Abuse of Lord Atkin

The contemporary assumption that *stare decisis* simply means following decisions and rules, is nowhere more evident than in the conventional treatment accorded that most famous of 'activist' decisions, the speech of Lord Atkin in the House of Lords in *Donoghue v. Stevenson*⁸ in 1932. In this case Lord Atkin purported to offer a principled justification for a wide range of nineteenth century decisions and doctrines imposing a liability for negligent damage. They were, he explained, applications of a more general legal principle that a duty of care arose where harm to others was foreseeable. Although not explicit in the judgments, such a principle was clearly implicit in those cases, he said, and therefore it was correct to apply it to manufacturers in their relationship to consumers, unless some distinction in principle could be found to support their immunity.

In putting this explanation, Lord Atkin was aware that such a distinction had been effective in the past to prevent the almost identical general principle of Brett M.R. in *Heaven v. Pender*⁹ in 1883 from gaining

8 [1932] A.C. 562.

9 (1883) 11 Q.B.D. 503.

judicial acceptance. This attempt had failed, in Lord Atkin's view, because it was widely felt that insufficient account had been taken of the ways in which a manufacturer would lose control over the condition of his product once released into the market-place. To avoid serious unfairness arising out of this feature, such a duty had to be confined to goods sold '... in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination...'.¹⁰ Once this was attended to, the principle implicit in those earlier cases would apply here as well.

As all lawyers now appreciate, this unusually rational approach to the question allowed later courts to extend negligence liability to a vast range of situations previously not covered by 'precedent'. In this way Lord Atkin was able to show how a pedigreed *list* of liabilities could be more appropriately characterised as a *test* for liability, so stating a coherent theory on which to base the modern law of Negligence.

If it now seems hardly conceivable that responsibility for negligent damage might still be confined within the narrow range of nineteenth century decisions, we should remember just how close was this epochal common law ruling. The manufacturer's duty was accepted by only three of the five Lords, and this famous 'broad proposition' about foreseeability was not endorsed by any of his fellow judges. Further, some highly regarded judges suggested that Lord Atkin's general principle lacked any authority. No one could be very confident about its status until 1943 when, in the well-known 'pregnant fishwife' case of *Bourhill v. Young*,¹¹ the House of Lords expressly endorsed this principle, before proceeding to adopt a variety of arguments to prevent its application for the benefit of a victim of nervous shock.

The conventional explanation for what 'really happened' in this case is that Lord Atkin simply decided it was time to venture on some fairly fundamental law-making by creating rights and duties which had never previously existed, outside of contract, between manufacturers and consumers. Hence the 'narrow' proposition about a manufacturer's duty was stated. In order to support this the argument was advanced that the earlier cases reflected a common principle, broad enough to cover the case in hand; hence the 'risk' or 'foreseeability' principle. For the purposes of this explanation it does not really matter whether Lord Atkin believed his own argument, and was intellectually committed to the account he gave, or was merely providing cover for an exercise in judicial legislation. The conventional view insists that he must have made new law, because certain tort rights and duties existed after this decision which were clearly not there previously. Accordingly, Lord Atkin's speech has served for nearly half a century as a pedagogical device for law teachers to give first year students some 'realist' insight into the judicial process. This is usually done by contrasting his claim

10 [1932] A.C. at p. 599.

11 [1943] A.C. 92.

to be applying law with the 'more realistic' account that he is making it, from which one might proceed to discuss judicial subjectivism, democratic theory, social relevance and a host of other interesting issues.

What students are generally expected to consider in this exercise are two fallacies which are said to have haunted the judicial process in the past. The first is the now unfashionable idea that a Natural Law of objective and eternal moral values will tell the judge what to do in such a case. Although Lord Atkin appealed to no such idea, he did refer to the Christian edict to 'love thy neighbour' as added support for the legal principle that one must at least take reasonable care to avoid harm to him. The second fallacy is the assumption that courts arrive at their decisions by some sort of mechanical process of argument which leaves no room for the interplay of personal evaluation or prejudice. Although no reputable theorist or judge has ever been exposed as a proponent of such a strange theory, this has long remained an attractive paranoia with 'realist' law teachers. They will point out that, since Lord Atkin's major premise cannot itself be deduced, it must in the end be 'supplied', *i.e.* by Lord Atkin himself.

On this view, Lord Atkin's fame is not to rest on his perceptive scholarship and imaginative reasoning, but rather in his strategic judgment and sense of historical timing, and our conception of a great judge ends up being little different to our conception of a great poker player, albeit one with some sense of fairness and humanitarian concern.

Despite its persuasiveness, we need not accept this view just because it avoids the twin fallacies of Natural Law metaphysics and 'mechanical jurisprudence'. At least we cannot do so without first considering the radical idea that Lord Atkin may in fact have done just what he claimed to be doing. For what, after all, is irrational or unreal about the claim that those earlier cases *did* exemplify the principle he attributed to them? If this is an intellectually defensible claim, it follows that he had 'found' rather than supplied this major premise. Can we, for example, refute such a claim by showing that the previous judges, apart from Lord Esher, had never adverted to much less purported to apply this principle, but in each case believed they were deciding liability by reference to a particular duty relationship supported by its own line of precedent? Not necessarily, because so long as they were merely applying these pedigreed duties to cases within their scope, the question could never arise as to whether such duties might reflect some broader legal principle. But if we cannot find at least *obiter dicta* in support, then in what sense can we say this principle is implicit, *i.e.* 'already there'? The answer we have to consider is that such a principle *provides the best explanation* for those previous cases;¹² it gives the most coherent and rational account of the tort liability they apply against a general background of non-liability for merely being a cause of injury to others. Further, we cannot assess this explanation other than by looking closely at the cases in

12 This conception of implicit standards is one of Dworkin's major contributions to legal philosophy.

point, when we will see that each duty applies to a relationship of special proximity between the defendant and the plaintiff. Of course, different judges may disagree on what this best explanation is: although Lord MacMillan adopted the logic of this approach, he was not prepared to commit himself to Lord Atkin's view that this proximity was one of foreseeable risk, and said that he remained open-minded as to its proper significance.¹³

Nevertheless, Lord Atkin was convinced that it was this essential factor of risk which should be seen as the gist of liability in these cases, and argued that the sense this gave to the law best reflected requirements of humane concern and fair treatment each citizen had a right to expect from others. After considerable hesitation, his colleagues in the English courts agreed with him. But we cannot conclude from these facts of initial disagreement and belated acceptance that our account is unrealistic, because the job of finding the most rational account is inevitably contentious, just as it often is in the more usual case of deducing a rule by the study of some particular decision. For the positivist sceptic can hardly deny that much the same intellectual exercise is involved in extracting a rule from a judgment or series of cases as is involved in thus extrapolating a principle from a set of rules. In both situations, the evidence may or may not support the inference, and where it does it may well do so unclearly; but it is still a question of considering the available evidence, *i.e.* the common law experience. There is no need to go outside this evidence and interpose particular social and moral goals in order to reach a conclusion. Further, in both situations we can understand the difference between a genuine attempt to put the most rational and consistent account of the past cases, and an account put merely to support the pursuit of some ulterior goal. We should not give up this understanding just because even the most sophisticated attempt to thus apply the law can, through the intrinsic vagueness of having to reason from general standards, often be made to look like the pursuit of some such personal choice.

This radical theory does not deny that such things as prejudice and class background may influence the judgment of these matters, nor that perceptive and experienced counsel may base their tactics on a sense of how these factors might affect individual judges. None of this is worth denying because it has no real significance for choosing a theory of law. The subjective element in judicial decision-making is not a basis for such a theory, but simply a hazard of the course, as it is in all social practices and games in which rules and other general standards have to be applied.

Despite all this, how can our theory really deny that new law has been made? Before *Donoghue v. Stevenson* there was no manufacturer's duty but after that decision there was; how can this not be a case of 'making' the law, since the acid test must surely be whether the plaintiff had a right to sue? Compelling as it seems, the radical theory has no

13 [1932] A.C. at p. 619.

real difficulty with this argument because it simply denies the claim that this right could not predate the decision. It says that manufacturers *did* owe this duty prior to 1932, but that the courts had not sufficiently appreciated this fact. This seemingly audacious claim is not as easy to refute as it appears. For a start, it follows from the decision given in the case that the House of Lords were ruling that a duty existed on the manufacturer at least at the time when the ginger-beer bottle was being processed, which is likely to have been some years before the case got to the House of Lords. Lower courts which denied such a duty during the earlier stages of litigation were not, as the House of Lords told us, applying the correct law to the case.

No doubt we could plead that this is just a fiction designed to cover a piece of retrospective law-making, but the question is whether such a plea can be supported by anything other than that it is needed to support the law-making assumption. If we avoid this sort of question-begging, there seems to be at least as good a case that the claim of retrospective law-making is a fiction, and that courts are applying the law as it was at least as far back as the vesting of the cause of action. Further, we really have no guarantee that the House of Lords might not have come to the same decision thirty or more years earlier, if the matter had then been argued, or even if an appeal had been taken in *Heaven v. Pender*¹⁴ in 1883. We could perhaps go back as far as *George v. Skivington*¹⁵ in 1869, where the Exchequer Chamber ruled in favour of a limited manufacturer's tort duty, albeit on somewhat dubious reasoning. In the end, it would seem dogmatic to deny that such a duty was at least on the cards from the time the House of Lords could accept the rationality of the sort of explanation which Lord Atkin eventually put up, and this was itself possible from the time those cases existed for which such an explanation was sought. On this view, the fact that we might provide plausible social or historical reasons why they might have been unlikely either to seek or accept such an account is not a challenge to this claim about misunderstood rights so much as an explanation of the failure to recognise them.

This sort of analysis shows how even the most famous example of positivist law-making is perfectly susceptible to a principled explanation. For the case illustrates the genesis of a common law principle conceived as a general standard of value capable of providing a coherent account of a set of respected past decisions in favour of liability for negligent injury. This principle does not need to be justified by an appeal to the social desirability of such decisions, but by an appeal to the most consistent expression of them taken together; for their appropriateness in context is not now in question. We cannot dismiss this analysis just by showing these decisions were more intuitive and less reasoned than we might now wish, because the judges who gave them did not need to

14 (1883) 11 Q.B.D. 503.

15 (1869) L.R. 5 Exch. 1.

consider their implications for all future cases; for they themselves needed an account of previous law sufficient only to resolve the disputes they dealt with.

It is because this principle can now be seen to provide the best explanation for these cases that we can claim it was implicit in them, even though none of the judges took their reasoning this far. For this principled analysis is not needed until the question arises whether a new dispute deals with interests sufficiently comparable to be governed by the same law applicable to these cases. When this occurs, the search for such principles is the only way to maximise consistency in resolving the new case with the law applied in past cases. What must be remembered about this kind of principled approach to precedent is that the best explanation for a body of judicial decisions may conflict with the reasons given for any particular decision purportedly based on them.

No doubt many people would feel reluctant to accept this account because of the seeming strangeness of the idea that courts might authoritatively apply rules long after they have ceased to be valid law. Further, because the search for the most consistent set of rules is continuous, it follows that no absolute certainty can ever be achieved on arguable matters of law. But this uncertainty exists no less within the positivist theory, the difference there being that the law on arguable issues will be treated as a matter of judicial choice, rather than of professional judgment in the sense described. There is no way to avoid this uncertainty and there are many examples where ultimate appellate courts have acknowledged that incorrect but authoritative judicial opinion may prevail over many years; a recent noted example is the House of Lords ruling in 1964 that English courts had misapplied and the legal profession had misunderstood the law of negligent statements, since the late nineteenth century.¹⁶ Because its test for correct law in the difficult case is simply the most recent opinion of the highest court, the positivist theory requires this court to apply retrospectively the law it wishes to apply in future. By contrast, the principles theory claims that some past authoritative opinions were not law, not because they were then or are now undesirable, but because a more rational and consistent account of the relevant case law is now available.

It is in this way that a sophisticated and thoroughgoing 'legalism' can allow a good judge to be a responsible 'activist'. Lord Atkin managed to do both and so, most of the time, do our own judges, mainly because their professional intuition tells them to take principles seriously and treat them with a respect appropriate to their influence in the law. It is only on those rare occasions when judges appeal to a legal philosophy that danger arises, and this is largely because of the hold of the positivist philosophy and its simplistic model of rules. This philosophy insists on the dogmatic claim that a judge must be either applying rules or making law. When judges give up this philosophy they will no longer be trapped

16 *Hedley Byrne v. Heller and Partners* [1964] A.C. 465.

by such a narrow choice, and will reconsider hard cases like *Trigwell* by reference to the general legal principles naturally relevant to such cases, just as they normally do in other difficult cases they deal with, when they are not led astray by their philosophical assumptions.

One of the most important assumptions likely to hinder acceptance of this principled approach is the idea that the highest court within a legal system cannot be *legally* incorrect. Its decision may be unwise, superficial or difficult to reconcile with past decisions; but in the absence of a higher court to appeal to it must represent the correct law until it is statutorily repealed or changed by another opinion of this court. Since the positivist theory says that the present status of an arguable rule is in the end settled only by the exercise of an authoritative judicial opinion, it follows that such an opinion *is* the law, and cannot therefore be wrong. For many judges this seems so obvious that it is not recognised as an assumption, and the only room for debate concerns the best way to exercise this judicial power in the disputed cases, whether, *e.g.* to appeal to some utilitarian ideal, or to some sort of consensus test. But this debate is essentially about preferences, since the court has already been conceded a discretion to 'make' law, and is therefore free to follow its own lights; whatever the court rules will be correct within the system.

But if the principles theory is adopted, it makes good sense to say that the highest court's decision may be wrong in law, because the validity of their ruling will now depend on its conformity with the law rather than on their inherent authority as senior judges. The choice between these theories, and in particular the cost of trying to maintain the positivist assumption, can be tested by considering the important if widely neglected ruling in *Beauesert Shire Council v. Smith*.¹⁷ For in this case the full High Court purported to recognise a new 'action on the case' in a decision which the Australian legal profession has subsequently ignored as representing the law of torts.

BEAUDESERT: NEW LAW OR MISJUDGED LAW?

In this case the full High Court based their unanimous decision on the proposition that, '... independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other'.¹⁸ This unusual formula, which the High Court described as an 'action on the case', was used to enforce a novel liability, without proof of fault, against the Shire Council's removal of gravel from the bed of a stream such that Mr. Smith was deprived of his normal access to irrigation water, and suffered the loss of a crop as well as financial loss in re-siting his pump. The unlawful element arose because the council technically lacked authority to carry out this excavation when, although the required

17 (1966) 120 C.L.R. 145.

18 *Ibid* at p. 156.

Ministerial permission had been granted, further documentary requirements had not yet been completed in accordance with regulations made under Queensland's *The Water Acts* 1926. However, this technical breach of the statutory requirement was not itself the 'unlawful' feature (because in the court's view that would confuse the general law on statutory liability in tort); rather, it was the technical trespass which thereby resulted against the owner of the water-course, viz., the Crown in right of the Queensland Government.

This interesting judgment provides a useful test case for our competing philosophies of law. The High Court, enthused by a notion that actions on the case may still be a fecund source of liabilities, ignored the potential availability of Nuisance, a tort designed to deal with actionable interferences with others' use of land, on the pretext that Nuisance would not lie against a defendant not himself an occupier of the land from which the interference came. Instead, it cited a handful of antique and disputable cases to give some pedigree to this new principle.¹⁹

Although it is difficult to briefly summarise all that is wrong with *Beautesert*, it is clear enough that its defects are due to the High Court's having turned a blind eye to questions of principle. They appear not to have considered what they were trying to do nor how their proposal would fit in with other legal principles they were required to respect. As a result, they have stated a doctrine for tort liability which will allow any person to sue for damage, as well as for financial loss, whenever this results as an 'inevitable' consequence of the defendant's tort to a third party. This latter tort may be quite technical and blameless, and no requirement either of intent to injure or recklessness or negligence, nor any requirement of foreseeing the risk, will limit the scope of this liability. Read on its terms, this creates a parasitical tort which can be attached to any conventional tort to defeat most of the complex and precise requirements of individual torts specifying the nature and extent of the tortfeasor's responsibility; these include well-settled principles governing the defendant's fault, the scope of plaintiffs, the limits of recovery for consequential injury and the general prohibition of financial loss. All in all, taken seriously it would make nonsense of much of the theory and practice of the law of torts.

Beautesert therefore ignores legal principles and doctrines which make up much of the body of the common law. But these are principles and doctrines which our High Court also takes seriously, since it has applied and defended them in countless past cases. And of course so have the

19 In the absence of precedent on the point, academic opinion strongly favours the view that a non-occupier can be liable for a private nuisance. See J. G. Fleming, *Law of Torts* (5th Ed. 1977) at pp. 709-410; *Winfield and Jolowicz on Tort* (11th Ed. 1979 Ed. Rogers) at p. 371; *Salmond on the Law of Torts* (17th Ed. 1977 Ed. Heuston) at pp. 68-71; H. Street, *The Law of Torts* (6th Ed. 1976) at p. 103; H. Luntz, D. Hambly, R. A. Hayes, *Torts — Cases and Commentary* (1980) at p. 904; *Clerk and Lindell on Torts* (14th Ed. 1975) at p. 382. The definitive legal critique of the *Beautesert* judgment is G. Dworkin and A. Harari 'The *Beautesert* Decision — Raising the Ghost of the Action Upon the Case' (1967) 40 *A.L.J.* 296, 347.

House of Lords, Privy Council and other courts whose views are relevant. It is not surprising, given the nature of this confrontation, that at least one State Supreme Court judge has actually dismissed an argument based on this doctrine because in the circumstances of his case there was 'no evidence of any intent by the defendant to injure the plaintiff', a desperate ignoring of the crucial fact that 'intent' in *Beaudesert* could refer only to the act of removing gravel as being one of conscious volition.²⁰

The conflict of legal principles here is so grave that we cannot both accept what *Beaudesert* tells us and also claim to accept the law this same High Court has applied in the past. We must, therefore, conclude that this unanimous ruling by three High Court judges cannot be taken as the law on the matter. On the other hand, we cannot altogether give up our respect for their right to make even a bad ruling, and it is this respect which requires us to take their actual decision as authoritative on its facts. When the dust settles we will return to this decision and find the best explanation we can give it which is consistent with the body of the law. This might be pursued either through some moderate extension of Nuisance doctrines, or by acknowledging a limited action on the case for protecting the beneficial interest in a government or statutory licence.²¹ If no explanation will make sense in this way, then we have to confine its authority to the most particular statement of its facts, and trust that the High Court will at the first opportunity correct itself.

Because our present High Court judges have adopted a philosophy which gives a higher ranking to judicial opinions than to legal principles, they will inevitably characterise *Beaudesert* as a case of law-making, albeit unwise, and will have to insist that it is therefore correct law until it is overruled by another law-making exercise. They cannot avoid this conclusion without jeopardising the claim that their decisions are valid law by virtue of their office, rather than through their consistency with authority. It is important to see that the logic of this explanation requires that their decision must represent the true law in the meantime, and that this proposition is rejected by the opposed theory of principles.

We can now test this claim by considering why this ruling, which ought to be the most prolific source of actions in the history of the common law, has not yet supported one instance of liability in any Australian court during the past fourteen years. For except in a handful of cases where it was suggested as a parallel argument, no legal practitioner has been prepared to risk his client's money on the authority of this ruling. This cannot be a light decision, because solicitors would appreciate that complaints of professional negligence would normally be based on just such a failure to advise on the relevant law.

Let us suppose that at least one solicitor, beguiled by the philosophy

20 See *Hull v. Canterbury Municipal Council* [1974] 1 N.S.W.L.R. 300.

21 See e.g., *Vaughan v. Shire of Benalla* (1891) 17 V.L.R. 129, in which the Full Supreme Court allowed an action on the case for damage sustained by a licensee whose beneficial use was prejudiced by the wrongful act of a third party. This important decision was overlooked by the High Court.

that the High Court has created at least temporarily valid law, ignores the common view of his colleagues and brings an action based squarely on this new 'action on the case'. A principled approach would require the Supreme Court to treat the *Beaudesert* doctrine as wrong in law and, in the absence of some other appropriate tort, to non-suit the solicitor's client. On appeal, the High Court, assuming it now appreciates the implications of its ruling, will have to treat the Supreme Court's decision as a correct statement of the law *at the time the cause of action arose* and in theory this could have been shortly after the cause of action arose in *Beaudesert* itself. It could not criticise the Supreme Court for thus refusing to apply the High Court's previous decision, because the High Court itself must apply its present view of the law back to the time the injury was suffered, and this is exactly what the trial court, with apparent presumption, has done. On the other hand, if the Supreme Court had applied *Beaudesert* and the defendant had appealed, then the High Court would have to rule that the trial court had not applied the correct law to the matter, although it could hardly criticise it for this failure. Our conclusion from this is that, once the highest appellate court appreciates that their previous ruling is thus contrary to law, then there is in reality no room for it to operate as 'valid'. It never has any life of its own in the way assumed.

If we press this argument further, we can show that the positivist theory must lead to logical contradiction in cases of this kind, because the highest court's ruling will be treated as both valid and invalid law at the same time. Suppose Smith's neighbour Brown suffered inevitable damage at the same time as, or prior to, Smith's loss, but his lawyers, knowing of no legal basis to sue, delay proceedings until the decision is given in Smith's case. Suppose the *Beaudesert* Council defends Brown's claim, hoping to re-open the Smith ruling in the High Court. If the latter now refused to follow itself, its decision that the Council owed no such duty to Brown will have to relate to a point in time *before* or *simultaneous* to that when Smith's action arose, and we cannot avoid the conclusion that the Smith ruling was never the law within the jurisdiction, merely a mistaken if authoritative opinion about the law. But this contradicts the claim that the High Court's Smith-ruling was valid law at least at the time it was given.

The only way to avoid this contradiction is for the later court to acknowledge some time-span during which the earlier ruling cannot be reviewed. But this would qualify its own power to apply what it believes is correct law, and do so by using a hopelessly arbitrary cut-off date to identify those with a right to sue. One might just as well admit that it was incorrect at the time it was given, even if such an admission raises the spectre that perhaps the present decision is itself incorrect. For the lack of any ultimate guarantee that an authoritative ruling is correct does not really matter, so long as judges do their best to apply the law as they understand it. Certainly this problem is not avoided by the positivist thesis, for it can support radical changes of judicial opinion no less than

a principles theory. The difference is that the positivist allows changes to be justified by whatever the judge chooses to consider in exercising his claimed discretion; the principles thesis insists the judge remains obligated to apply that version of the previous decisions which makes most sense of all the relevant law.

If we persist in the claim that this is really just a matter of making rules and then making more rules, and that the earlier rules were valid in the meantime, but got caught up in the 'retrospective' application of the later rules, then we will end up with a seriously distorted picture. For what we will ignore is the difference between the High Court overruling itself because it changes its mind on the desirability of the *Beautesert* doctrine, and overruling itself because it now understands that decision to be contrary to legal principles it respects. The language of 'temporary validity' and 'retrospective application' is simply the rhetoric needed to present all cases of the latter as misunderstood examples of the former.

It need hardly be stressed that this is not just a choice between equally permissible descriptions, because this choice will determine how judges should judge such difficult cases. The principles theorist appeals to the idea that judges must try to act consistently with the available law on the matter. Once a judge sees that his ruling, although authoritative in disposing of the parties' dispute, is nevertheless inconsistent with legal principles he also supports, then he must either give up that support or reject his ruling. There is no scope to consider the benefits of keeping both. Once the High Court sees what is involved in trying to sustain the *Beautesert* proposition together with those numerous tort principles it has long respected, then it likewise will have no choice.

Beautesert is a useful case for those who argue the merits of such legal theories, because it exemplifies an aberration so striking that it must usually be hypothesized. As a test-case it suggests the standpoint from which the principles theorist challenges the claim that the common law is just the accumulated opinions of judges as to how disputes should be resolved. For he argues that such decisions will inevitably express a respect for the appropriateness of certain claims which people will make on others within the community, because the latter have in one way or another opposed their interests, and threatened or caused them damage. At any given time the general principles of the law of torts will reflect the very broad reasons behind these acknowledged claims, and will therefore suggest the criteria by which this sense of appropriateness is applied to different classes of injury and different kinds of circumstances. The rules and doctrines of tort law will in turn constitute the detailed administrative apparatus for applying these principles to the myriad particular circumstances where disputes arise.

Such a picture will inevitably see conflicts between judicial decisions and the established rules and doctrines governing them. But it will also occasionally produce situations where such rules and doctrines appear to controvert the more general standards and commitments they sup-

posedly reflect, and in such cases the substantive requirement of these general principles will need to be measured against principles requiring respect for the authoritative status of any past ruling. No doubt the latter will often prevail in unclear cases just because we must concede authoritative opinion the benefit of the doubt. But there will remain the possibility of cases like *Beaudesert*, where the highest court's ruling is outside this doubtful area and is clearly wrong. In such cases we need not confuse *res judicata* with *stare decisis*, and can accept that the highest court's ruling will bind the litigants without conceding that it was necessarily the correct law either for themselves or others within the system.

Post-script: The Law versus Authoritative Opinions

A major problem for any theory of principles is how it reconciles current judicial opinion on what these principles require with the principles themselves. Suppose a recent decision has interpreted relevant legal principles in a difficult case. Our theory requires that a later court might have to rule this interpretation incorrect even if the earlier court has applied the correct arguments. But to say it is wrong suggests that it was not itself a 'part' of the body of the law and hence itself evidence from which the relevant principles are derived; we cannot ignore this part of the evidence just as we cannot pick and choose from amongst the past body of decisions to which we are supposedly comparing it. But if we treat this opinion as authoritative, then we necessarily concede that it adds a distinctive weight to the interpretation it favours. If it can thus bend the argument in favour of its own interpretation, how can we deny that the judge who gave it could *make* law? Such a conclusion seems to follow from the fact that the case for his interpretation must be of less weight overall without the additional weight of his own opinion. The same reasoning will support the claim that a supreme appellate court will inevitably add a conclusive weight to the interpretation it favours; hence the realist view that the law is in the end simply what such a court says it is.

Although this appears a serious criticism, a theory of principles can defend the claim that every decision is operative without conceding either that judges may choose to bend the law or that the highest court cannot be legally mistaken. For the authoritative force attributable to any judgment will also be affected by its professional integrity. For example, if it was clear (e.g., from posthumous diaries) that the questionable decision was given to advance some personal pecuniary interest of the judge, his ruling would be discredited. In a less extreme case, we would have to consider whether the judge was trying to apply past decisions, however poor his understanding of them, or whether he ignored them in favour of some extraneous consideration. Our respect for his ruling will be crucially affected by our assessment of whether he himself respected the past rulings of his predecessors, or whether he was slack in this regard either because the intellectual effort was too difficult or because he did not agree with the results.

It is, therefore, only the decisions of judges who try to understand and apply the decisions of their predecessors to which we will give significant weight, and the reason for this conservatism is obvious: if we accorded authoritative status to the opinions of judges who did not bother to apply past law, then we could offer no justification, as judges, for bothering to apply this law ourselves, in *any* case. Our commitment to a general duty to resolve disputes by applying the law will thus counteract the occasional temptation to give weight to the opinion of a judge who ignores this duty.

Hence the interpreting court necessarily lacks any real power to alter the law it is purporting to apply; it has no freedom to make a stronger case than the authorities will allow. This is consistent with the fact that, when the judge conscientiously tries to apply past law, his decision will add its own weight to the body of authorities which all future judges must respect, and this weight might conceivably tip the scales in some future decision where the other authorities are seen to be evenly balanced. No doubt an unscrupulous judge could trick us into a false belief that his opinion on the law was actually based on the cases he cited, but this risk is a hazard of the course for any social practice governed by rules which someone must interpret, and cannot undermine the theory.

Although the same analysis applies to the highest court, confusion arises out of the suggestion that it seems academic to say such a court is wrong in law. But if a decision is correct because it is in conformity with the relevant law, rather than because it conforms with the latest opinion of the highest court, there is nothing irrational in saying the latter is wrong. The point of preserving this distinction lies in the special status it gives to the principle requiring consistency of judicial rulings. When we say the highest court's latest ruling is wrong in law we are saying no more than that, if the court took the most rational and consistent view of the authorities, it would have given a different decision.

The positivist understandably squirms at this because it suggests a world of phantom rights which cannot be demonstrated by pointing to any particular ruling. But although such unrecognised rights may represent only a small fraction of the law, if the argument for their acknowledgment is strong enough, they will have as much hard-edged reality as the most explicit rulings of our highest courts. Mrs. Donoghue drank her ginger beer on the 26th August, 1928 and her 'phantom' right had sufficient substance at that time to vindicate her solicitor's advice to appeal to the Lords, even if the force of the argument in favour of this right was not acknowledged until four years later.

Our sense of the reality of such claims of right must therefore be based *primarily* on the cogency of the argument that they are required by the common law rather than that they have been expressly endorsed by judicial opinion. In the vast majority of cases it will be sufficient to rely on judges' views of the law; but occasionally, problem cases like *Beauesert* will arise which will need to be approached on the assumption that even the highest such opinion may be wrong. If it is wrong this

will not be simply because some other view of the law seems to make more sense of the past cases, but because the substantive legal principles supporting this view will also outweigh the requirement of respect for past judges' views supporting the decision in question. Hence when we say that *Beaudesert* is not valid law, we express a deep conviction that because the High Court is bound to respect the same principles, its opinion of their requirement cannot be more important than the principles themselves.

In this competition for the reality of one theoretical account over another, we cannot differentiate the two theories in the standard case where the rules are clear and clearly supported by the authorities; both theories simply tell us that the court must apply the clear rules, and it is sufficient to appeal to their latest and most authoritative exposition. But in the difficult case the positivist must try to guess what the court is likely to do, by canvassing a theoretically unlimited range of legislative choices. The principles theorist, who need not be less sensitive to the subjective preferences of the judges, claims that the court can and should restrict itself to the law, and offers a theory of law broad enough to make sense of this responsibility.

This theory insists that we must not confuse *stare decisis* with *res judicata*. For it claims that the moral and administrative necessity of finalising all particular disputes has nothing to do with the rational basis of a principle of judicial deference to past decisions. The latter draws its force from the distinct requirements of the morality of fairness it embodies, that like cases must be treated alike, and holds that even complex and difficult arguments can be approached from this perspective. The responsibility to respect this requirement of fairness does not diminish because past decisions and rules have ceased to be very explicit, and because the consistency required must be spelled out from quite general standards. This is surely just why principled decision making is a hard craft requiring a commensurate professionalism. But our High Court is more than adequate to the task; all that is needed is a more sceptical view of the conventional assumption that legal principles are merely useful guides not compelling standards. Once these principles are conceded obligatory force consistently with their role in the law, then the rights they support will determine judges' opinions and not the other way round.