Policy, principle or values: An exploration of judicial decision-making

R.J. Cahill-O'Callaghan and B.J. Richards*

Synopsis:

The law deals with the complexities of humanity and human relationships. Unique questions are brought before the judges who are called upon to find answers that fit within an established and potentially inflexible legal framework. Often the search for an answer requires the judges to exercise discretion at the same time as providing an outcome which complies with legal principle. This process often leads to appeals to public policy which potentially masks an application of judicial values. This paper draws on three difficult judicial decisions to reveal the values underpinning the application of 'policy' to the facts before the court. The research is combined with original critical analysis of the language of policy in the difficult cases. The conclusion reached is that the language of policy facilitates personal values and it is this process that creates essential flexibility and injects humanity into the hard cases.

Introduction

The law, as pointed out by Frank over 60 years ago, 'is not a machine and the judges are not machine-tenders.'[1] It is dealing with 'human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it.'[2] Judges are often called upon to find answers to questions never posed before, to balance a complex array of needs and interests and to ensure that their answers fit

* Senior Lecturer, Cardiff Law School, Cardiff University, Associate Professor, Adelaide Law School, University of Adelaide

[1] Frank, (1949),p 120.

[2] Frank, (1949) p 6.

within a recognised legal framework. This is particularly evident in the rapidly changing landscape of medical law. These cases, which are by definition unique both in circumstance and potential outcome, give rise to questions where the answer is not clearly defined and the law is complex and uncertain. Judges are called upon to balance the conflicted rights, interests and duties and find answers where none are readily available. In reaching a decision, judges will exercise discretion to achieve an outcome which is perceived fair and just. It is often explicitly recognised that the exercise of discretion introduces an element of flexibility which is essential in these decisions. However, with flexibility there is potential for inconsistency and the high level of public scrutiny requires that the judge must provide transparent reasons for the conclusions that they reach. Reasons which are expected to be consistent with accepted legal principle and may, despite the often fact-driven nature of the dispute, be accorded precedential value in subsequent disputes.[3]

In reaching a decision in many of these difficult cases the judge appeals to 'public policy' to provide the foundation for the decision. The assertion of policy facilitates discretion and allows the judge to address issues outside the framework of legal principle. Indeed, judicial appeals to policy are, according to Lord Steyn, an 'everyday occurrence.'[4] Yet policy has been described as 'one of the most under-analysed terms in the modern legal lexicon.'[5] It is a term that is poorly articulated in the judgments and this becomes even more evident when both majority and dissenting judges make appeals to public policy without defining or explaining the relevant policy, yet reach opposite conclusions.

[3] Although as we will see, some judges will take specific steps to assert that the decision holds no precedential value and is confined to the specific facts before the court.
[4] Lord Steyn. *Deference. A Tangled Story*. Judicial Studies Board Lecture, Belfast, 25th November 2004 and cited in Paterson & Paterson,(2012), p15.
[5] Cane, (2004), p191.

It is our position that in in cases where the law does not provide a clear answer, judicial decision-making is framed by legal principle, but decisions which assert public policy are underpinned by individual values. This paper will explore the judicial process and assert that the complex interplay of influences warrants acknowledgment. Furthermore, whilst there is a retreat from the language of values, the language of policy and the values it represents is an important aspect of the application of the law and serves to lend flexibility to the judicial decision-making process that would not be possible if judges were limited to strict and formulaic legal principle. It follows in cases which require the exercised of judicial discretion, other extra-legal factors may influence the decision making process.

There is an increasing interest by social psychologists and behavioral economists in the process of decision-making. The work of Daniel Kahenman and Aaron Tversky brought the subconscious psychological influences on decision making to public attention.[6] However, to date there are limited studies on the psychological process of judicial decision-making. Those studies that do exist, suggest that despite being expert decision makers, in uncertain decisions judges are subject to the same subconscious psychological influences and processes as any other educated decision maker.[7]

The recognition of these influences is not confined to abstract or theoretical discussion. Indeed, innate influences such as personal values have been shown to play

[6] Kahneman, (2011), Kahneman & Tversky (2000), Kahneman, Slovic & Tversky (1982)
[7] Guthrie, Rachlinski & Wistrich (2000).

a role in legal decisions.[8] In this context, the potential influence of subconscious factors highlight issues regarding the transparency of judicial decisions.

Indeed, it was the presence of these extra-legal influences, including values, that concerned Justice Michael Kirby in *Chappel v Hart* when he quoted Lord Salmon;

> "In truth, the conception in question [ie causation] is not susceptible of reduction to a satisfactory formula". Similarly, in *Alphacell Ltd v Woodward* Lord Salmon observed that causation is "essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory." Yet, a losing party has a right to know why it has lost and should not have its objections brushed aside with a reference to "commonsense", at best an uncertain guide involving "subjective, unexpressed and undefined extra-legal values" varying from one decision-maker to another.'[9]

Justice Hayne, in the same case, suggested that the values underpinning judgments should be revealed:

> "The description of the steps involved in that kind of process is difficult and is apt to mislead. Articulating the reasoning will sometimes appear to give undue emphasis to particular considerations. No doubt if policy and value judgments are made, they should be identified.[10]

[8] Cahill-O'Callaghan (2013) .
[9] *Chappel v Hart* (1998) 198 CLR 232, Kirby J at [93].
[10] *Chappel v Hart* (1998) 198 CLR 232, Hayne J at [148].

In this paper we aim to reveal the values that underpin judicial decisions in three cases and will argue that the language of public policy is used to frame the decision which is based on judicial values. We do not go so far as to suggest that this implicit role of values become explicit, we merely seek to explore and understand the role that they may play.

Personal Values and Judicial Decisions

Values and value judgements within legal scholarship encompasses a wide range of different concepts from morals, interests, pleasures, likes, preferences, duties, desires, wants, goals, needs, attractions and other kinds of selective orientations. This paper is grounded in psychological understandings of values and as such defines values within a psychological context. Values are defined by Milton Rokeach, as;

> "enduring beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct."[11]

Personal values are developed through human experience and act as a largely subconscious guide to decision making. [12] They underpin the decision making process and guide a decision-maker. However, it may not be a binary choice as an individual may hold a wide range of values in high regard. It is the relative importance of the specific values in relation to each other that varies between individuals and this is the relationship that is critical to decision-making, as opposed to the importance of a single value alone. Drawing on a model of personal values developed by Schwartz, a content analysis method was developed to identify values

[11] Rokeach, (1979), p160.

[12] Hitlin & Piliavin, (2004) , Feather, (1995). Maio argues that values operate at three levels, a) the system level b) the level of specific abstract values and the beliefs and feelings toward it and finally, c) the instantiation level, or the level at which the value is applied to a specific situation. Maio, (2010).

within legal judgments.[13] The study revealed different personal values in judicial opinions endorsing opposing positions in cases which divided the UK Supreme Court. This finding was supported by experimental evidence demonstrating a close link between personal values and legal decision making.

This paper draws on the techniques developed in the earlier work to examine the relationship between values and judicial reasoning centered on policy. We have chosen to focus on three key cases at the interface of personal autonomy and medical practice, within the reasoning of each case, the judges draw on policy as significant to the decision reached. This discussion will highlight the values which underpin the 'policy' decisions and demonstrate that judicial language may be consistent, but the personal drivers behind those decisions is as individual as the judges themselves.

A brief introduction to the Schwartz model of values

There are many models of values within legal and psychological literature.[14] This paper draws on the model developed Shalom Schwartz which has been extensively used and unlike many models of values, demonstrates how an individual's values relate to each other.[15] This model of personal values is based on highly conserved, trans-cultural values and has been used extensively in psychological research and validated world-wide.[16] The Schwartz model argues that all conserved personal values can be encompassed in ten overarching motivations; *stimulation* (excitement), *self-direction* (including independence and freedom), *universalism* (including social

[13]Cahill-O'Callaghan , (2015).
[14] Rokeach (1979), Weinrib (1983), Bender (1989), Shackleton and Abbas 8(1990), Feldman (1998), Rohan (2000), Goldberg and Zipursky (2006),
[15] Schwartz, (1992), Davidov et al (2008).
[16] Judge & Bretz, (1992); Sagiv & Schwartz, (1995); Garling, (1999); Roccas et al, " (2002); Bardi & Schwartz, (2003); Schwartz & Rubel, (2005); Caprara et al, (2006)..

justice and equality), *benevolence, conformity, tradition, security, power, achievement, hedonism* (personal pleasure). An individual can regard each value as important, however when a decision is to be reached between conflicting values, the decision-maker will support one value above another. For example, if the discussion of detention orders was framed as a value decision, in deciding to support detention orders, the decision-maker can be viewed as affirming values encompassed in *security* (national security) over those encompassed in *independence* (freedom and liberty).

Values are broadly classified into two opposing dimensions. Conservative values emphasising order, preservation of the past, and resistance to change (including values encompassed within *tradition, conformity* and *security*) which are opposed to the values affirming openness to change and independence of thought, action and readiness for change (such as *self-direction*). The second are those values that promote self-enhancement (*achievement, power*) and those embodied in concepts of self-transcendence, or subverting self-interests for the welfare and interests of others (*universalism, benevolence*). [17]

Turning specifically to judicial opinions, this value framework has been used to develop a method of systematic content analysis. Although empirical content analysis is not commonly used, it has been used to identify characteristics of judicial reasoning in tort law cases[18], including contributing to the understanding of policy.[19] The content analysis is the systematic rule-guided technique to analyse textual data

[17] For further details on the relationship of values and the Schwartz model see Schwartz, " (1994); Schwartz, (1992) and Cahill-O'Callaghan (2013).

[18] Burns (2012)

[19] Andrew Serpell (2006), The Reception and Use of Social Policy Information in the High Court of Australia (Law Book, 2006); Andrew Serpell (2011), 'Social Policy Information: Recent Decisions of the High Court of Australia' (2011) 21 Journal of Judicial Administration 109

and provides an unobtrusive, replicable method to provide insight into complex text. The content analysis coding framework used in this analysis associated judicial statements with the values that the statements affirm.[20] For example; Justice Hayne in *Chappel v Hart*

> "The law of negligence is intended to compensate those who are injured as a result of departures from standards of reasonable care. It is not intended to compensate those who have received reasonable care but who may not have had the best available care."[21]

In this statement Justice Hayne highlights the importance of limiting the application of the law of negligence. This statement presents an affirmation of social order which asserts the need to limit the obligations of the State and individuals. This value is encompassed within *Security* which centers on the stability of society. Therefore this statement represents an affirmation of the values encompassed within *security*.

In the same case Kirby J affirmed the importance of autonomy in the context of the legal duty to inform a patient of risks inherent in proposed medical treatment;

> 'This is the duty which all health care professionals in the position of Dr Chappel must observe: the duty of informing patients about risks, answering their questions candidly and respecting their rights, including (where they so choose) to postpone medical procedures and to go elsewhere for treatment.'[22]

[20] Cahill-O'Callaghan (2013).
[21] *Chappel v Hart* (1998) 195 CLR 232, Hayne J at [139].
[22] *Chappel v Hart* (1998) 195 CLR 232, Kirby J at [95]. It is important to note here that given the conscious decision of the High Court to retreat from the language of 'informed consent' the word 'autonomy' is not used in the judgments here. Rather the language focusses on the expression of autonomy, the right and ability to choose what medical treatment would be provided.

The value of autonomy is encompassed within *self-direction* values that promote independent thought and action and includes autonomy. Therefore in affirming autonomy, Justice Kirby is affirming the values associated with *self-direction*.

Universalism is a broad value defined as understanding, appreciation, tolerance, and protection for the welfare of all people. It encompasses values which emphasise the subordination of self for society as a whole. In a legal context, this value affirms social justice and the protection of the vulnerable;

> 'It would, in the circumstances of the case, be unjust to absolve the medical practitioner from legal responsibility…..'[23]

> 'It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence.'[24]

Tradition and *conformity* values share the same goal of subordinating the self to socially imposed expectations. Tradition and conformity in legal opinions emphasise restraint and adherence to precedent and the affirmation of Parliamentary sovereignty.

The systematic content analysis of judgments reveals the values affirmed within the judgments and facilitates the comparison of judgments.

Selection of Cases

[23] *Chappel v Hart* (1998) 195 CLR 232, Gummow J [81]
[24] *Chester v Afshar* [2005] 1 AC 134, Lord Hope, at 163.

This model of values is used to analyse difficult cases which assert policy as central to the reasoning. In doing so, it is possible to examine the association between the language of policy and values. Three cases were selected for analysis. All draw heavily on policy in the reasoning and focus on the same difficult legal question of 'loss of a chance'. Two of the decisions divided judicial opinion on the issues surrounding a doctor's duty to warn patients of the risks inherent in proffered medical treatment. *Chappel v Hart* [1998] was heard in the Australian High Court and the subsequent case of *Chester v Afshar* [2004], in the UK Court of Appeal, considered the decision in *Chappel v Hart.* The third decision, *Tabet v Gett*, re-visited the question of the loss of a chance in the context of provision of medical treatment and rejected 'loss of a chance' as having a role in the law of negligence.

We will argue that in these cases where the outcome is uncertain, the concept of policy is introduced as a tool for the exercise of judicial discretion. In exercising discretion, the judge is reaching a decision between two equally valid arguments and this decision is underpinned by personal values, which act as a subconscious influence on judicial decision-making.

Methodology

Systematic value content analysis was carried out in Nvivo on each of the judgments in the selected cases.[25] The analysis through Nvivo facilitated the quantification of value statements both within individual judgments and combined judgments which allowed comparisons between individual judges and between those supporting

[25] Further details can be found in Cahill-O'Callaghan (2013).

opposing positions. The data is presented in graphic form, with the number of value statements expressed as a percentage of the total values in the judgment(s) or case.

Results.

The decision in *Chappel v Hart* (1998) centred on a surgeon's negligent failure to warn, loss of a chance and causation. Mrs Hart underwent necessary surgery but was not warned of the heightened risk of infection if her oesophagus was perforated. Her condition was progressive and there was no question that she would have undertaken the surgery at some time. The risk of perforation and infection would have been present whenever Mrs Hart had the surgery and irrespective of who treated her. The claim therefore focused on her assertion that she would have delayed the surgery and sought the most experience surgeon to perform it. Thus, she argued that she had lost the chance to have the surgery performed at another time, by another surgeon. The case divided the court 3-2 with five separate opinions. Justices Gaudron, Gummow and Kirby in the majority upheld the original damage award and identified a causal connection between the failure to warn and the claimant's injury. Justices McHugh and Hayne dissented and suggested that the plaintiff would be exposed to the class of risk regardless of the omission.

The majority and dissenting opinions drew on both legal principle and policy to support their positions. For example Gaudron J highlighted the duty to inform as a legal principle;

> 'Because the risk was a risk of physical injury, the duty was to inform her of that risk. And that particular duty was imposed because, in

point of legal principle, it was sufficient, in the ordinary course of events, to avert the risk of physical injury which called it into existence.'[26]

'In this way the submissions for Dr Chappel tended to divert attention from the central issue, namely whether there was adequate reason in logic or policy for refusing to regard the 'but for' test as the cause of the injuries sustained by Mrs Hart, by the allurement of further cogitation upon the subject of 'loss of a chance.'[27]

The dissenting opinions also used the language of policy and principle. McHugh J acknowledged the role of policy in the decision reached

'As a natural consequence of the rejection of the 'but for' test as the sole determinant of causation, the Court has refused to regard the concept of remoteness of damage as the appropriate mechanism for determining the extent to which *policy* considerations should limit the consequences of causation-in-fact.' [28]

And later in his judgment appeals specifically to principles of law:

'No *principle of the law* of contract or tort or of risk allocation requires the defendant to be liable for those risks of an activity or course of conduct that cannot be avoided or reduced by the exercise of

[26] *Chappel v Hart* (1998) 195 CLR 232, Gaudron J, at [10]

[27] *Chappel v Hart* (1998) 195 CLR 232, Gummow J,at [70].

[28] *Chappel v Hart* (1998) 195 CLR 232, McHugh J, at [24]..

> reasonable care unless statute, contract or a duty otherwise imposed by law has made the defendant responsible for those risks.'[29]

Thus the language was similar in both majority and minority opinions, with both drawing on policy and legal principle to support their reasoning.

Both the majority and minority recognise the importance of values in their decisions making an association between policy and values in legal decisions surrounding issues of causation;

> 'However, the 'but for' test is not a comprehensive and exclusive criterion, and the results which are yielded by its application properly may be tempered by the making of value judgments and the infusion of policy considerations.'[30]

Indeed, McHugh J supporting the minority position also asserts an association between values and policy considerations,

> 'Consequently, value judgments and *policy* as well as our 'experience of the 'constant conjunction' or 'regular sequence' of pairs of events in nature' are regarded as central to the common law's conception of causation.'[31]

Therefore the judges themselves specifically identify the role of values but package them in the language of policy which implies consistent sets of values and application of those values. We see that the judgments, despite reaching opposing

[29] *Chappel v Hart* (1998) 195 CLR 232, McHugh J at [28].
[30] *Chappel v Hart* (1998) 195 CLR 232, Gummow J, at [62].
[31] *Chappel v Hart* (1998) 195 CLR 232, McHugh J, at [24].

decisions, draw on both policy and legal principles to support their positions and in the process, highlight the link between policy and values. The question to ask then is, 'do the opposing judgments reflect opposing values?' Empirical analysis of the judgments revealed a differential pattern of expression of the values in the judgments of the majority in comparison to those supporting the minority position.

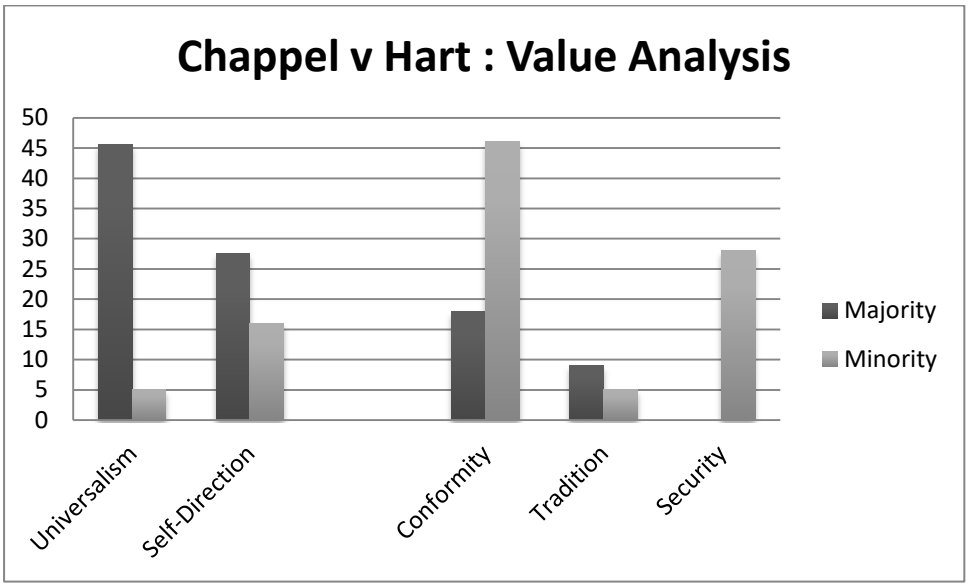

Figure 1: Value content analysis of the judgments supporting opposing positions in *Chappel v Hart* (1998) 195 CLR 232.

The values espoused by the majority are represented in the dark bars and expressed as percentage of the overall number of value statements in the opinions of the majority. The values of the minority expressed as a percentage are represented in the light bars.

Value content analysis revealed different value profiles for judgments written in support of the majority and those in support of the dissenting position. 73% of coded value statements in the majority opinions represented values encompassed within *self-direction* in the form of autonomy and judicial freedom and *universalism* which encompassed the principles of social justice and protection of the vulnerable.

Although there was some coding of values encompassed within *tradition* and *conformity* these only represented 1/5 of the total coding.

In contrast, the judgments written supporting the minority position recognised the values encompassed in *universalism* and *self-direction*, but in contrast to the majority judgments more than half the coding reflected the opposing values encompassed within *conformity* including preventing uncertainty in the law and conforming with rules, and *security*.

The empirical analysis suggests that the majority decision reflected values encompassed in *self-direction* and *universalism*, in contrast the minority espoused values encompassed within *conformity* and *security*. Indeed, this conflict in values was emphasised by Justice Kirby when he highlighted the tension between conforming to legal principles (*conformity*) and fairness (*universalism*);

> 'Where a breach of duty and loss are proved, it is natural enough for a court to feel reluctant to send the person harmed (in this case a patient) away empty handed. However, such reluctance must be overcome where legal principle requires it. It must be so not only out of fairness to the defendant but also because, otherwise, a false standard of liability will be fixed which may have undesirable professional and social consequences.'[32]

Interestingly, Justice Kirby was the most neutral in his value position, espousing values encompassed within both *universalism* and *conformity* (preventing uncertainty in the law) representing 37% of his coding. This may reflect an element of indecision

[32] *Chappel v Hart* (1998) 195 CLR 232, Kirby J at [93].

between the two positions and the values they represent. It appears that Justice Kirby cast the deciding vote which may have been reflected in his reasoning;

> 'It is further illustrated by the division of opinions in this case: Gaudron J and Gummow J favouring the dismissal of the appeal; McHugh J and Hayne J being in favour of allowing it. I agree with the remarks of my colleagues that the case is a difficult one involving an unusual chain of events.'[33]

In this decision therefore we see the Judges recognising the potential influence of values mediated through policy, on the decision reached. Value analysis of the collective judgments reveals a tension between the values of the majority and minority and this tension is also evident in the individual judgments. Indeed, the analysis of values, reveals the internal tensions between opposing values, although the final outcome is framed in the language of neutrality and policy, the analysis reveals the intrinsic values that underpins the outcome.

A similar pattern of differential value expression was evident in the House of Lords case *Chester v Afshar*. This later case drew upon the reasoning in *Chappel v Hart* to decide whether a doctor's failure to fully inform a patient of risks was sufficient to satisfy causation. This case also divided judicial opinion, with Lords Walker, Hope and Steyn endorsing the majority position and Lord Bingham and Lord Hoffman dissenting.

[33] *Chappel v Hart* (1998) 195 CLR 232, Kirby J, at [88]

Again, the reasoning highlighted a conflict between opposing values.

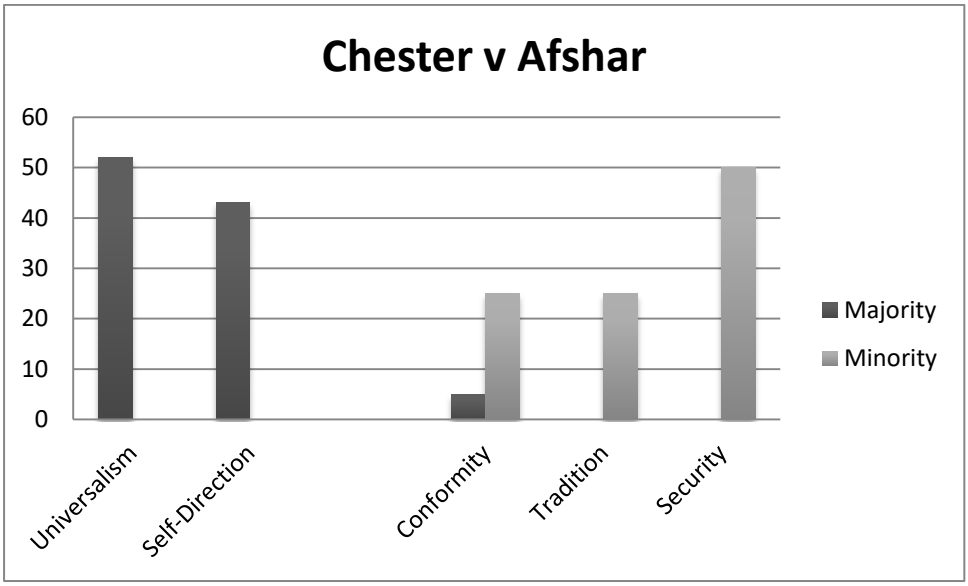

Figure 3: Value content analysis of the opposing judgments in *Chester v Afshar* [2005] 1 AC 134

The values espoused by the majority are represented in the dark bars and expressed as percentage of the overall number of value statements in the opinions of the majority. The values of the minority expressed as a percentage are represented in the light bars.

As with the judgments in *Chappel v Hart*, the majority espoused values encompassed within *self-direction* (autonomy) and *universalism* (social justice, equality and protection of the vulnerable). Although there were very few values expressed in the dissenting opinions, the values expressed were the opposing values encompassed in conservation, including conformity, security and tradition. Lord Steyn highlighted the conflict between opposing values of *self-direction* and *tradition*

> ‘But they [facets of autonomy] must also be weighed again the undesirability of departing from established principles of causation, except for good reasons. The collision of competing ideas poses a difficult question of law.’[34]

In his judgment, Lord Steyn also highlighted the conflict between the values of *tradition* and *universalism*, drawing on academic opinion to promote *universalism* to affirm a link with policy, by paraphrasing the work of Prof. Honore suggesting that

> ‘He was also right to say that policy and corrective justice pull powerfully in favour of vindicating the patient’s right to know.’[35]

The empirical analysis of these decisions suggests that despite the similar language of policy the judicial approaches to the complex issues raised by the claimants are underpinned by different values which may influence the decision reached. In both *Chappel v Hart* and *Chester v Afshar*, the majority reached a decision supporting individual autonomy, espousing the values encompassed in both *self-direction* and *universalism*. In contrast, the dissenting opinions espoused values included in conservation including *tradition, conformity and security.*

Statements which reflect values are more frequently espoused in cases which divide judicial opinion, and this is true in *Chester v Afshar* and *Chappel v Hart.* However, values are not limited to decisions that divide opinion, they may play a role in decisions where the Bench is in accord and indicate situations where the application of an established legal test does not immediately present an answer meaning that

[34] *Chester v Afshar* [2005] 1 AC 134, Steyn LJ, at [20] .
[35] *Chester v Afshar* [2005] 1 AC 134, Steyn LJ at [22].

broader considerations such as 'policy' are invoked. Such a situation is demonstrated by the third case in our discussion: *Tabet v Gett* (2010).

The central issue from both *Chester v Afshar* and *Chappel v Hart* was loss of a chance and causation, this question was re-visited by the Australian High Court in *Tabet v Gett*[36] where the court considered whether recovery for loss of chance was available in personal injury cases. The High Court held that recovery for loss of a chance was not available, highlighting that if it was available the balance in these kinds of cases may tip in favour of the plaintiffs, resulting in a significant impact on professional liability insurance and consequentially the healthcare system. The significance of this decision was reflected in the number of individual judgments, Gummow ACJ, Heydon, Crennan and Keifel JJ all chose to deliver an individual judgment, with only Hayne and Bell JJ writing a jointly. The graph below presents the values espoused in those judgments;

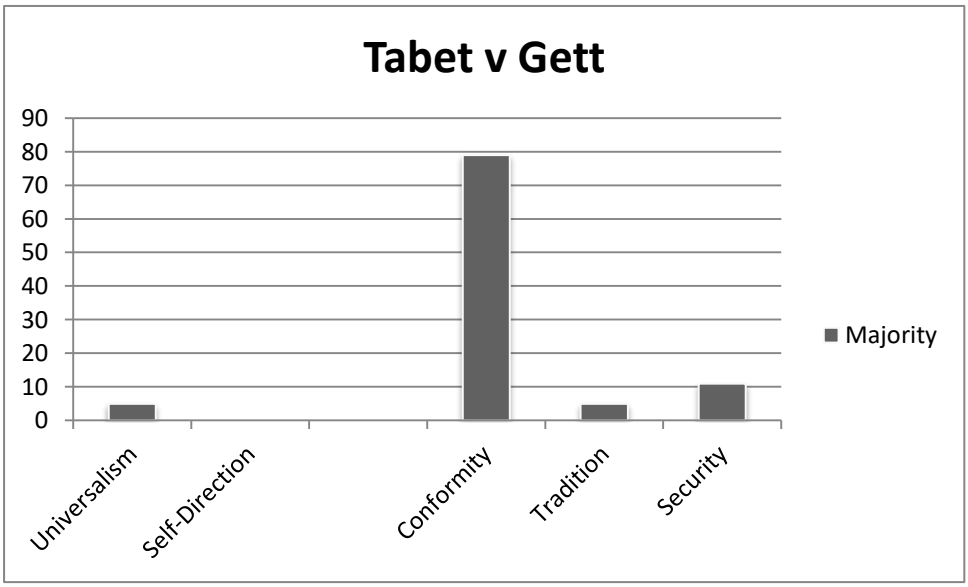

Figure 3. Value content analysis of the consensus opinions (judgments) in *Tabet v Gett* (2010) 240 CLR 537.

[36] *Tabet v Gett* (2010) 240 CLR 537.

Individual values are expressed as a percentage of the total values expressed in the judgments**.**

Typically, cases in which a consensus decision is reached, do not have many opinions written by individual judges and do not have many statements which reflect values. However, although reaching a consensus decision, five opinions were delivered in *Tabet v Gett* encompassing 18 coded statements. The decision centred on the values encompassed in conformity with 'preventing uncertainty in the law' which represented 83% of the total coding. Indeed, despite different reasoning, the majority of the value coding of each of four of the judgments (Justices Heydon, Keifel, Hayne, Bell and Gummow ACJ) was coded in conformity representing between 64% (Gummow ACJ) to 100% (Keifel J) of the coding.[37] Only Gummow ACJ espoused a need for flexibility in the law which is encompassed within *universalism* but the expression of this value was significantly less than the values encompassed in overarching motivation of conservation (conformity, tradition and security).

Discussion

There is increasing evidence that values may play a role in hard cases "those cases in which the result is not clearly dictated by statute or precedent". [38] In such uncertain cases, values influence the judicial reasoning and decisions through the exercise of discretion. The question that flows from this is whether this appeal to values is clearly set out in the judicial narrative or is there a linguistic veil thrown over the

[37] Justice Gummow had the highest level of coding with 9 codes in his written opinion.
[38] Dworkin, (1975), p1057..

reasoning? We argue that instead of openly acknowledging value-based considerations the judiciary will instead cloak their discussion in appeals to 'public policy'. This is a broad and somewhat uncertain term that fails to lend clarity to the discussion and warrants careful consideration. However, values, even cloaked as policy, may provide a critical role in such cases to open the door to the exercise of judicial discretion.

As we have seen in the preceding discussion, judges will sometimes refer to the underlying values but are more likely to appeal to 'policy' or 'public policy', terms that defy clear and specific definition. It is a fluid concept which is, at times, employed by the judiciary to meet a perceived need, and that is to place the exercise of value judgments within an acceptable framework.

In the context of the complex medical decisions we are discussing, there has been a consistent pattern of placing emphasis on the social utility of treatment and in 2005, in *Chester v Afshar* (*Chester*)[39] the House of Lords clearly, and emphatically, addressed policy considerations such as social utility and questions of whether a plaintiff 'ought' to recover at the expense of established causative principles. Tracking this language through some earlier decisions we can see that 'policy' has played an overt role, but as illustrated above, values sit at the base of these 'policy' discussions. Indeed, it is argued that values underpin these policy decisions. In the foundational decision of *Bolam v Friern Hospital Management Committee* (*Bolam*)[40]

[39] [2005] 1 AC 134.
[40] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

policy was described as a relevant consideration[41] and again in *Sidaway v Board of Governors of the Bethlehem Royal Hospital & the Maudsley Hospital & Ors* (*Sidaway*)[42] the need to focus on broader interests than those represented by one patient were emphasised, along with the policy demand to avoid the practice of defensive medicine which would potentially cripple medical advancement.[43] These decisions were considering the duty to warn of risks inherent in medical treatment. The conclusions reflected a policy decision that to impose an onerous duty to warn would create an overly cautious medical professional, unwilling to advance or try out new treatment. *Bolitho v City Hackney Health Authority* (*Bolitho)*[44] completed this triumvirate of cases and acted to reinforce the doctor-centric policy base of earlier decisions, thus preparing the ground for the emphatically policy driven decision of *Chester*.

The difficult decision of *Chester* saw the House of Lords openly embracing policy as a driving consideration in decisions such as these. The problem with this approach is that whilst the Lords all referred to and relied upon policy, it was not always the same 'policy'. In the view of Lord Bingham, the appropriate policy consideration was the underlying purpose of negligence law as a whole,[45] whilst the majority looked to the underlying ethos of the duty to warn of the risks inherent in medical treatment. And, in still a different approach again, Lord Steyn struggled to fit the enquiry into the existing negligence framework and application of the 'but for

[41] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, at 586 in consideration of the social utility of the provision of medical treatment.
[42] *Sidaway v Board of Governors of the Bethlehem Royal Hospital & the Maudsley Hospital & Ors* [1984] QB 493.
[43] *Sidaway v Board of Governors of the Bethlehem Royal Hospital & the Maudsley Hospital & Ors* [1984] QB 493,at 893 (Lord Diplock).
[44] *Bolitho v City Hackney Health Authority* [1998] AC 232.
[45] *Chester v Afshar* [2005] 1 AC 134, [7] (Lord Bingham).

test.' This resulted in an unconvincing conclusion based on the reduced likelihood of a small risk materialising if the operation was delayed.[46] The poorly articulated reference to policy considerations was in reality reflecting the significant role of values as outlined above.

In the Australian decisions, policy considerations have not been as openly embraced, but nevertheless they sit behind much of the judicial reasoning in the more difficult decisions under consideration here. Whilst the High Court has readily acknowledged that 'value judgments' and 'considerations of policy' enter into 'intangible question of responsibility' in the negligence enquiry,[47] it has carefully avoided openly embracing policy based decisions. There is a consistent endeavour to place the negligence discussion within a setting of principle but the Court often returns to the significance of broader 'normative considerations,' such as 'values or policy'[48] acknowledging that the issues under consideration in this context do not always sit comfortably within the existing framework. We see therefore that at times, the role of values is expressly acknowledged but it is always with some reluctance and care is taken to place any statement of values firmly within the framework of principle.

In *Chappel v Hart*[49] the High Court studiously avoided the language of policy, opting instead for the 'common sense' test developed in *March v Stramare,*[50] and so

[46] This reasoning was flawed because it is based on a 'lightning never strikes twice' principle, that is a small risk materialised at this time, therefore it will not materialise at another time. See discussion in Chapter 6 regarding Lord Hoffman's discussion of the Casino rationale and Lord Steyen's subsequent application of this rationale. Also refer *Chester v Afshar* [2005] 1 AC 134 [31], (Lord Hoffman) and [11] (Lord Steyn).
[47] *March v Stramare* (1991) 171 CLR 506, at 524 (Toohey J).
[48] See for example Gleeson CJ in *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 639.
[49] (1998) 195 CLR 232.

aimed for a principled approach to the law. The 'common sense' test however, necessarily involves the introduction of value judgments and this is reflected in the analysis of the judgment represented in Figure 1. When the concept of common sense is scrutinised, it is clear that the term requires individual, and often idiosyncratic, interpretations of what constitutes both common and sense. Thus whilst policy as a term is not employed, the underlying process is driven by similar considerations as those found in the decisions from the United Kingdom which specifically refer to policy considerations. These policy considerations range from views of the purpose of negligence law as a whole through to individual interpretations of what is just and right in the circumstances. Underpinning all of this is the values framework.

If we consider some later decisions there is a more overt acknowledgment of the role of individual values as expressed in 'policy' considerations and an indication that something more than a strict application of principle can drive judicial decision-making processes. This was acknowledged in *Elbourne v Gibbs*[51] when, following an analysis of post *Chappel* decisions, Basten JA emphasised that establishing the principles of causation in tort law must 'satisfy the policy underlying the legal attribution of responsibility.'[52] Similarly in *Dr Ibrahim v Arkell*[53] Fitzgerald JA noted that these[54] decisions are driven by the 'policy requirement entitling a competent person to make his or her own decision about his or her life.'[55]

---

[50] *March v Stramare* (1991) 171 CLR 506, this would of course now involve consideration and application of the relevant legislative provision.
[51] *Elbourne v Gibbs* [2006] NSWCA 127 (24 May 2006).
[52] *Elbourne v Gibbs* [2006] NSWCA 127 (24 May 2006), at [74].
[53] *Dr Ibrahim v Arkell* [1999] NSWCA 95.
[54] As *Chappel v Hart* addressed the question of pre-treatment advice, this discussion focusses on decisions addressing the same legal issue.
[55] *Dr Ibrahim v Arkell* [1999] NSWCA 95, at [33].

Thus we have the broad notion of a policy which serves to preserve the rigour of the law alongside a narrower, individual needs-based policy aimed at preserving the personal integrity of the plaintiff-patient. This opens the question of what is the dominant 'policy' consideration, how is it formed and how can potentially conflicting 'policies' be reconciled? It is the inability to answer this question with any certainty that lies at the heart of our argument that these decisions are not driven by objective, externally driven concerns. Rather, underpinning the judicial rationale is an internal set of values that are given expression in the language of policy.

The role of 'policy' is therefore to lend some flexibility to the judicial decision-making process. The problem with the term is that it is employed by the judges to appeal to some apparently external measure that can be used as a measure of the decision reached. However there is no consistency or clarity around the term and as we have seen, 'policy' can 'dictate' opposing conclusions. Thus policy is exposed as a flexible term that is best viewed as the means by which judges are able to address the complexities presented by the 'the whole confused, shifting helter-skelter of life parades before [them].' [56] In short, the very nature of the issues that come before the Courts call for a willingness to be flexible and to perhaps apply a clear mix of established legal tests and the more loosely defined considerations collectively labelled policy. This is a process we have seen applied with a liberal hand in the decisions outlined above.

To have an inflexible court would result in injustice and a denial of the very nature of humanity and human problems which seek resolution through the

[56] *Dr Ibrahim v Arkell* [1999] NSWCA 95, at [6].

application of the law. However, the need for flexibility must be balanced against the need for coherent law and whilst basing judicial conclusions upon individual statements of 'broad values … [may well be] beguiling'[57] it is 'misleading simplicity'[58] and unlikely to result in the development of coherent law.

Seeking coherence

The issue we are raising here is the potential for a lack of coherence and transparency. The judges employ the term policy, in the words of McHugh and Gummow JJ, 'glide to a conclusion,'[59] based upon individually-formed assumptions of what is appropriate in the circumstances. This occurs when the chaos of human relations collides with apparently rigid legal principles. It is our view, policy may serve to mask the true nature of judicial reasoning.

Whilst it is easy to refer simply to the notion of 'policy,' it is difficult to give it specific content. As pointed out by Bennion, 'the content of public policy (and therefore legal policy) is what the Court thinks and says it is.'[60] In the absence of clear (and consistent) content, how can reasoning based upon policy provide clarity or certainty in the law? To appeal to policy is potentially to appeal to uncertain and individual notions of what is a fair result in the specific circumstances before the Court, such an appeal represents a departure from 'the path of merely logical

[57] *Cattanach v Melchior* (2003) 215 CLR 1, at [77] (McHugh and Gummow JJ).
[58] *Cattanach v Melchior* (2003) 215 CLR 1, at [77] (McHugh and Gummow JJ).
[59] *Cattanach v Melchior* (2003) 215 CLR 1, at [77] (McHugh and Gummow JJ).
[60] Bennion, (1997), p657.

deduction … [and we] lose the illusion of certainty.'[61] It is from certainty and consistency that confidence in the law grows.

It is important to recognise that a call for certainty does not connote a call for a concrete or inflexible law. Indeed the law must, as argued above, remain inherently flexible as it is not (and ought not be) a machine.[62] Flexibility however, does not necessarily lead to incoherent or opaque (as opposed to transparent) law. Rather it means a system that is able to shift and change as needs and expectations of society shift and change.

The law must evolve and change, and this evolution and change must also be acknowledged. To appeal to 'policy' as though it were a concrete and fixed notion is to deny the nature of the law and to conceal the true nature of the reasoning process underlying the decision. The problem here is lies in the absence of clearly stated reasoning. As explained by Kirby J in *Cattanach v Melchior*[63] 'if the application of ordinary legal principles is to be denied on the basis of public policy, it is essential that such policy be spelt out so as to be susceptible of analysis and criticism.'[64] Flexibility of the law is not something to hide; it is important that we acknowledge that the process of judicial decision-making is more than a mechanical application of rules.[65] Despite the uncertainty associated with the language of policy, there are some clear advantages associated with the value based decisions which policy enables. Frank takes this argument further and argues that we ought openly to acknowledge the

[61] Wendell Holmes Jr, (1894-1895) p 7.
[62] Frank (1949).
[63] *Cattanach v Melchior* (2003) 215 CLR 1.
[64] *Cattanach v Melchior* (2003) 215 CLR 1,at [152] (Kirby J).
[65] *Cattanach v Melchior* (2003) 215 CLR 1, at [121].

flexibility, embrace the 'unavoidably human, fallible character of the law,' and if we do this, then perhaps the 'retreat into policy,' may not be necessary.[66]

[66] *Cattanach v Melchior*(2003) 215 CLR 1, at [2].

Reference List:

Secondary Sources

Books

F.A.R. Bennion, (1997), *Statutory Interpretation: A Code*, 4th ed, Butterworths, 1997.

Jerome Frank, (1949), *Law and the Modern Mind,* Stevens & Sons Ltd.

Daniel Kahneman, (2011) *Thinking, Fast and Slow*, Farrar, Straus and Giroux.

Daniel Kahneman, Paul Slovic and Amos Tversky, (1982),*Judgment Under Uncertainty: Heuristics and Biase,* Cambridge University Press.

Daniel Kahneman and Amos Tversky, (2000) *Choices, Values and Frame*, Cambridge University Press.

Alan Paterson and Chris Paterson, (2012) *Guarding the Guardians? Towards an Independant, Accountable and Diverse Senior Judiciary,* Centreforum

Milton Rokeach, (1979) *Understanding Human Values. Individual and Societal* ,Free Press

Andrew Serpell (2006), The Reception and Use of Social Policy Information in the High Court of Australia , Law Book.

Journal Articles

Anat Bardi and Shalom H Schwartz, (2003) 'Values and Behaviour: Strength and Structure of Relations' 29 *Journal of Personality and Social Psychology* 1207

Leslie Bender (1989) "Changing the Values in Tort Law." 25 *Tulsa Law Journal* 759.

Burns, Kylie (2012) "The Australian high court and social facts: A content analysis study." 40 *Fed. L. Rev.* 317.

Rachel J Cahill-O'Callaghan,(2013) 'The Influence of Personal Values on Legal Judgments.' 40 *Journal of Law and Society* 596

Rachel J Cahill-O'Callaghan (2015) 'Reframing the judicial diversity debate: personal values and tacit diversity' 35 *Legal Studies* 1

Peter Cane, (2004) 'Another Failed Sterilisation' 120 *Law Quarterly Review* 189

Gian V Caprara et al, (2006) 'Personality and Politics: Values, Traits and Political Choice.' 27 *Political Psychology* 1

Elad Davidov, Peter Schmidt, and Shalom H. Schwartz. (2008) "Bringing values back in: The adequacy of the European Social Survey to measure values in 20 countries." 72 *Public opinion quarterly* 3: 420-445.

Ronald Dworkin, (1975) 'Hard Cases' *Harvard Law Review* 1057

Heidi Li Feldman, (1998) "Prudence, benevolence, and negligence: Virtue ethics and tort law." 74 *Chi.-Kent L. Rev.* 1431.

Norman T. Feather, (1995) 'Values, valences and choice: The influence of perceived attractiveness and choice alternatives' 68 *Journal of Personality and Social Psychology* 1135

Tommy Garling, (1999) 'Value priorities, social value orientations and cooperation in social dilemmas' (1999) 38 *British Journal of Social Psychology* 397

John CP Goldberg Benjamin C. Zipursky. (2006) Tort law and moral luck." 92 *Cornell L. Rev.* 1123.

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich (2000), 'Inside the Judicial Mind." 86 *Cornell L. Rev.* 777

Steven Hitlin and Jane Allyn Piliavin,(2004) 'Values: Reviving a Dormant Concept' 30 *Annual Review of Sociology* 359

Timothy A Judge and Robert D Bretz, (1992) 'Effect of work values on job choice decisions.' 77 *Journal of Applied Psychology* 261

Gregory R Maio, (2010) 'Mental Representations of Social Values' 42 *Advances in Experimental Social Psychology* 1

Sonia Roccas et al, (2002) 'The Big Five personality factors and personal values' 29 *Personality and Social Psychology Bulletin* 789

Meg J Rohan (2000) "A rose by any name? The values construct." 4 *Personality and social psychology review* 3: 255-277. Lilach Sagiv and Shalom H Schwartz, (1995) 'Value priorities and readiness for out-group social contact' 25 *Journal of Personality and Social Psychology* 1

Shalom .H. Schwartz, (1992) 'Universals in the Content and Structure of Values: Theoretical advances and empirical tests in 20 countries' 25 *Advances in Social Psychology* 1

Shalom H. Schwartz, (1994) 'Are there universal aspects in the structure and contents of human values?' *Journal of Social Issues* 19

Shalom H Schwartz and Tammy Rubel, (2005) 'Sex Differences in Value Priorities: Cross-Cultural and Multimethod Studies' 89 *Journal of Personality and Social Psychology* 1010

Viv J Shackleton and Ali H Abbas (199) "Work-related values of managers: A test of the Hofstede model." *21 Journal of cross-cultural psychology* 1: 109-118.

Andrew Serpell (2011), 'Social Policy Information: Recent Decisions of the High Court of Australia' 21 Journal of Judicial Administration 109

Ernest J Weinrib (1983) "Toward a moral theory of negligence law." In *Justice, Rights, and Tort Law*. Springer, Dordrecht, 123-148.

Primary Sources

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

Oliver Wendell Holmes Jr, "Privilege, Malice and Intent" (1894-1895) 8 Harvard Law Review 1,

Bolitho v City Hackney Health Authority [1998] AC 232

Cattanach v Melchior (2003) 215 CLR 1

Chappel v Hart (1998) 195 CLR 232

Chester v Afshar [2005] 1 AC 134

Dr Ibrahim v Arkell [1999] NSWCA 95

Elbourne v Gibbs [2006] NSWCA 127 (24 May 2006)

March v Stramare (1991) 171 CLR 506

Sidaway v Board of Governors of the Bethlehem Royal Hospital & the Maudsley Hospital & Ors [1984] QB 493

Tabet v Gett (2010) 240 CLR 537

Travel Compensation Fund v Tambree (2005) 224 CLR 627