

TORT LAW, POLICY AND THE HIGH COURT OF AUSTRALIA

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[This article concerns the High Court of Australia's use of policy in deciding torts cases, particularly in negligence. It examines the Court's stated position on the use of policy reasoning and compares this with its actual practice. The argument made is that courts should be wary about the use of policy-based reasoning because policy is 'unstable' or incapable of consistent application. Courts are limited in their ability to predict the future consequences of different legal rules for disparate parties. Moreover, reasonable minds will differ as to what policy demands. These matters are illustrated by reference to recent cases concerning wrongful conception and wrongful life. The conclusion is that, in doubtful cases, courts should apply what the author describes as the 'golden rule of negligence': that duties of care are to be recognised where there are substantial factual features linking the parties, creating pathways to harm. The onus should lie upon either defendants or courts themselves to supply convincing policy reasons for departing from this rule. The result is that the High Court arguably decided the wrongful life case of *Harriton v Stephens* incorrectly; the decision should have been in favour of recovery on the basis of the doctor's obvious capacity to cause the plaintiff to incur substantial financial costs relating to her disability.]

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I INTRODUCTION

The High Court of Australia's 2001 decision in *Sullivan v Moody* ('*Sullivan*')¹ was very significant. It represented a rare moment in modern Australian tort law — one in which a full bench of the Court was able to deliver a single substantive judgment. Rarer still was the Court's unanimity regarding the methodology to be employed in establishing a duty of care in negligence. The Court held that the 'three-stage test' for duty, comprising foreseeability, proximity and policy, did not represent the law in Australia.² The Court referred to, without fully articulating, an alternative test for duty — the salient features approach.³ It also ex-

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¹ (2001) 207 CLR 562.

² Ibid 589 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

³ The term 'salient features' did not actually appear in *Sullivan* — it was first mentioned by Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 576, referred to with approval by Gummow J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180,

pressed a conservative view about the role of policy-based reasoning in duty determinations.⁴ This article explores the decision and the use that has been made by the Court of policy-based reasoning in two subsequent controversial cases.

The article begins by examining what is meant by ‘policy’ in the context of judicial decision-making and how this might be different from ‘principle’. It then offers a theoretical framework for the duty of care analysis, including an explanation of the role that policy should play.⁵ The framework indicates that, whilst foreseeability and the ‘factual features linking the parties’ are concerned primarily with the factual positioning of the plaintiff relative to the defendant to a negligence action, the policy enquiry is different.

The presence of substantial factual features linking the parties is indicative of substantial pathways to harm between the plaintiff and defendant. It is thus argued that the internal logic of the tort of negligence demands that, where such pathways are identified, the assumption must be that a duty of care arises. The failure to recognise a duty will reduce incentives to take care and increase the likelihood of harm to protected interests. The onus should therefore lie upon either the court or the defendant to establish reasons for not imposing the duty. In sum, the argument to be made is that courts should apply what is here called the ‘golden rule of negligence’: duties of care are to be recognised where there are substantial factual features linking the parties, creating pathways to harm.

Viewed from a broad perspective, the policy enquiry is directed to the legal relations that *ought* to obtain between the parties. This perspective takes into account the likely future impact of a particular duty rule upon those who will occupy positions similar to the present parties, and upon others. The result of the need to make predictive assessments, however, is that policy-based reasoning is comparatively ‘unstable’. Courts might have little evidence upon which to assess the future impact of their rules, and even if the predictive assessment proves to be unproblematic, reasonable minds might differ as to what action a particular policy requires and duty rules might thus attract never-ending controversy. As such, courts should err against ad hoc policy-based reasoning.

Having laid down a theoretical framework for analysis of duty problems, the article then proceeds to examine *Sullivan* and the High Court’s use of policy in two significant cases, one on the wrongful conception action⁶ and the other on the wrongful birth action.⁷ In these two cases, although the judges agreed upon the value of human life and the importance of the family unit, there was substan-

253 and again by Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597–8. However, the reasoning of the Court was substantively equivalent to this approach: see Ian Malkin and Tania Voon, ‘Social Hosts’ Responsibility for Their Intoxicated Guests: Where Courts Fear to Tread’ (2007) 15 *Torts Law Journal* 62, 79–81.

⁴ See above n 3.

⁵ The framework was developed in Christian Witting, ‘Duty of Care: An Analytical Approach’ (2005) 25 *Oxford Journal of Legal Studies* 33; Christian Witting, ‘The Three-Stage Test Abandoned in Australia — Or Not?’ (2002) 118 *Law Quarterly Review* 214. Further references will be made to the former article alone, which focused on matters of proximity (that is, the factual features linking the parties). As the title suggests, the focus of the present article is different.

⁶ *Cattanach v Melchior* (2003) 215 CLR 1 (‘*Cattanach*’).

⁷ *Harriton v Stephens* (2006) 226 CLR 52 (‘*Harriton*’).

tial discord as to what these propositions might signify for the duty of care. In hindsight, it is obvious that the High Court could not have hoped to resolve fundamental differences of opinion concerning the appropriate duty of care and liability for economic losses by way of ad hoc policy-based reasoning (even if it was necessary to make some reference to such reasoning). The reasoning in these cases, insofar as they depart from the application of ordinary principles or the golden rule of negligence, was bound to be contentious and a cause of dissatisfaction.

II DEFINING 'POLICY'

In recent times, the High Court has had a history of denigrating legal concepts used in tort cases that have been seen as lacking clear and determinate meanings. This appears to be a particular concern of Gummow J⁸ who (with Gaudron and McHugh JJ) in *Brodie v Singleton Shire Council*, for example, noted that the 'present state of the law' of negligence on highway authorities encouraged the expenditure of 'public funds on litigation turning upon indeterminate and value-deficient criteria'.⁹ In that case, their Honours also criticised the use of the time-honoured distinction between 'misfeasance' and 'non-feasance', deeming the distinction to be of 'diminishing importance'.¹⁰ Further concepts that have been criticised include the 'policy/operational' distinction,¹¹ 'general reliance'¹² and 'proximity',¹³ the last of which the Court in *Sullivan* banished with the admonition that 'it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established'.¹⁴ What these critiques appear to demonstrate is that legal concepts must be used with care. They are but tools to facilitate understanding and to assist in the process of reasoning to conclusions about the rights and obligations of legal persons. With each variation in the factual features of a tort case, decisions must be made about the appropriateness of using any particular concept.

Despite its wariness about the cogency of such legal concepts, the High Court has clung to another set of concepts — concepts that are bound up in the supposed distinction between 'principle' and 'policy'. These terms appear to

⁸ *Cattanach* (2003) 215 CLR 1, 32 (on 'wrongful birth'), 33–4 (on 'legal policy'); *Esanda Finance Corporation v Peat Marwick Hungerfords* (1995) 188 CLR 241, 299 ('*Esanda*') (on 'assumption of responsibility' and 'reliance'); *Hill v Van Erp* (1995) 188 CLR 159, 229–30 (on 'assumption of responsibility' and 'known reliance'); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 385–8 (on 'general reliance'), 393 (on the 'policy/operational distinction'); *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 451 (on the 'policy/operational distinction').

⁹ (2001) 206 CLR 512, 559.

¹⁰ *Ibid* 551 (Gaudron, McHugh and Gummow JJ).

¹¹ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 393 (Gummow J).

¹² *Ibid* 344 (Brennan CJ), 385 (Gummow J), 411 (Kirby J).

¹³ *Sullivan* (2001) 207 CLR 562, 578 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Hill v Van Erp* (1997) 188 CLR 159, 175–8 (Dawson J).

¹⁴ (2001) 207 CLR 562, 578 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) (citations omitted).

have been employed to denote fixed and binary opposites.¹⁵ Most significantly, the High Court in *Sullivan* expressed the desire to reason by reference to principle — and to avoid the use of policy — in determining duty of care issues. The Court stated that

[t]here are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.¹⁶

For the purposes of this article, the first point that must be addressed (in brief) relates to the meaning of the term ‘policy’. The second is whether policy can be distinguished from ‘principle’ in the way suggested. Before turning to these issues, it should be noted that policy undoubtedly operates at a number of levels — at the systems level, across private law and at the individual tort level. The primary aim here is to determine how the term should be used in the last case, when determining liability rules for individual torts, and particularly for the tort of negligence.

Peter Cane has noted that ‘policy arguments are normative arguments — ie, arguments about what the rights and obligations of individuals *ought to be* — that underpin and justify statements about what the legal rights and obligations of individuals *are*.’¹⁷ He notes that ‘all rules and principles that state individuals’ legal rights and obligations are underpinned by policy arguments’.¹⁸ In very similar terms, Neil MacCormick has written that ‘[a] “policy argument” for a given decision is an argument which shows that to decide the case in this way will tend to secure a desirable state of affairs.’¹⁹ In this sense, policy feeds into the development of legal principles and the formulation of specific rules. In broad terms, the law *is an instrument* of policy. It is shaped by pre-determined ideas of what law should do — in guiding conduct and/or in resolving disputes between persons.²⁰

It follows that the concepts ‘principle’ and ‘policy’ cannot be neatly separated from each other in the way that the High Court in *Sullivan* supposes. Certainly,

¹⁵ A binary opposition is a means of giving meaning to a concept or word by contrasting it to what it is not: see Laurie Bauer, *The Linguistic Student's Handbook* (2007) 64.

¹⁶ (2001) 207 CLR 562, 579.

¹⁷ Peter Cane, ‘Another Failed Sterilisation’ (2004) 120 *Law Quarterly Review* 189, 192 (emphasis in original).

¹⁸ *Ibid.*

¹⁹ Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 263.

²⁰ That this is the direction of cause and effect in the creation of law is asserted by Martin Stone, ‘Formalism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 166, 196 (citations omitted):

It looks like a mistake ... to think that, sometime in the twentieth century, a discovered need to resort to ‘policy’ interrupts a previous ... fantasy of being able to resolve all legal questions by deduction. For it seems more accurate to say that it is the resort to policy which first makes such a fantasy possible. Only when the law is understood as an instrument of policy does the possibility of deductively accessible judgments begin to come into view.

Peter Cane is of the same opinion: ‘Most legal norms exist outside the law before they are given legal force; and uniquely legal norms typically supplement or elaborate pre-existing, extra-legal norms’: Peter Cane, ‘Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law’ (2005) 25 *Oxford Journal of Legal Studies* 393, 402.

principle and policy cannot be spoken of as binary opposites. Commenting on the High Court's stance, Jane Stapleton has argued that policy contributes to the development of principle and that there is considerable difficulty in discerning where one begins and the other ends: 'the spheres of principle and of policy are not distinct and mutually opposed, but irretrievably interlocking'.²¹ Stapleton concludes that 'we should ditch both the "principle" and "policy" terminology, and simply describe these concerns *neutrally* as "legal concerns"'.²² In her view, it is possible in duty of care cases 'to assemble a matrix of substantive legal concerns that governs recognition of liability [for example, for economic loss in negligence] ... and illuminates some of the deepest impulses in the law of torts'.²³

But this approach to the use of policy is not entirely satisfactory. Stapleton's 'concerns' indiscriminately comprise both the positive (that is, relating to the factual features of the case) and the normative (that is, the more obviously policy-oriented concerns). Thus, she would consider on the same plane both the vulnerability of the plaintiff and 'the concern that the boundaries of liability be normatively justifiable'.²⁴ Yet this conflation of the positive and normative is apt to do mischief because it suggests that the application of policy might be value-neutral in the way, or at least to the degree, that the finding of facts is value-neutral. The point of many critics of the reasoning in tort cases is that the courts are not explicit enough about their use of policy.²⁵

The supposed distinction between principle and policy is not the focus of this article. As will become apparent, this article seeks to draw a distinction between another set of legal concepts that operate at the individual tort level. This is the distinction between the 'factual features' of a case and matters of 'policy', where 'policy' is understood as referring to normative reasoning — reasoning 'about what the rights and obligations of individuals *ought to be*'.²⁶ It is submitted that the use of this distinction is convenient and defensible in the context of a debate about policy in duty of care cases.

III TORT LAW AND POLICY

Recent pronouncements of the High Court of Australia on matters of policy in tort law have been concerned largely with the development of the tort of negligence.²⁷ This is not surprising. Relative to torts such as battery, the law of

²¹ MacCormick, above n 19, 263.

²² Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 135, 137 (emphasis in original).

²³ Jane Stapleton, 'Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory"' (2003) 50 *UCLA Law Review* 531, 537–8.

²⁴ *Ibid* 538.

²⁵ See, eg, Bob Hepple, 'Negligence: The Search for Coherence' (1997) 50 *Current Legal Problems* 69, 80–1; Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 *Law Quarterly Review* 461, 483.

²⁶ Cane, 'Another Failed Sterilisation', above n 17, 191–2. See also John Goldberg and Benjamin Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 *Vanderbilt Law Review* 657, 720–3.

²⁷ *Cattanach* (2003) 215 CLR 1, 87 (Hayne J). The modern history of negligence prior to *Sullivan* (2001) 206 CLR 512, was similarly concerned with policy issues: see Sir Anthony Mason,

negligence is not fixed or determinate in terms of the conduct that it regulates.²⁸ Negligence might be found in many circumstances that are incapable of precise *ex ante* definition.²⁹ This is because negligence is concerned with the maintenance of general standards of conduct.³⁰ When legal obligations should arise and what those standards of conduct should be will depend on the circumstances.³¹ Negligence is also pleaded with respect to losses that are caused indirectly and that might have a 'ripple' effect.³² In this way, limits need to be set upon the extent of liability. Thus, policy is more likely to become an issue in negligence than in battery, and indeed in most other torts, which are clearer in their proscription of conduct.³³ It is with negligence that this article is primarily concerned but its implications have a wider resonance in the law of torts.

In negligence, the debate about the use of policy has taken place in the context of the debate about the duty of care. The writer's views on duty of care issues have been explored elsewhere³⁴ but do require brief mention here. It should be stated immediately that these views on duty — and on the role of policy in particular — have been developed with the values of certainty, consistency and predictability in mind. This is to say that, insofar as the tort of negligence is able to provide a guide to the conduct of, and legal decision-making by, courts and other actors, the law should be stable and predictable.³⁵ Alterations to the law should take place — so far as is reasonably practicable — on the basis of properly evidenced need and not on the basis of mere changes in the composition of courts.³⁶ Presumably, few commentators on tort law would contest the importance of these propositions.

In general, courts are prepared to recognise a duty of care upon proof of foreseeability and factual features which link the parties to each other.³⁷ The test for foreseeability determines whether it was reasonable for a person in the position

'Policy Considerations' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 535, 536; Justice Michael McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37. With respect to English law: see John Bell, *Policy Arguments in Judicial Decisions* (1983) ch 3.

²⁸ See Daniel More, 'The Boundaries of Negligence' (2003) 4 *Theoretical Inquiries in Law* 339, 347, noting that '[t]he crux of this tort is not the existence of specific fixed elements, but, rather, the legal concept of the scope of tortious liability.'

²⁹ Cases might be either 'bounded', where the source of the content of a norm of reasonable care pre-exists and is independent of the fact-finder's sense of the situation, or 'unbounded', where the content of this norm is derived from the fact-finder's individual experience and the evidence submitted by the parties: Kenneth S Abraham, 'The Trouble with Negligence' (2001) 54 *Vanderbilt Law Review* 1187, 1190.

³⁰ *Ibid* 1192, noting that 'negligence is the paradigm example of a general standard'.

³¹ See More, above n 28, 341.

³² Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *Law Quarterly Review* 249, 255.

³³ See Bell, above n 27, 42; Christian Witting, 'More than the Sum of Its Parts? The Elements of Negligence and Tort Method' (2004) 12 *Torts Law Journal* 202, 211.

³⁴ See above n 5.

³⁵ See Cane, 'Taking Disagreement Seriously', above n 20, 414, noting that 'stability and continuity are undoubtedly two of the most valued characteristics of the common law.'

³⁶ *Sullivan* (2001) 207 CLR 562, 580 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Cattanach* (2003) 215 CLR 1, 53 (Kirby J). See also *Perrett v Collins* [1998] 2 Lloyd's Rep 255, 263 (Hobhouse LJ).

³⁷ Witting, 'Duty of Care', above n 5.

of the defendant to foresee that their carelessness might have had negative consequences for others of a particular class. The foreseeability test excludes liability on the part of those who had no such ability to foresee the harm and, thus, no ability to modify their conduct to avoid the harm.³⁸ In cases of positive acts causing physical injury, foreseeability combined with the fact of the physical injury provides the basis for the imposition of a duty of care.

In most cases, foreseeability is a necessary but not a sufficient requirement for the recognition of a duty.³⁹ In addition, the courts insist upon what used to be called ‘proximity’ but might now, in Australia, be called ‘factual features linking the parties’. This is so especially in cases where the cause of damage is indirect, including cases of negligence causing mental harm and pure economic loss. The test for factual features determines whether there existed, at the time of the injurious interaction between the plaintiff and defendant, *substantial causal pathways* by which a failure in care might have caused harm to the plaintiff. The more substantial the pathways, the greater the potential for harm, and the greater the likelihood that a duty of care will be recognised.⁴⁰

Upon this understanding of foreseeability and the factual features elements, it is obvious that courts concern themselves with factual matters relating to the parties before them. Courts determine the presence of these elements by undertaking a fact-based evaluation of the positioning of the parties with respect to each other at a point in time prior to their injurious interaction.⁴¹ As previously stated, in the case of foreseeability, the court is required to determine whether harm to persons or a class of persons was reasonably foreseeable. In the case of factual features, the courts must determine whether sufficient links existed between the parties to *justify* the imposition of obligations of care.

According to Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan*, the presence of foreseeability and factual features linking the parties does not automatically *require* the finding of a legal obligation to take care — it is for the court to determine the ‘ultimate question’ of whether a duty ought to be recognised.⁴² The court must exercise its discretion in determining whether to recognise the duty and, thus, a legal obligation owed by the defendant to the plaintiff. In this sense,

³⁸ *Tame v New South Wales* (2002) 211 CLR 317, 357–8 (McHugh J). See also Stephen Perry, ‘Risk, Harm and Responsibility’ in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) ch 14.

³⁹ See, eg, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 418 (Kirby J); *Sullivan* (2001) 207 CLR 562, 573 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 550 (Gaudron, McHugh, Gummow and Hayne JJ).

⁴⁰ Witting, ‘Duty of Care’, above n 5, 37. These observations build upon the description of ‘causal proximity’ provided by Deane J in various cases: see, eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497–8.

⁴¹ This is the ‘applicative judgment’ that leads from a rule (for example, on the preconditions for a duty of care) to a decision regarding the application of that rule to the facts of the case: Stone, above n 20, 203.

⁴² (2002) 211 CLR 540, 626–8. See also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 32–3 (McHugh J).

the duty question is normative,⁴³ and it is in the exercise of this discretion that policy-based reasoning may prove determinative.⁴⁴

It has been conceded that the law is an instrument of policy. The law of negligence must serve social purposes. The contention of this article is that the policy served by the tort of negligence is clear. The rules of negligence encourage adherence to proper standards of conduct; they have a 'role in practical reasoning (ie, reasoning about what to do and how to behave)'.⁴⁵ This role is likely to be more cogent in some contexts than others — in particular, where the ability to plan activity is possible, for example, where professional services are offered. Where standards have not been adhered to and damage has been caused, the internal logic of negligence indicates that the injured party should be compensated.

Following on from this, *the presence of substantial pathways to harm between persons ought, ordinarily, to ground a duty of care*.⁴⁶ The defendant has the substantial ability to harm the plaintiff and the law's default position (as a normative proposition) should be that an obligation arises to exercise reasonable care. Failure to recognise the duty ordinarily reduces the legal incentives for care to be taken and increases the likelihood that harm will be caused to the plaintiff. Courts should be wary about using the tort of negligence to achieve policy aims in conflict with negligence law's standards-setting/compensatory rationale. Where substantial pathways to harm are present between persons, the onus should be on the defendant or the court itself to argue clearly and convincingly the policy reasons why a duty should not be recognised.⁴⁷

Let us call the proposition italicised in the previous paragraph the golden rule of negligence in order to emphasise the fact that the duty of care analysis seems predicated upon a duty applying where there is the clear potential for the causation of a recognised form of harm by one person to another. The proposition is a simple and yet compelling one, of which the High Court has occasionally lost sight. As will be seen below, the decision of the High Court in *Harriton*⁴⁸ appears to defy it and to defy the internal logic of negligence law. A powerful argument exists for concluding that ordinary principles of negligence

⁴³ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 628 (Kirby J). See generally Mason, above n 27, 535.

⁴⁴ 'Discretion' is described in terms of 'leeways of choice': Harold Luntz, 'The Use of Policy in Negligence Cases in the High Court of Australia' in Michael Bryan (ed), *Private Law in Theory and Practice* (2007) 58; Cane, 'Another Failed Sterilisation', above n 17, 193.

⁴⁵ Peter Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203, 212.

⁴⁶ Given that the law is norm-based, any statement of a rule must be based upon policy. This includes policy that justifies the imposition of a duty of care in cases where there are significant causal pathways to the causation of harm — a matter not fully elucidated in my own previous work: see Mark Gergen, 'The Ambit of Negligence Liability for Pure Economic Loss' (2006) 48 *Arizona Law Review* 749, 763 fn 54 (Witting 'justifies his factors on descriptive grounds without making a normative argument'), 764 fn 54 ('I am not sure what Witting would have a court do in' a case like *Perre v Apand* (1999) 198 CLR 180).

⁴⁷ See also Bell, above n 27, 53, 69.

⁴⁸ (2006) 226 CLR 52.

pointed to the justice of recovery by the plaintiff,⁴⁹ and that the policy-based reasoning which provided for a no-duty rule in that case is unsatisfactory.

What *Harriton* and other cases demonstrate is that courts have, at times, come to grief when making use of policy-based reasoning.⁵⁰ The explanation for this lies in the *very nature of policy-based reasoning*. Policy reasoning ordinarily involves a focus wider than the relative positioning of the plaintiff and defendant; it involves a forward-looking consideration of parties other than those before the court.⁵¹ Often, the court will concern itself with the anticipated impact of a holding of a duty of care, or no duty of care, upon a diverse range of legal persons, whether that be persons who will, in future, occupy positions similar to the plaintiff and defendant, or persons who will be indirectly affected by the rule applicable as between the plaintiff and defendant.⁵²

This kind of policy reasoning — focusing upon parties not before the court and upon future consequences⁵³ — gives rise to problems. Reasoning in this way involves much prediction or guess work⁵⁴ and different predictions might be made by different judges. Obvious opportunities for predictive error arise⁵⁵ and predictions might be wrong for many reasons. These include the possibility of errors of judgement and changes in the assumptions upon which predictions are made.⁵⁶ Ad hoc policy-based reasoning is thus ‘unstable’.⁵⁷ In a great proportion of cases, it cannot offer definite guidance for decision-making.

But reasoning by reference to policy might be even more problematic than the preceding paragraph indicates. Policy imperatives have a tendency to be inconsistent with each other in terms of what they demand.⁵⁸ There may be policy arguments for and against liability. Indeed, even a single policy — such as the promotion of autonomy — might give rise to inconsistent demands upon courts.

⁴⁹ See Dean Stretton, ‘Wrongful Life and the Logic of Non-Existence’ (2006) 30 *Melbourne University Law Review* 972.

⁵⁰ Allan Beever, *Rediscovering the Law of Negligence* (2007) ch 5.

⁵¹ Bell, above n 27, 22; Mason, above n 27, 535; Witting, ‘Duty of Care’, above n 5, 38.

⁵² See, eg, *Esanda* (1995) 188 CLR 241, 282–9 (McHugh J), where a wide range of policy concerns was reviewed. These included the impact that a duty of care would have on the ‘administration of the court system’: at 283.

⁵³ Mason, above n 27.

⁵⁴ This might be thought of as the issue of ‘means-effectiveness’ in MacCormick’s categorisation: see above n 19, 262–3.

⁵⁵ Kylie Burns, ‘The Way the World Is: Social Facts in High Court Negligence Cases’ (2004) 12 *Torts Law Journal* 215, 232.

⁵⁶ See *ibid* 221–2, where it is noted that ‘Australian rules of evidence appear to have been designed to support and reflect the adjudicative fact-finding function of judges, without any significant consideration of how to respond to the wider role of social facts in judicial decision-making.’ See also Ernest J Weinrib, ‘The Disintegration of Duty’ in M Stuart Madden (ed), *Exploring Tort Law* (2005) 143, 172, referring disapprovingly to McHugh J’s reasons in *Esanda* (1997) 188 CLR 241, 283; McHugh, above n 27, 48.

⁵⁷ Stability is also referred to by Goldberg and Zipursky, above n 26.

⁵⁸ This might be thought of as the issue of ‘goal-desirability’ in MacCormick’s categorisation: see above n 19, 263. See also *Cattanach* (2003) 215 CLR 1, 67 (Hayne J); Bell, above n 27, 26–7; John Goldberg, ‘Twentieth-Century Tort Theory’ (2003) 91 *Georgetown Law Journal* 513, 543; Goldberg and Zipursky, above n 26, 723; Jane Stapleton, ‘Controlling the Future of the Common Law by Restatement’ in Stuart Madden (ed), *Exploring Tort Law* (2005) 267; Weinrib, ‘The Disintegration of Duty’, above n 56, 177; Witting, ‘Duty of Care’, above n 5, 40.

It then becomes a matter of prioritising policy choices.⁵⁹ This is hardly a surprising conclusion. One only has to look at the choices faced by the most important of all policy-makers — elected politicians, making laws for broad classes of person — in order to recognise the need for prioritising and compromise.

As indicated above, an example of a policy imperative that gives rise to inconsistent demands is that of furthering autonomy. Autonomy is seen as a central value in the Western liberal legal tradition.⁶⁰ This is the idea, frequently referred to in tort cases, that persons should be free to make their own decisions about how they will act,⁶¹ especially where they would be subject to legal obligations.⁶² When considering the imposition of a tort rule, reference is made to the supposed *competition* between the autonomy of the defendant and the security interest of the plaintiff. The assumption is that there is a need to preserve the autonomy of the ‘active’ defendant who has acted to injure the ‘passive’ plaintiff, unless it can be demonstrated that a wrong has been committed.⁶³ Tort theory tells us that wrongs may only arise where there is fault in the conduct of the defendant.⁶⁴

But this analysis of a simple tort scenario is incomplete. It neglects the impact that injury might have upon the plaintiff. Even where fault is not present in the defendant, a loss is a loss and this diminishes the autonomy of the plaintiff. The court is thus faced with the choice of either preserving the ability of the defendant to act without legal hindrance, or awarding damages to the injured plaintiff so as to restore (so far as possible) their ability to enjoy an autonomous existence. The promotion of autonomy is a policy-based imperative that can swing either way — in favour of the plaintiff or the defendant.⁶⁵

The example illustrates the argument in favour of reasoning in duty of care cases by reference to factual features linking the parties rather than by reference

⁵⁹ The result is that ‘[a] plaintiff can therefore be denied compensation on the basis of policy considerations that, although one-sidedly pertinent to the defendant or to persons carrying on a similar activity, have no normative bearing on the position of the plaintiff as the sufferer of an injustice’: Weinrib, ‘The Disintegration of Duty’, above n 56, 166. See also Bell, above n 27, 23, 26, 70, 197–8, 206.

⁶⁰ See John C P Goldberg, ‘Rights and Wrongs’ (1999) 97 *Michigan Law Review* 1828, 1828–9, referring to: William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 1979 ed) vol 1, 118; Oliver Wendell Holmes, *The Common Law* (first published 1881, 1946 ed) 144.

⁶¹ Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (1986) vol 3, 68.

⁶² See, eg, *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469, 477 (Gleeson CJ), 483 (McHugh J), 494–5 (Kirby J), 503 (Callinan J).

⁶³ The assumption of the active injurer and the passive tort victim is regularly made in the literature: Arthur Ripstein, *Equality, Responsibility and the Law* (1999) 6–9, 48–53; Ernest Weinrib, *The Idea of Private Law* (1995) 147; Jules Coleman, *Risks and Wrongs* (1992) 224–5. That this assumption is too simplistic has been exposed: see Stephen Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa Law Review* 449, 463–5.

⁶⁴ John Goldberg, ‘Tort’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 21, 23–4, summarising the widely-accepted views of Holmes, above n 60. See also Weinrib, *The Idea of Private Law*, above n 63, 127–8, 181; Coleman, above n 63, 325.

⁶⁵ Christian Witting, ‘Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort’ (2006) 29 *University of New South Wales Law Journal* 33, 52–3. Such a view recognises that ‘responsibility in law ... is a three-way relationship between agents, “victims” and the wider community’: Peter Cane, *Responsibility in Law and Morality* (2002) 56.

to policy.⁶⁶ The suggestion is that duty rules are likely to be more coherent — and operate more consistently — where courts recognise or reject them on the basis of the factual links between the parties (or those typically present as between persons of certain classes, such as motorists and pedestrians).

This is not to say that courts should never reason by reference to policy.⁶⁷ The point is really a matter of *emphasis*. There are occasions when it is impossible for courts to escape policy-based reasoning beyond the golden rule of negligence. Often this is so where there are significant factual features linking the parties (or classes of person), but significant and undesirable consequences are *likely* to attend the imposition of a duty of care. In recent times, this has been so in High Court cases involving, for example, the immunity from suit of advocates.⁶⁸ Experience warns that courts should be careful about the kinds of policy reasons that they invoke and the conclusions to which they appear to lead. Given the instability of policy as a tool of reasoning, and the differences of opinion that arise with respect to the use of policy, duty determinations are *more likely* to be subject to ongoing judicial scrutiny and to lead to inconsistent choices where they are the result of palpable policy choices.

In a recent chapter entitled ‘The Disintegration of Duty’, Ernest J Weinrib propounds arguments similar to those developed in this article about policy-based reasoning.⁶⁹ Weinrib’s concern is with policy-based reasoning that is instrumentalist in nature, looking beyond the relationship between the parties to the causation of a loss. His argument is that:

The disintegration of duty is the consequence of thinking that duty is a matter of policy, and that policy, in turn, refers to the various independent goals that liability might serve. On this view, each particular kind of duty represents the balance of goals, in themselves diverse and competing, that is peculiar to it.⁷⁰

There is no room ‘within the duty of care for policy, regarded as discreet [sic] considerations of social expediency that do not pertain to the immediate relationship between plaintiff and defendant’.⁷¹

Weinrib notes the limited institutional competence of the courts to undertake assessments of competing policy considerations, stating that ‘given the heterogeneity of possible policy considerations, a rigorous comparison would require the elaboration and application of some metric of social gains and losses — a task

⁶⁶ Witting, ‘Duty of Care’, above n 5, 40–2.

⁶⁷ Here one might refer to the wisdom of Martin Stone, above n 20, 203 (citations omitted):

The common law is ... replete with the discovery that it is sometimes mistaken to expect some more exact rule [such as a rule about what should be considered ‘foreseeable’] to be laid down prior to the contingent situations in which judgment is required. The law teaches that to demand such exactness is sometimes to fail to grasp what matters about those situations — the aim of judgment — not to grasp it more determinately.

⁶⁸ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

⁶⁹ Weinrib, ‘The Disintegration of Duty’, above n 56, ch 5. Weinrib’s general arguments about the nature of the tort relationship have, unquestionably, been very influential to my own understanding of tort law and its inherent limits (as they have been to a generation of tort lawyers), although I have only recently come across the chapter referred to here.

⁷⁰ *Ibid* 149.

⁷¹ *Ibid* 157.

beyond judicial competence.⁷² Beyond the resolution of the dispute before them, courts are institutions of limited competence, subject to rules of evidence and advocate-led contestation.

But Weinrib does not deny the normative character of legal decision-making. He states that Lord Atkin's conception of the duty of care provides

a structure of thinking that is actualized in legal reasoning through the casuistic assessment of facts or comparison of cases or through the elucidation of its particular normative features in the overall context of a legal system that values coherence. This second notion of policy is ... not only compatible with but indeed required by the general conception of duty.⁷³

Thus, Weinrib acknowledges that courts must develop coherent legal doctrine. In this he quotes from the judgment of the High Court in *Sullivan*: 'problems in determining the duty of care "may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships"'.⁷⁴

Undoubtedly, Weinrib is correct in his argument that a compelling policy reason for shaping a duty of care rule lies in the need for consistency of the proposed rule with already existing rules in tort law, private law and the law in general. But this is hardly a controversial point. The real controversy lies in the resort to more adventurous reasoning by reference to policy. In what follows, a practical illustration will be given of the dangers that arise with respect to such adventurous reasoning.

IV THE HIGH COURT ON POLICY

Having considered a theoretical framework through which the application of policy might be analysed, it is now pertinent to consider the position adopted by the High Court itself. The starting point is the 2001 decision in *Sullivan*. As mentioned, this was a watershed case. The High Court rejected the use of the three-stage test for the duty of care applied in English courts⁷⁵ (and elsewhere)⁷⁶ and pointed towards the adoption of the 'salient features' approach. From this case and subsequent clarifications, it appears that the High Court has adopted a methodology for analysing duty situations that proceeds by (a) considering prior authorities to see whether a binding decision covers the case at hand; (b) considering non-binding but analogous cases; and (c) applying, in 'novel cases', the test for foreseeability of harm to persons, and searching for 'salient fea-

⁷² Ibid 167.

⁷³ Ibid 149.

⁷⁴ Ibid 182, citing *Sullivan* (2001) 207 CLR 562, 580 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

⁷⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605; cf *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181.

⁷⁶ *Cooper v Hobart* [2001] 3 SCR 537; *R M Turton & Co (in liq) v Kerslake & Partners* [2000] 3 NZLR 406. The approach in these cases has been commented upon by the present writer: see Christian Witting, *Liability for Negligent Misstatements* (2004) 19–20, 22–8.

tures'.⁷⁷ The remainder of this article concerns itself with the salient features aspect of the approach.

The greatest controversy about the Court's new approach to duty concerns what constitutes 'salient features'. This term has been explained, at least in part, by its ostensible originator Gummow J in *Perre v Apand Pty Ltd*: 'The question ... is whether the salient features of the matter give rise to a duty of care ... In determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties.'⁷⁸ A majority of the High Court in *Woolcock* echoed this approach.⁷⁹ These connections between the parties include physical closeness,⁸⁰ contractual relations,⁸¹ legal or factual control over conduct,⁸² knowledge of the likelihood of harm,⁸³ vulnerability to harm⁸⁴ and determinacy of class.⁸⁵

However, the High Court's treatment of duty factors in *Sullivan* does not focus exclusively upon factual features linking the parties. 'Salient features', so it seems, combines consideration of the positive and the normative, resembling the earlier described approach of Stapleton.⁸⁶ There is, therefore, a need to decipher the High Court's statements regarding the role of the normative in the use of policy-based reasoning. The concern here is with the general approach that the Court appears to adopt (a matter which has, again, become clearer over the years since the decision was handed down). This will be compared, shortly, with the Court's actual practice.

In *Sullivan*, the Court stated:

There is ... a danger [in cases of duty] that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case ... The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.⁸⁷

Although the purported contrast between principle and policy is, as has been demonstrated, difficult to maintain, the effect of the judgment is tolerably clear.

⁷⁷ See, eg, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 526–33 (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Woolcock*'), for the manner in which the judgment is structured.

⁷⁸ (1999) 198 CLR 180, 253.

⁷⁹ (2004) 216 CLR 515, 530 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁸⁰ Established long ago in *Donoghue v Stevenson* [1932] AC 562.

⁸¹ *Woolcock* (2004) 216 CLR 515, 530 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁸² *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597 (Gummow and Hayne JJ).

⁸³ *Woolcock* (2004) 216 CLR 515, 530 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁸⁴ *Ibid* 530–1 (Gleeson CJ, Gummow, Hayne and Heydon JJ), referring to Stapleton, 'Comparative Economic Loss', above n 23, 558–9.

⁸⁵ *Woolcock* (2004) 216 CLR 515, 553 (McHugh J), 574–5 (Kirby J).

⁸⁶ Stapleton, 'The Golden Thread at the Heart of Tort Law', above n 22, 137.

⁸⁷ (2001) 207 CLR 562, 579 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

The Court is uncomfortable with *formulating* policies — ostensibly those that affect wide classes of person. Where the Court has no choice but to reason by reference to policy, it would prefer to reason by reference to *established* policies rather than ad hoc policy concerns.⁸⁸ Analysis of *Sullivan* itself reveals that the Court will look to established policies enshrined in statutes,⁸⁹ case law (or doctrine)⁹⁰ and judicial values.⁹¹ The implication is that it will hesitate before going further than that. In what follows it will be demonstrated that the Court would be wise to follow its own advice here.

It appears obvious that policy played an important role in *Sullivan* in determining that those involved in investigating allegations of sexual abuse could not be sued in negligence. These policy imperatives were that the law should develop obligations that are consistent with other legal rules and, where the potential for conflict arises, that the rules of defamation should prevail over those of negligence in suits concerning investigation of criminal offences.⁹² Also, the law should develop so as to respect the intention of the legislature that the interests of the child in such cases be treated as paramount — that they should prevail over the interests of persons under investigation.⁹³ These policies were enshrined in existing statute and case law; their invocation conforms to Weinrib's permitted use of policy and is relatively uncontroversial.

It is unfortunate that the High Court's salient features approach does not appear to differentiate between the positive and normative features of a case. This has an obfuscatory effect and gives credence to suggestions that the courts have attempted to 'hide' the use of policy in duty of care decision-making. Otherwise however, there is much to be said for the Court's current approach. The Court has stated its preference that policy-based reasoning be used with caution. This recognises the unsatisfactory nature of the discretion which courts would wield were they to feel unconstrained in invoking policy. It also recognises that courts have, at times, taken what can be seen as mistaken turns when speculating about appropriate rules to guide future conduct or achieve socially desirable results.⁹⁴

⁸⁸ Cane, 'Another Failed Sterilisation', above n 17, 191. As an aside, it is worth mentioning that this view of the High Court's methodology appears to reflect the extra-judicial comments of former High Court Justice Michael McHugh, above n 27, 46:

Values and the practical working of legal rules have as much a part to play in creating, extending or modifying a legal rule as logic does. No doubt many of the values invoked to develop or modify the law derive from the legal system itself. Values such as freedom of the individual, equality before the law, certainty and predictability, ... good faith, reasonableness and, in recent years, fairness permeate the legal system.

His Honour was of the opinion that 'in the future extra legal values will have only a small role in judicial law-making': at 46.

⁸⁹ *Sullivan* (2001) 207 CLR 562, 576 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

⁹⁰ *Ibid* 581–2 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), commenting on the fact that statements are privileged in the law of defamation.

⁹¹ *Ibid* 581 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), referring to the need for 'coherence' in legal obligations.

⁹² *Ibid* 580–1 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

⁹³ *Ibid* 582 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ). See also Luntz, above n 44.

⁹⁴ Surely one of the better examples is *Annis v Merton London Borough Council* [1978] AC 728, which was later departed from: see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Murphy v Brentwood District Council* [1991] 1 AC 398.

V USE OF POLICY IN THE BIRTH CASES

Having considered the High Court's statement of principle, the next question is: what has the High Court *done* since *Sullivan*? It seems that the *Sullivan* approach has not yielded any great change in the nature of judicial reasoning in negligence and other tort cases. It is obvious that, at times, the High Court has engaged in an in-depth consideration of ad hoc policy issues — issues that go far beyond the established policies found in statutes, principle and legal values.

The debates in the wrongful conception and wrongful life cases (collectively referred to as 'the birth cases') are instructive. These cases have raised considerable controversy and have, in Kylie Burns' terminology, been examples of a 'dense' use of 'social fact'.⁹⁵ There are strong policy concerns on both sides of the argument as to duty of care,⁹⁶ including 'statements about loss distribution, possible deterrent value and the general social effect of liability'.⁹⁷

It will be argued that the application of ordinary duty principles in these cases leads to the recognition of duties of care. Duties of care should be recognised under the golden rule of negligence where, as between individuals, there are substantial pathways to harm, and especially physical harm. The birth cases did not involve orthodox claims with respect to physical harms⁹⁸ — they were 'failure to advise' cases. However, logic and consistency suggest that negligent medical practitioners should be in no better position than negligent auditors who are held liable to their clients or third parties for misstatements leading to financial losses.⁹⁹ The only doubt about the application of the golden rule of negligence, as shall be explained, arises in the *Harriton*-type case because of the role of the mother and the difficulty in ascertaining what her final say regarding abortion would have been if she had been warned of the risk that her child would be born seriously disabled. That however, is a matter not of duty but causation.

It should be noted, as a preliminary, that the issues to which these cases give rise are both complex and sensitive. The discussion that follows cannot hope to draw out all of these complexities. It will focus upon policy arguments as to liability that take as their starting point either the proposition that human life is valuable, or the proposition that the law should not undermine the family unit. It will be shown that these propositions are just as unhelpful as the policy of 'advancing autonomy' in determining duty/liability issues in negligence.¹⁰⁰

*Cattanach*¹⁰¹ involved a claim by parents of an unplanned child for the costs of raising the child. The child was born without substantial medical complication¹⁰²

⁹⁵ Burns, above n 55, 225.

⁹⁶ There is a substantial amount of literature on the *Cattanach* wrongful conception case: see, eg, *ibid*; Ben Golder, 'From *McFarlane* to *Melchior* and Beyond: Love, Sex, Money and Commodification in the Anglo-Australian Law of Torts' (2004) 12 *Torts Law Journal* 128; John Seymour, '*Cattanach v Melchior*: Legal Principles and Public Policy' (2003) 11 *Torts Law Journal* 208.

⁹⁷ Burns, above n 55, 228.

⁹⁸ See Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th ed, 2003) 95–6. See especially Christian Witting, 'Physical Damage in Negligence' (2002) 61 *Cambridge Law Journal* 189, 192–6.

⁹⁹ See *Esanda* (1997) 188 CLR 241.

¹⁰⁰ Interestingly, notions of autonomy did not feature prominently in the birth cases. For comment: see especially Golder, above n 96, 149–54.

¹⁰¹ (2003) 215 CLR 1.

and healthy. The claim was made against the parents' obstetrician and gynaecologist on the basis of his negligent failure to advise of the risk of pregnancy following the clipping of the left fallopian tube. This was in circumstances where the mother erroneously believed that her right ovary and fallopian tube had previously been removed. Gleeson CJ observed that:

The [trial judge's] finding of negligence was based upon a conclusion that Dr Cattanach had too readily and uncritically accepted his patient's assertion that her right fallopian tube had been removed, that he should have advised her to have that specifically investigated, and that he should have warned her that, if she was wrong about that, there was a risk that she might conceive.¹⁰³

The damages sought related to costs such as those of feeding the child, clothing, medical and pharmaceutical expenses.¹⁰⁴

A majority of the High Court held that the claim for the costs of raising the unplanned child was good; the defendant doctor's duty of care extended to the financial costs of a negligent failure to advise.¹⁰⁵ The reasons for the majority position can be summed up in the words of McHugh and Gummow JJ: liability arose 'under ordinary principles for the foreseeable consequences of Dr Cattanach's negligence'.¹⁰⁶ No adequate reason had been given 'to shield or immunise the appellants from what otherwise is a head of damages recoverable in negligence under general and unchallenged principles in respect of the breach of duty by Dr Cattanach'.¹⁰⁷ Callinan J stated that '[a]ll of the various touchstones for, and none of the relevant disqualifying conditions against, an award of damages for economic loss are present here'.¹⁰⁸ Interestingly, it was Kirby J who opined that the legal issues in this case were best resolved by reference to ordinary negligence principles: 'the diverse opinions of their Lordships in *McFarlane [v Tayside Health Board]* illustrate what can happen when judges embark upon the "quicksands" of public policy, at least when doing so leads them away from basic principle'.¹⁰⁹

In arguing that the application of ordinary negligence principles led to the recognition of a duty of care and to liability, the judges relied on significant factual features linking the parties. The case was similar to the paradigm of a professional offering a service and/or advice to a client¹¹⁰ where there had been direct dealings between the parties, a request for advice, and knowledge of the

¹⁰² The evidence revealed that the mother had suffered no more than a thrombosis associated with the pregnancy and depression: *ibid* 12–13, 26. While it is not suggested that these injuries are to be taken lightly, they are comparatively minor in the context of childbirth, which is a natural event full of risks to mother and child.

¹⁰³ *Ibid* 12.

¹⁰⁴ *Ibid* 12–13 (Gleeson CJ).

¹⁰⁵ *Ibid* 35 (McHugh and Gummow JJ), 68 (Kirby J), 107 (Callinan J).

¹⁰⁶ *Ibid* 27.

¹⁰⁷ *Ibid* 28 (McHugh and Gummow JJ). See also at 59, 66, 68 (Kirby J).

¹⁰⁸ *Ibid* 107.

¹⁰⁹ *Ibid* 62 (citations omitted). The United Kingdom cases have been summarised in these terms: 'In essence, the injuria in wrongful pregnancy is the incompetent operation or the provision of misleading information; the *damnum* is being pregnant': J K Mason, 'Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology' (2002) 6 *Edinburgh Law Review* 46, 48.

¹¹⁰ See especially Witting, *Liability for Negligent Misstatements*, above n 76, ch 9.

likelihood of reliance by the clients upon the advice given, in circumstances where their goal must have been tolerably clear. One of the most frequently given reasons for seeking a sterilisation is the desire of the reluctant parents to insulate their existing families from the financial effects of childbirth and child-rearing.¹¹¹ Dr Cattnach could not have been unaware that this was a possible explanation of the Melchiors' decision to seek a tubal ligation.¹¹²

Thus, it does not seem to involve any logical leap from established authorities to hold that the ordinary duty of care owed by the doctor to the patient with respect to physical integrity could be extended to cover the financial consequences of an unplanned child.¹¹³ In such circumstances, the onus would have lain upon the defendant to give strong reasons for departing from what principle would seem to dictate. This was explicitly recognised by one of the dissentients — Hayne J.¹¹⁴

The next issue relates to the use of policy in *Cattnach*. In that case, Hayne J observed that

[a]lthough variously described, the values invoked all relate to the worth that is to be ascribed to the life of the individual, and the worth that can be found in establishing and maintaining a good and healthy relationship between parent and child.¹¹⁵

The value of the family unit and the parent-child relationship within it can be agreed upon by all. But the question is what consequence this policy imperative should have for a case like *Cattnach*. The case demonstrates that one of a number of different perspectives might be adopted.

On the one hand, it can be said that allowing the kind of claim made by the Melchiors involves the Court in treating childbirth as an actionable event¹¹⁶ and that the Court might be seen as devaluing the life of the unplanned child by awarding damages with respect to the birth.¹¹⁷ In the view of the minority, the plaintiff was wrong to argue that the advent of a parent-child relationship could be viewed in this way. Such a perspective would undermine the importance of the family unit in the eyes of the law. Thus, Gleeson CJ observed that

[t]he recognition of the family as the natural and fundamental group unit of society ... in conjunction with declarations of the need to provide for the care and protection of children, is not easy to reconcile with the idea of the parent-child relationship as something the law will regard as an element of actionable damage.¹¹⁸

¹¹¹ *Cattnach* (2003) 215 CLR 1, 69–70 (Hayne J).

¹¹² This is so even if the reasons for seeking a sterilisation are not considered to be the business of the medical practitioner: *Cattnach* (2003) 215 CLR 1, 76 (Hayne J).

¹¹³ Cf Stephen Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life' (2005) 27 *Sydney Law Review* 525, 532, arguing that 'the very special nature of the damage which is alleged to be actionable — financial loss by way of expenditure on the child — suggests that the majority approach in *Cattnach* is not a policy-free application of ordinary principle.'

¹¹⁴ *Cattnach* (2003) 215 CLR 1, 72.

¹¹⁵ *Ibid* 89 (Hayne J). See also at 10 (Gleeson CJ), 120–1 (Heydon J).

¹¹⁶ *Ibid* 16–18 (Gleeson CJ).

¹¹⁷ *Ibid* 92 (Hayne J), 126 (Heydon J).

¹¹⁸ *Ibid* 21.

Heydon J was of the opinion that ‘since the law assumes that human life has a unique value ... the impact of a new life in a family is incapable of estimation in money terms’.¹¹⁹

On the other hand, it can be said that the Melchiors were doing no more in bringing their claim than attempting to ensure that they could afford to raise their son; that they could provide for him what otherwise would not be available. The award of damages would thus represent just compensation for the negative financial consequences, to the parents and the family as a whole, of a failure in professional care. This would help to avoid the inevitable stresses of financial hardship and *strengthen* the family unit. Thus, opined McHugh and Gummow JJ, ‘[w]hat was wrongful in this case was not the birth of a third child to Mr and Mrs Melchior but the negligence of Dr Cattanach.’¹²⁰ Their Honours rejected the proposition that the law’s regard for the value of human life and the maintenance of familial relationships subverted these propositions. In conformity to the thesis presented in this article, McHugh and Gummow JJ remarked: ‘It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach’s negligence.’¹²¹ The finding of the majority in favour of liability was entirely justifiable.

The more recent case of *Harriton*¹²² involved a ‘wrongful life’ claim. The plaintiff was a child born with profound disabilities, including blindness, deafness, mental retardation and spasticity, and endured a very low quality of life. The plaintiff’s mother had been tested by the defendant doctor for rubella while pregnant and had been advised erroneously that she had not contracted the disease. She alleged that if she had been informed of the fact that she had contracted it, she would have undergone a legally-sanctioned abortion of the foetus. The plaintiff claimed that this was the preferable course; that she should not have been born with her level of disability. She claimed damages for pain and suffering, loss of amenities, medical expenses and costs of care. Here, as in *Cattanach*, the High Court was required to determine the validity of the plaintiff’s cause of action.

The decision turned upon a number of discrete issues, including whether a duty of care existed and, if so, whether the plaintiff had suffered a recognised form of damage. The majority judgments focused upon the second of these issues. It was held that the plaintiff had suffered no recognised damage. Whether damage existed depended upon a comparison between the plaintiff’s present medical state and what would have prevailed had the defendant not been negligent.¹²³ That counterfactual state was non-existence. In concurrence with reasoning in similar cases around the world,¹²⁴ the conclusion was that the

¹¹⁹ Ibid 126.

¹²⁰ Ibid 32. See also at 57 (Kirby J).

¹²¹ Ibid 35.

¹²² (2006) 226 CLR 52, considered in Alice Grey, ‘*Harriton v Stephens*: Life, Logic and Legal Fictions’ (2006) 28 *Sydney Law Review* 545; Stretton, above n 49.

¹²³ *Harriton* (2006) 226 CLR 52, 103–4 (Hayne J).

¹²⁴ See, eg, *McKay v Essex Area Health Authority* [1982] QB 1166; *Gleitman v Cosgrove*, 227 A 2d 689 (NJ, 1967).

required comparison could not be made. Important in Crennan J's view was the fact that no person could experience non-existence.¹²⁵ Her Honour noted that '[t]here is no practical possibility of a court (or jury) ever apprehending or evaluating, or receiving proof of, the actual loss or damage as claimed by the appellant.'¹²⁶

These are issues that do not call for extensive examination in this article. However, it might be said that there are good reasons for thinking that the analysis of the damage suffered by the plaintiff in *Harriton* is inadequate. In the author's tentative opinion, the damage did not consist of a physical form of harm — negligence was not the biological cause of the disability from which the plaintiff suffered. She was never going to exist, either inside the womb or out of it, without genetic abnormality; that was her terrible fate.¹²⁷ Although it might be said that the failure to terminate caused the suffering that resulted, it is not settled principle that this should be seen as giving rise to legally recognised damage. In the context of a wrongful life claim, that is a matter open to debate. However, the financial expenses that her condition gave rise to could have been avoided and this constitutes a recognised form of damage. The claim should have been characterised as one concerning an economic loss by analogy with the defective property cases.¹²⁸ Indeed, there was argument to this effect,¹²⁹ although it was overwhelmed by judicial concern about the impossibility of comparison with the non-existent.¹³⁰

More pertinent to the argument made in this article, Crennan J determined that no duty of care arose. Her Honour stated that

[t]o superimpose a ... duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born, which may or may not be compatible with the same doctor's duty of care to the mother in respect of her interests, has the capacity to introduce conflict, even incoherence, into the body of relevant legal principle.¹³¹

Conflict could arise, for example, in the case where the mother's religious or other convictions were against abortion, while the interests of the unborn child were in termination of a life that would otherwise lead to certain misery.¹³²

In dissent, Kirby J argued that the application of ordinary negligence principles established that a duty of care had been owed by the defendant doctor to the then unborn child. Kirby J stated:

¹²⁵ *Harriton* (2006) 226 CLR 52, 126. See also at 104–5 (Hayne J).

¹²⁶ *Ibid* 126.

¹²⁷ See Christian Witting, 'Physical Damage' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (2008, forthcoming).

¹²⁸ *Ibid*.

¹²⁹ See *Harriton* (2006) 226 CLR 52, 80–2, 101 (Kirby J).

¹³⁰ For good arguments against Crennan J's majority-approved approach in *Harriton* (2006) 226 CLR 52: see Stretton, above n 49, 984–1001. Cf Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70 *Modern Law Review* 59, 76–7, arguing in favour of characterisation of physical changes as damage based upon the affected person's subjective interpretation of those changes.

¹³¹ *Harriton* (2006) 226 CLR 52, 125.

¹³² *Ibid* 124–5 (Crennan J).

health care providers owe a duty to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury. Such a duty has been held to exist even before conception. Once the child is born, the damage accrues in law and the child is able to maintain an action for damages. Unless some disqualifying consideration operates, the present case falls within the duty owed by persons such as the respondent to take reasonable care to prevent pre-natal injuries to a person such as the appellant.¹³³

His Honour thought the case to be an ‘unremarkable one’,¹³⁴ with the doctor–patient relationship falling within the ‘standard duty relationship for such a case’.¹³⁵

In terms of policy, arguments were made again in *Harriton* about the value of life. In the view of Crennan J, the difficulty for the Court lay in persons other than the plaintiff pronouncing to the plaintiff the value of her own life: ‘it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities.’¹³⁶ It was necessary for the Court to affirm the position that all life is valuable in the eyes of the law ‘irrespective of any disability or perceived imperfection’.¹³⁷ Moreover, Crennan J pointed to the absence of any evidence that questioned the ability of the plaintiff to experience pleasure or find life rewarding.¹³⁸

By contrast, in the view of Kirby J the value of life could be acknowledged but by no means represented an ‘absolute’ principle.¹³⁹ Thus, his Honour noted exceptional rules of law that allowed killing in self-defence and the withdrawal of life-sustaining treatment from certain hopelessly ill patients.¹⁴⁰ Yet here the argument of the plaintiff in no way hinged upon any subsisting obligation to kill. The life of the plaintiff was a fact to be assumed. The real issue concerned what was to be done about the plaintiff’s life of suffering.¹⁴¹ In Kirby J’s view, an award of damages would have provided the plaintiff ‘with a degree of practical empowerment. Such damages would enable [her] to lead a more dignified existence.’¹⁴²

Undoubtedly, it is unsatisfactory that in wrongful conception cases, doctors owe a duty of care to their adult patients with respect to the financial costs of raising a child, but that in wrongful life cases, doctors owe no duty to the disabled child who must spend a life in human misery.¹⁴³ Where there are substantial pathways to the causation of harm, the golden rule of negligence

¹³³ Ibid 74–5 (citations omitted).

¹³⁴ Ibid 76.

¹³⁵ Ibid.

¹³⁶ Ibid 129.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid 89.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid 90.

¹⁴³ A point noted in *Cattanach* (2003) 215 CLR 1, 146 (Heydon J). Cf Penny Dimopoulos and Mirko Bagaric, ‘Why Wrongful Birth Actions Are Right’ (2003) 11 *Journal of Law and Medicine* 230, 237–8.

suggests that a duty should be recognised. This is so especially in cases of professionals who are paid to give accurate advice or information and where their failure to do so might lead to very significant financial losses. The proposition, argued by Dean Stretton,¹⁴⁴ that a duty to the foetus should have been recognised is consistent with the presence of significant causal pathways to harm and the surrounding case law establishing an analogous duty.¹⁴⁵

An issue more troubling than that of duty in the wrongful life cases concerns the position of the mother, who has the ultimate choice about whether or not to abort a foetus likely to be born seriously disabled (although one notes that this choice is undermined by the treating doctor's lack of proper advice). This fact leads to real difficulty in determining the issue of causation. As Hayne J noted, '[i]f termination is lawful, the woman must choose whether to take that course. That choice is wholly subjective.'¹⁴⁶ In those circumstances, 'a doctor's liability to the child would ... depend upon the particular subjective views of the mother'.¹⁴⁷ The author offers no substantive comment on this issue; that is for another day.

The discussion of the birth cases demonstrates that the policy propositions that human life is valuable and that the law should not undermine familial relationships do not speak unequivocally either in favour of or against liability. Different conclusions can be drawn from these propositions. Moreover, these propositions compete with other legal policies. This means that the various judgments in *Cattanach* and *Harriton*, while densely reasoned and overflowing with policy-based argument, do not satisfy any desire for decisiveness in legal reasoning.¹⁴⁸ They appeal, in a conflicting manner, to our values and sense of priorities. It is in this respect that Kirby J's views appear to be truest to the inherent logic of negligence and provide the least room for argument. It is difficult to argue that Kirby J's decisions in favour of liability in both wrongful birth and wrongful life cases undermine the two policy objectives found important in the birth cases. Moreover, his Honour's decisions do further the golden rule of negligence.

It should be noted that legislatures in three Australian states have reacted to the decision in *Cattanach* by abolishing actions for damages for the costs of raising the child.¹⁴⁹ This appears to be proof that the courts need to decide cases on their merits and have faith in the ability of legislatures to reverse or modify any decisions which are thought to be unacceptable to the community in general. The argument in this article is, of course, that courts in negligence cases should make their decisions by reference to the factual links between the parties and that they should be hesitant about resorting to contentious policy-based reasoning.

¹⁴⁴ Stretton, above n 49, 979–84.

¹⁴⁵ See *X v Pal* (1991) 23 NSWLR 26; *Watt v Rama* [1972] VR 353.

¹⁴⁶ *Harriton* (2006) 226 CLR 52, 106.

¹⁴⁷ *Ibid* 107 (Hayne J).

¹⁴⁸ A very similar conclusion has been reached with respect to analogous English cases. Thus, Laura Hoyano has written that notions of distributive justice have proved to be empty in providing no proper guide as to how decisions should be made or in explaining or justifying decisions: see especially Laura Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 *Modern Law Review* 883, 905–6.

¹⁴⁹ *Civil Liability Act 2002* (NSW) s 71; *Civil Liability Act 2003* (Qld) s 49A; *Civil Liability Act 1936* (SA) s 67.

Before concluding this discussion, a caveat should be noted. The one area of negligence law in which automatic application of the golden rule of negligence might not be suitable relates to the three party economic loss cases.¹⁵⁰ These include cases where a statement is passed through the hands of an intermediary before being relied upon by the plaintiff and where the defendant damages property owned by an intermediary, which the plaintiff relies upon with respect to some economic activity. In such cases, given the dangers of the ripple effect and indeterminate liability, courts might find that the golden rule of negligence must be tempered. In such cases, courts should proceed as is often suggested: by carefully considering the existing authorities and developing the law incrementally.

VI CONCLUSION

This article has demonstrated that the High Court continues to reason by reference to policy in negligence and other tort cases. Indeed, it has been demonstrated that this is a logical inevitability. But the cases also demonstrate a change in emphasis. The High Court has indicated that it does not want to (be seen to) formulate wide social policy, or reason by way of ad hoc policy considerations. It has expressed a preference to reason by reference to policy already inherent in the law. This is what the Court attempted to do in *Sullivan*.

But there have been controversial cases, such as the birth cases, in which members of the Court have found it difficult to keep to the stated preference. From a negligence lawyer's perspective, much of the reasoning in these cases was founded upon contentious and contestable policy perspectives. Insofar as the cases departed from the application of the golden rule of negligence, they remain contentious and open to reconsideration by the High Court itself. Few would treat them as settling, for the next decade and beyond, the law in birth cases. Indeed, the importance of the golden rule of negligence has been all but lost in the debate. This is a rule that ultimately encourages proper standards of conduct and ensures, to the extent possible, that people can plan their lives on the basis that if minimal standards are not observed, it is the negligent party who will pay the price.

¹⁵⁰ With respect to most cases of negligently-inflicted mental harms, legislation now applies: see, eg, *Civil Liability Act 2002* (NSW) pt 3; *Wrongs Act 1958* (Vic) pt XI.