

Policy, Principle, or Values: An Exploration of Judicial Decision-Making

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Repository Citation

R.J. Cahill-O'Callaghan and B.J. Richards, *Policy, Principle, or Values: An Exploration of Judicial Decision-Making*, 79 La. L. Rev. (2019)
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Policy, Principle, or Values: An Exploration of Judicial Decision-Making

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

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INTRODUCTION

The law, as Jerome Frank pointed out 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 Society often calls upon judges to find answers to questions never posed before, to balance a complex array of needs and interests, and to ensure that their answers fit within a recognized legal framework. This challenge is particularly evident in the rapidly changing landscape of medical law.³ These cases,

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1. JEROME FRANK, *LAW AND THE MODERN MIND* 120 (1949).

2. *Id.* at 6.

3. The rapid evolution of medicine is reflected in concerns with the rise of medical liability resulting in two Bills before Congress in 2017. The American Health Care Reform Act of 2017 (“HR 277”) and Protecting Access to Care Act (“HR 1215”). This Article centers on one aspect of this evolving landscape: “loss of chance.”

which are, by definition, unique both in circumstance and potential outcome, give rise to questions for which the answer is not clearly defined and the law is complex and uncertain.⁴ In reaching a decision, judges will exercise discretion to achieve an outcome that is “fair and just.”⁵ The exercise of discretion often introduces an element of flexibility, which is essential in these decisions. With flexibility, however, comes the potential for inconsistency, and with a high level of public scrutiny comes the requirement that the judges provide transparent reasons for the conclusions they reach; society expects these reasons to be consistent with accepted legal principles and may, despite the often fact-driven nature of the dispute, accord precedential value in subsequent disputes.⁶

In reaching a decision in many of these difficult cases, the judge appeals to public policy to provide the foundation for the decision.⁷ The assertion of policy facilitates discretion and allows the judge to address issues outside the legal framework.⁸ Indeed, judicial appeals to policy are, according to Lord Steyn, an “everyday occurrence.”⁹ Yet, policy has been described as “one of the most under-analysed terms in the modern legal lexicon.”¹⁰ Judges poorly articulate the term “policy” in judgments, which becomes even more evident when both the majority and dissenting judges make appeals to public policy without defining or explaining the relevant policy—yet reach opposite conclusions.¹¹

4. This Article analyzes three such cases in which the complexity and legal uncertainty divided the court. See *Chappel v. Hart* (1998) 195 CLR 232 (Austl.); *Chester v. Afshar* [2005] 1 AC 134 (UK); *Tabet v. Gett* (2010) 240 CLR 537 (Austl.).

5. TONY BINGHAM, *THE BUSINESS OF JUDGING* 36 (Oxford Univ. Press 2000). The full quote is as follows: “[I]f, being governed by no (clear) rule of law, its resolution depends on the individual judge’s assessment (within such boundaries as have been laid down) of what is fair and just to do in a particular case.” *Id.*

6. As this Article will demonstrate, some judges take specific steps to assert that the decision holds no precedential value and is confined to the specific facts before the court.

7. BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* (W. Acad. Publ’g 2013).

8. This Article develops this argument.

9. ALAN PATERSON & CHRIS PATERSON, *GUARDING THE GUARDIANS? TOWARDS AN INDEPENDENT, ACCOUNTABLE AND DIVERSE SENIOR JUDICIARY* 15 (2012), <https://strathprints.strath.ac.uk/40759/> [<https://perma.cc/6HUI-82NG>] (quoting Lord Steyn, *Deference: A Tangled Story*, *STUDY LIB* (Nov. 25, 2004), <https://studylib.net/doc/7904474/deference--a-tangled-story---the-constitutional-and-adminis> [<https://perma.cc/JUC9-5YJ6>]).

10. Peter Cane, *Another Failed Sterilisation*, 120 L. Q. REV. 189, 191 (2004).

11. This Article details this argument in the discussion.

In cases in which the law does not provide a clear answer, legal principle frames judicial decision-making, but individual values underpin decisions that assert public policy. This Article explores the judicial process and establishes that the complex interplay of influences warrants acknowledgment. Furthermore, the Article argues that despite the retreat from the language of values, the language of policy and the values it represents are an important aspect of the application of the law, lending flexibility to the judicial decision-making process that would not be possible if judges were limited to consideration of strict and formulaic legal principle. In cases that require the exercise of judicial discretion, other extra-legal factors may influence the decision-making process.

This Article aims to reveal the values underpinning judicial decisions in three cases and argues that the language of public policy is used to frame a decision based on judicial values.¹² Without suggesting that the implicit role of values should become explicit, this Article seeks to explore and understand the role that such values may play.

I. PERSONAL VALUES AND JUDICIAL DECISIONS

Social psychologists and behavioral economists are increasingly interested in the process of decision-making. The work of Daniel Kahneman and Aaron Tversky brought subconscious psychological influences on decision-making to public attention.¹³ To date, however, limited studies exist on the psychological process of judicial decision-making. The studies that do exist suggest that despite being expert decisionmakers, in uncertain decisions, judges are subject to the same subconscious psychological influences and processes as any other educated decisionmakers.¹⁴

The recognition of these psychological influences is not confined to abstract or theoretical discussion. Indeed, studies have shown that innate influences, such as personal values, play a role in legal decisions.¹⁵ In this context, the potential influence of subconscious factors raises questions regarding the transparency of judicial decisions. It was the presence of

12. See generally *Chappel v. Hart* (1998) 195 CLR 232 (Austl.); *Chester v. Afshar* [2005] 1 AC 134 (UK); *Tabet v. Gett* (2010) 240 CLR 537 (Austl.).

13. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

14. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2000).

15. Rachel J. Cahill-O'Callaghan, *The Influence of Personal Values on Legal Judgments*, 40 J.L. & SOC'Y 596 (2013).

these extra-legal influences that concerned Justice Michael Kirby in *Chappel v. Hart* when he quoted Lord Salmon:

“In truth the conception in question [i.e. 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.¹⁶

In the same case, Justice Hayne suggested that judges should reveal the values underpinning judgments: “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.”¹⁷ Values and value judgements within legal scholarship encompass a wide range of different concepts, including: morals; interests; pleasures; likes; preferences; duties; desires; wants; goals; needs; attractions; and other kinds of selective orientations. This Article is grounded in the psychological understandings of values and, as such, defines values within a psychological context. Milton Rokeach defined values as “enduring beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct.”¹⁸

Humans develop their personal values experience and act as a largely subconscious guide to decision-making.¹⁹ An individual may hold a wide range of values in high regard; it is the relative importance of the specific

16. *Chappel*, 195 CLR, ¶ 2 (Kirby J).

17. *Id.* ¶ 148 (Hayne J).

18. MILTON ROKEACH, UNDERSTANDING HUMAN VALUES: INDIVIDUAL AND SOCIETAL 160 (1979).

19. Steven Hitlin & Jane Allyn Piliavin, *Values: Reviving a Dormant Concept*, 30 ANN. REV. SOC. 359 (2004); see also Norman T. Feather, *Values, Valences, and Choice: The Influence of Perceived Attractiveness and Choice Alternatives*, 68 J. PERS. SOC’Y PSYCHOL. 1135 (1995). Gregory Maio argues that values operate at three levels: (1) the system level; (2) the level of specific abstract values and the beliefs and feelings toward it; and (3) the instantiation level, or the level at which the value is applied to a specific situation. Gregory R. Maio, *Mental Representations of Social Values*, 42 ADV. EXP. SOC’Y PSYCHOL. 1 (2010).

values in relation to other values that is critical to decision-making, as opposed to the importance of a single value in isolation.²⁰ Drawing on a model of personal values Professor Shalom H. Schwartz developed,²¹ one of the authors devised a content analysis method to identify values within legal judgments.²² The study revealed different personal values in judicial opinions, endorsing opposing positions in cases, which divided the Supreme Court of the United Kingdom.²³ Experimental evidence demonstrating a close link between personal values and legal decision-making supported the link between legal judgments and values.²⁴

This Article examines the relationship between values and judicial reasoning centered on policy, focusing on three key cases at the interface of personal autonomy and medical practice. Within the reasoning of each case, the judge significantly draws on policy to reach his decision. This discussion highlights the values that underpin the “policy” decisions and demonstrate that judicial language may be consistent, but the personal drivers behind those decisions are as individual as the judges themselves.

20. Shalom H. Schwartz, *Are There Universal Aspects in the Structure and Contents of Human Values?*, 50 J. OF SOC. ISSUES 19 (1994); see also Bas Verplanken & Rob W. Holland, *Motivated Decision Making: Effects of Activation and Self-Centrality of Values on Choices and Behavior*, 82 J. OF PERSONALITY & SOC. PSYCHOL. 434 (2002); Gian Vittorio Caprara, Shalom Schwartz, Cristina Capanna, Michele Vecchione & Claudio Barbaranelli, *Personality and Politics: Values, Traits, and Political Choice*, 27 POL. PSYCHOL. 1 (2006); David Fritzsche & Effy Oz, *Personal Values' Influence on the Ethical Dimension of Decision Making*, 75 J. OF BUS. ETHICS 335 (2007).

21. Shalom H. Schwartz, *Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (1992); see also Schwartz, *supra* note 20; Shalom H. Schwartz et al., *Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement*, 32 J. OF CROSS-CULTURAL PSYCHOL. 519 (2001); Wolfgang Bilsky, Michael Janik & Shalom H. Schwartz, *The Structural Organization of Human Values-Evidence from Three Rounds of the European Social Survey (ESS)*, 42 J. CROSS-CULTURAL PSYCHOL. 759 (2011).

22. Rachel J. Cahill-O'Callaghan, *Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity*, 35 LEGAL STUD. 1 (2015).

23. Cahill-O'Callaghan, *supra* note 15.

24. *Id.*

II. A BRIEF INTRODUCTION TO THE SCHWARTZ MODEL OF VALUES

Many models of values exist within legal and psychological literature.²⁵ This Article draws on the model Professor Shalom Schwartz developed, which scholars have extensively used and—unlike many models of values—demonstrates how an individual's values relate to her other values.²⁶ Scholars have used the model extensively and validated it in psychological research worldwide.²⁷ According to the Schwartz model, one can encompass all conserved values in ten overarching motivations: (1) *stimulation*, or excitement; (2) *self-direction*, including independence and freedom; (3) *universalism*, including social justice and equality; (4) *benevolence*; (5) *conformity*; (6) *tradition*; (7) *security*; (8) *power*; (9) *achievement*; and (10) *hedonism*, or personal pleasure.²⁸ An individual can regard each value as important, but when one must reach a decision between conflicting values, the decisionmaker will support one value over another. For example, if one frames the discussion of detention orders as

25. See ROKEACH, *supra* note 18; ERNEST J. WEINRIB, TOWARD A MORAL THEORY OF NEGLIGENCE LAW 123–48 (1983); Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1989); Viv J. Shackleton & Ali H. Abbas, *Work-related Values of Managers: A Test of the Hofstede Model*, 21 J. CROSS-CULTURAL PSYCHOL. 1, 109–18 (1990); Heldi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI-KENT L. REV. 1431 (1998); Meg J. Rohan, *A Rose by Any Name? The Values Construct*, 4 PERS. SOC'Y PSYCHOL. REV. 3, 255–77 (2000); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2006).

26. Schwartz, *Universals in the Content and Structure of Values*, *supra* note 21; see also Elad Davidov et al., *Bringing Values Back in: The Adequacy of the European Social Survey to Measure Values in 20 countries*, 72 PUB. OPINION Q. 3, 420–45 (2008).

27. See, e.g., Timothy A. Judge & Robert D. Bretz, *Effect of Work Values on Job Choice Decisions*, 77 J. APPLIED PSYCHOL. 261 (1992); Lilach Sagiv & Shalom H. Schwartz, *Value Priorities and Readiness for Out-Group Social Contact*, 25 J. PERS. SOC'Y PSYCHOL. 1 (1995); Tommy Garling, *Value Priorities, Social Value Orientations and Cooperation in Social Dilemmas*, 38 BRITISH J. SOC'Y PSYCHOL. 397 (1999); Sonia Roccas et al., *The Big Five Personality Factors and Personal Values*, 29 PERS. SOC'Y PSYCHOL. BULL. 789 (2002); Anat Bardi & Shalom H. Schwartz, *Values and Behavior: Strength and Structure of Relations*, 29 J. PERS. SOC'Y PSYCHOL. 1207 (2003); Shalom H. Schwartz & Tammy Rubel, *Sex Differences in Value Priorities: Cross-Cultural and Multimethod Studies*, 89 J. PERS. SOC'Y PSYCHOL. 1010 (2005); Gian V. Caprara et al., *Personality and Politics: Values, Traits and Political Choice*, 27 POL. PSYCHOL. 1 (2006).

28. The model is described in detail in Schwartz, *Universals in the Content and Structure of Values*, *supra* note 21.

a value decision, in deciding to support detention orders, the decision maker is affirming values encompassed in *security*—national security—over those encompassed in *independence*—freedom and liberty.

The Schwartz theory broadly classifies values into two opposing dimensions.²⁹ The first dimension contains conservative values, emphasising order, preservation of the past, and resistance to change. It includes 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 dimension includes those values that promote self-enhancement—*achievement* and *power*—and those embodied in concepts of self-transcendence, or subverting self-interests for the welfare and interests of others—*universalism* and *benevolence*.³⁰

In the context of judicial opinions, the author has used Schwartz's value framework to develop a method of systematic content analysis.³¹ Although not commonly used, scholars have used empirical content analysis to identify characteristics of judicial reasoning in tort law cases,³² including a contribution to a greater understanding of policy.³³ The content analysis is a systematic, rule-guided technique to analyze textual data, which provides an unobtrusive, replicable method to provide insight into complex text.³⁴ The author used such content analysis coding framework to associate judicial statements with the values that the statements affirmed.³⁵ For example, in *Chappel v. Hart*, Justice Hayne stated: "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."³⁶ Thus, Justice Hayne recognized the importance of limiting the application of the law of negligence. Hayne's

29. *Id.*

30. For further details on the relationship of values and the Schwartz model, see Schwartz, *supra* note 20.

31. Cahill-O'Callaghan, *supra* notes 15 and 22.

32. Kylie Burns, *The Australian High Court and Social Facts: A Content Analysis Study*, 40 FED. L. REV. 317 (2012).

33. ANDREW SERPELL, *THE RECEPTION AND USE OF SOCIAL POLICY INFORMATION IN THE HIGH COURT OF AUSTRALIA* (2006); Andrew Serpell, *Social Policy Information: Recent Decisions of the High Court of Australia*, 21 J. JUD. ADMIN. 109 (2011).

34. KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (Sage Publ'ns 4th ed. 2019).

35. See Cahill-O'Callaghan, *supra* notes 15 and 22.

36. *Chappel v. Hart* (1998) 195 CLR 232, ¶ 139 (Hayne J) (Austl.).

statement presents an affirmation of social order, asserting the need to limit the obligations of the State and individuals, which value is encompassed within *security*, centering on the stability of society. It represents, therefore, an affirmation of the values encompassed within *security*.³⁷

In the aforementioned case, Justice Kirby also 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.”³⁸ The value of autonomy is encompassed within *self-direction* values that promote independent thought and action.³⁹ In affirming autonomy, therefore, Justice Kirby affirmed 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 that emphasize the subordination of self for society as a whole.⁴⁰ In the legal context, the value of *universalism* affirms social justice and the protection of the vulnerable. Justice Gummow affirmed this value when he stated, “It would, in the circumstances of the case, be unjust to absolve the medical practitioner from legal responsibility.”⁴¹ Lord Hope in *Chester v. Afshar* highlighted the importance of protecting the vulnerable patient: “It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence.”⁴² In doing so, Lord Hope affirmed values encompassed within *universalism*.

Tradition and *conformity* values share the goal of subordinating oneself to socially imposed expectations.⁴³ In legal opinions, the values of *tradition* and *conformity* emphasize restraint, adherence to precedent, and the affirmation of Parliamentary sovereignty.

37. *See id.* ¶ 33.

38. *Id.* ¶ 95 (Hayne J). Given the conscious decision of the High Court to retreat from the language of “informed consent,” judges do not use the word “autonomy” in the judgments here. Rather the language focuses on the expression of autonomy—the right and ability to choose what medical treatment the doctor would provide.

39. *See id.* ¶ 33.

40. Shalom H. Schwartz, *An Overview of the Schwartz Theory of Basic Values*, 2.1 ONLINE READINGS IN PSYCHOL. & CULTURE 11 (2012).

41. *Chappel*, 195 CLR 232, ¶ 81 (Gummow J).

42. *Chester v. Afshar* [2005] 1 AC 134, ¶ 87 (UK) (Lord Hope).

43. Schwartz, *supra* note 40, at 11.

Content analysis reveals the values that underpin legal judgments. Comparison of the values expression facilitates identification of similar and differing values priorities. It is these value priorities that serve to underpin the judgment and outcomes of cases. The central argument of this Article is that analysis of the value expression in cases that draw on the language of policy will reveal the values that underpin judicial policy decisions in the medical context. In doing so, it is possible to examine the association between the language of policy and values.

III. SELECTION OF CASES AND METHODOLOGY

Three cases heavily draw on policy in their reasonings and address 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: the Australian High Court heard *Chappel v. Hart*,⁴⁴ and the United Kingdom Court of Appeal heard the subsequent case *Chester v. Afshar*, and considered the decision in *Chappel*.⁴⁵ The third decision, *Tabet v. Gett*,⁴⁶ revisited 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.

The authors subjected the cases to systematic value content analysis, coding statements that affirm values encompassed within the Schwartz value framework.⁴⁷ The analysis facilitated the quantification of value statements both within individual judgments and combined judgments, allowing comparisons between individual judges and between judges supporting opposing positions.⁴⁸ The authors present the data in graphic form, with the number of value statements expressed as a percentage of the total values in the judgments or case.

In cases in which the outcome is uncertain, the application of the Schwartz model shows that judges introduce the concept of policy as a tool for the exercise of judicial discretion. In exercising discretion, the judge is reaching a decision between two equally valid arguments; personal values underpin this decision.

44. *Chappel*, 195 CLR 232.

45. *Chester*, 1 AC 134.

46. *Tabet v. Gett* (2010) 240 CLR 537 (Austl.).

47. Further details can be found in Cahill-O’Callaghan, *supra* notes 15 and 22.

48. *See infra* Part IV.

IV. RESULTS

The decision in *Chappel*⁴⁹ centered on a surgeon's negligent failure to warn, loss of a chance, and causation. Mrs. Hart underwent necessary surgery but no doctor warned her of the heightened risk of infection if her esophagus was perforated. Her condition was progressive, and there was no question that she would have undergone the surgery at some time. The risk of perforation and infection would have been present irrespective of the time at which Mrs. Hart had the surgery and who treated her.⁵⁰ The claim, therefore, focused on the assertion that she would have delayed the surgery and sought the most experienced surgeon to perform it had someone adequately informed her of the risks. Thus, she argued that she lost the chance to have another surgeon perform the surgery at another time. The case divided the court 3–2, with five separate opinions.⁵¹ The majority—Justices Gaudron, Gummow, and Kirby—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 have been 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 respective positions. For example, both Justices Gaudron and Gummow 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. . . .

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 allurements of further cogitation upon the subject of “loss of a chance”.⁵²

49. *Chappel*, 195 CLR, ¶¶ 1–6.

50. *Id.* ¶ 44 (McHugh J).

51. *See generally id.*

52. *Id.* ¶¶ 10 (Gaudron J), 70 (Gummow J).

Likewise, the dissenting opinions used the language of policy and principle.⁵³ Justice McHugh acknowledged the role of policy in the decision reached “[a]s 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.”⁵⁴ Later in his judgment, he specifically appealed 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 reasonable care unless statute, contract or a duty otherwise imposed by law has made the defendant responsible for those risks.⁵⁵

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

In addition, both the majority and minority recognized the importance of values in their decisions, drawing 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.”⁵⁶

Indeed, Justice McHugh, supporting the minority position, similarly 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.”⁵⁷

The judges themselves, therefore, specifically identify the role of values, but package them in the language of policy, implying consistent sets of values and application of those values. The judgments, despite reaching opposing conclusions, draw on both policy and legal principles to support their positions and, in the process, highlight the link between policy and values. Thus, the question becomes whether the opposing

53. *Id.* ¶¶ 24, 28.

54. *Id.* ¶ 24 (McHugh J) (emphasis added).

55. *Id.* ¶ 28 (McHugh J) (emphasis added).

56. *Id.* ¶ 62 (Gummow J).

57. *Id.* ¶ 24 (McHugh J) (emphasis added) (quoting H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 14 (2d ed. 1985)).

judgments reflect opposing values. Empirical analysis of the judgments reveals a differential pattern of expression of the values in the judgments of the majority as compared to those supporting the minority position.

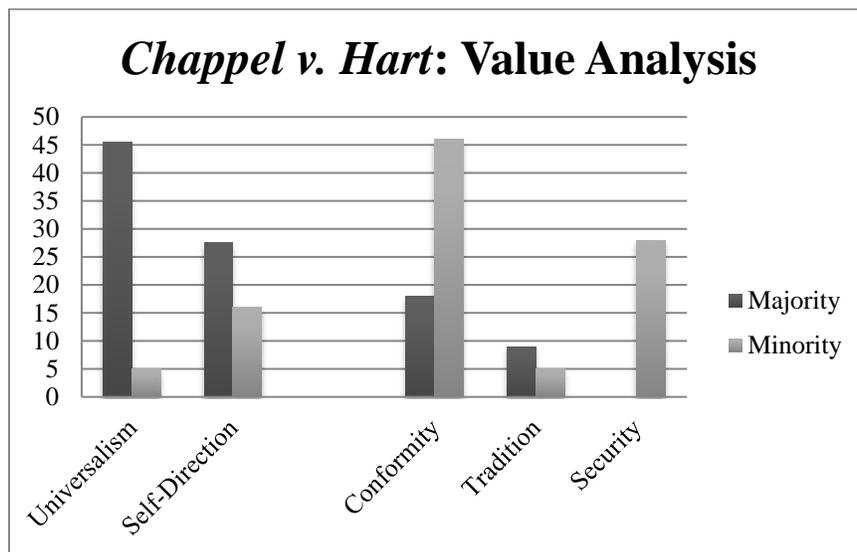


Figure 1: Value content analysis of the judgments supporting opposing positions in *Chappel v. Hart* (1998) 195 CLR 232. The values espoused by the majority are represented in the dark bars and expressed as a percentage of the overall number of value statements in the opinions of the majority. The values of the minority expressed as a percentage are represented in the light bars.

Value content analysis reveals different value profiles for judgments written in support of the majority and those in support of the dissenting position. In the majority opinions, 73% of coded value statements 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.⁵⁸ In contrast, the judgments in support of the minority⁵⁹ position recognized the values encompassed in *universalism* and *self-direction*. In contrast to the majority judgments, however, over half of the coding reflected the opposing values encompassed within *conformity*, including preventing uncertainty in the law, conforming with rules, and *security*.

58. Although some coding of values was encompassed within *tradition* and *conformity*, these only represented one-fifth of the total coding.

59. The authors use the language of “minority” to represent a subset of dissenting opinions in which more than one justice adopts an opposing position to the majority.

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*.⁶⁰ Indeed, Justice Kirby emphasized this conflict in values, highlighting 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.⁶¹

Notably, 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 neutrality may reflect an element of indecision 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.⁶²

In *Chappel*, therefore, the judges recognized the potential influence of values mediated through policy on the decision reached.⁶³ Value analysis of the collective judgments reveals tension between the values of the majority and minority; this tension is also evident in the individual judgments.⁶⁴ Indeed, the analysis of values reveals the internal tensions between opposing values, and although the decision frames the final outcome in the language of neutrality and policy, the analysis divulges the intrinsic values that underpin the outcome.

60. See *supra* Fig. 1.

61. *Chappel*, 195 CLR, ¶ 93 (Kirby J).

62. *Id.* ¶ 88 (Kirby J).

63. See *supra* Fig. 1.

64. See *supra* Fig. 1.

A similar pattern of differential value expression was evident in the House of Lords case, *Chester*,⁶⁵ which drew upon the reasoning in *Chappel* to decide whether a doctor's failure to fully inform a patient of risks was sufficient to satisfy causation.⁶⁶ *Chester* was also a divided judicial opinion, with Lords Walker, Hope, and Steyn endorsing the majority position, and Lords Bingham and Hoffman dissenting.⁶⁷ Again, the reasoning evidenced a conflict between opposing values.



Figure 2: Value content analysis of the opposing judgments in *Chester v. Afshar* [2005] 1 AC 134. The values the majority espoused 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 in *Chappel*, the *Chester* majority espoused values encompassed within *self-direction*—autonomy—and *universalism*—social justice, equality, and protection of the vulnerable.⁶⁸ Although judges expressed very few values in the dissenting opinions, the values they expressed were the opposing values encompassed in conservation, including *conformity*, *security*, and *tradition*.⁶⁹ Lord Steyn highlighted the conflict between opposing values of *self-direction* and *tradition*, stating: “But they [facets of autonomy] must also be weighed against the undesirability of departing

65. *Chester v. Afshar* [2005] 1 AC 134 (UK).

66. *Id.* ¶¶ 9, 22.

67. *Id.* ¶¶ 1–10 (Lord Bingham), 28–36 (Lord Hoffman).

68. *See supra* Fig. 2.

69. *See supra* Fig. 2.

from established principles of causation, except for good reasons. The collision of competing ideas poses a difficult question of law.”⁷⁰ 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 Professor Honore, suggesting: “[H]e was also right to say that policy and corrective justice pull powerfully in favour of vindicating the patient’s right to know.”⁷¹

The empirical analysis of these decisions suggests that despite the similar language of policy, different values that influence the decision the court reached underpin the judicial approaches to the complex issues the claimants raised. In both *Chappel* and *Chester*, the majority reached a decision in support of individual autonomy, espousing the values encompassed in both *self-direction* and *universalism*.⁷² In contrast, the dissenting opinions espoused values included in conservation, including *tradition*, *conformity*, and *security*.⁷³

Statements that reflect values are more frequently espoused in cases that divide judicial opinion, which is true of *Chester* and *Chappel*. Values are not limited, however, to decisions that divide opinion. Rather, values may play a role in decisions in which the bench is in accord and indicate situations in which the application of an established legal test does not immediately present an answer, invoking broader considerations, such as policy. A third case demonstrates such a situation: *Tabet v. Gett*.⁷⁴

In *Tabet*,⁷⁵ the Australian High Court revisited the central issues presented in both *Chester* and *Chappel*, namely, loss of a chance and causation. Specifically, the *Tabet* court addressed whether recovery for loss of chance was available in personal injury cases.⁷⁶ The High Court held that recovery for loss of a chance was not available, emphasizing that if it had been available, the balance in these kinds of cases would tip in favor of the plaintiffs, resulting in a significant impact on professional liability insurance and, consequentially, the healthcare system.⁷⁷ The number of individual judgments reflected the significance of this decision; Gummow ACJ, Heydon, Crennan, and Keifel JJ all delivered individual

70. *Chester*, 1 AC 134, ¶ 20 (Lord Steyn).

71. *Id.* ¶ 22 (Lord Steyn).

72. *See supra* Fig. 2.

73. *See supra* Fig. 2.

74. *Tabet v. Gett* (2010) 240 CLR 537 (Austl.).

75. *Id.*

76. *Id.* ¶ 13.

77. *Id.* ¶ 102.

judgments, with only Hayne and Bell JJ writing jointly.⁷⁸ The graph below presents the values espoused in those judgments.

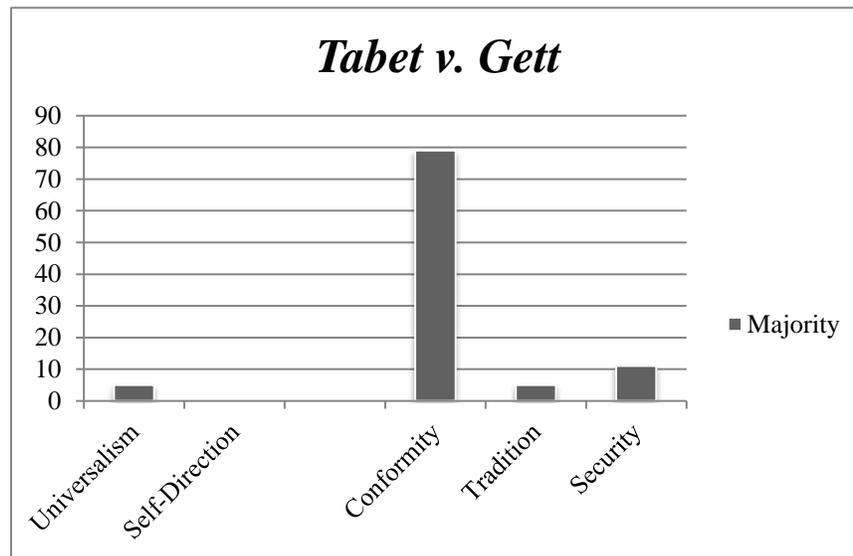


Figure 3. Value content analysis of the consensus opinions in *Tabet v. Gett* (2010) 240 CLR 537. Individual values are expressed as a percentage of the total values expressed in the judgments.

Typically, cases in which judges reach a consensus decision do not have many opinions individual judges wrote or many statements that reflect values.⁷⁹ Although reaching a consensus decision in *Tabet*, the justices delivered five opinions, encompassing 18 coded statements.⁸⁰ The decision centered on the values encompassed in conformity with “preventing uncertainty in the law,” which represented 83% of the total coding.⁸¹ Indeed, despite the array of 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—and 100%—Keifel J—of the coding.⁸² Only Gummow ACJ espoused a need for flexibility in the law, which is encompassed within *universalism*; however, the expression of this value

78. *Id.* ¶¶ 65–69.

79. Rachel Cahill-O’Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (forthcoming 2019).

80. *See, e.g., Tabet*, 240 CLR 537, ¶¶ 18, 59, 62, 68, 69, 98, 102, 111, 124, 142, 145, 151, 152.

81. *See supra* Fig. 3.

82. The judgment of Justice Gummow had the highest level of value coding with nine coded statements in his written opinion.

was significantly less than the values encompassed in overarching motivation of conservation—*conformity, tradition, and security*.

V. DISCUSSION

Increasing evidence demonstrates that values play a role in “those cases in which the result is not clearly dictated by statute or precedent.”⁸³ In such uncertain cases, values influence the judicial reasoning and decisions through the exercise of discretion. The question becomes whether this appeal to values is clearly set out in the judicial narrative or, alternatively, whether there is a linguistic veil thrown over the reasoning. It is evident that instead of openly acknowledging value-based considerations, the judiciary will cloak its discussion in appeals as public policy. This broad and somewhat uncertain term fails to lend clarity to the discussion and warrants careful consideration. Even values cloaked as policy may, however, have a critical role in such cases, opening the door to the exercise of judicial discretion.

Thus, 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 definitions. “Policy” is a fluid concept, which the judiciary sometimes employs to meet a perceived need and that places the exercise of value judgments within an acceptable framework.

In the context of complex medical decisions, there has been a consistent pattern of emphasizing the social utility of treatment. In *Chester*,⁸⁴ the House of Lords emphatically addressed policy considerations, such as social utility and whether a plaintiff ought to recover at the expense of established causative principles. Tracking this language through earlier decisions,⁸⁵ it is clear that policy has played an overt role, but as illustrated above, values sit at the base of these policy discussions and underpin the decisions. In the foundational decision of *Bolam v. Friern Hospital Management Committee*,⁸⁶ the court described policy as a relevant consideration.⁸⁷ In *Sidaway v. Board of Governors of the Bethlehem Royal Hospital & the Maudsley Hospital & Others*,⁸⁸ the court again emphasized the need to focus on broader interests

83. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1057 (1975).

84. *Chester v. Afshar* [2005] 1 AC 134 (UK).

85. *Bolam v. Friern Hosp. Mgmt. Comm.* [1957] 1 WLR 582; *Sidaway v. Bd. of Governors of the Bethlehem Royal Hosp. & the Maudsley Hosp. & Others* [1985] 1 All ER 643.

86. *Bolam*, 1 WLR 582.

87. *Id.* at 586 (in consideration of the social utility of the provision of medical treatment).

88. *Sidaway*, 1 All ER 643.

than one patient represents, along with the policy demand to avoid the practice of defensive medicine, which could potentially cripple medical advancement.⁸⁹ These decisions considered the duty to warn of risks inherent in medical treatment. The conclusions reflected a policy decision that the imposition of an onerous duty to warn would create an overly cautious medical professional, unwilling to advance or try new treatment.⁹⁰ *Bolitho v. City Hackney and Health Authority*⁹¹ 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*.

In the difficult decision of *Chester*, the House of Lords openly embraced policy as a driving consideration in similar decisions.⁹² The problem with this approach is that although the Lords referred to and relied upon policy, it was not the same policy. In the view of Lord Bingham, the appropriate policy consideration was the underlying purpose of negligence law as a whole,⁹³ but the majority looked to the underlying ethos of the duty to warn of risks inherent in medical treatment.⁹⁴ In yet another approach, Lord Steyn struggled to fit the inquiry into the existing negligence framework and application of the “but for test.” This resulted in an unconvincing conclusion based on the reduced likelihood of a small risk materializing if the operation delayed.⁹⁵ The poorly articulated reference to policy considerations was, in reality, a reflection of the significant role of values as outlined above.⁹⁶

In the Australian decisions, the courts did not openly embrace policy considerations, but they nevertheless form a basis for much of the judicial reasoning in the more difficult decisions under consideration. The High Court has carefully avoided openly embracing policy-based decisions. There is a consistent endeavor to place the negligence discussion within a setting of principle, but the court often returns to the significance of

89. *Id.* ¶ 17 (Lord Diplock).

90. *Bolam*, 1 WLR 582; *Sidaway*, 1 All ER 643.

91. *Bolitho v. City Hackney and Health Authority* [1998] AC 232.

92. “But the issue of causation cannot be separated from issues about policy.” *Chester v. Afshar*, [2004] UKHL 41 [85] (Lord Steyn).

93. *Id.* ¶ 7.

94. *Id.* ¶¶ 11, 22.

95. This reasoning is flawed because it is based on a “lightning never strikes twice” principle: a small risk materialized at this time, therefore it will not materialize at another time. *See also id.* ¶¶ 11 (Lord Steyn), 31 (Lord Hoffman) (Lord Hoffman’s discussion of the *Casino* rationale and Lord Steyn’s subsequent application of this rationale).

96. *See supra* Fig. 1.

broader normative considerations such as values or policy,⁹⁷ acknowledging that the issues under consideration do not always sit comfortably within the existing framework. At times, courts expressly acknowledge the role of values, but it is always with some reluctance.⁹⁸ Courts take care to place any statement of values firmly within the framework of principle.

In *Chappel*,⁹⁹ the High Court aimed for a principled approach to the law and avoided the language of policy, opting instead for the “common sense test” developed in *March v. Stramare*.¹⁰⁰ The common sense test, however, necessarily involves the introduction of value judgments, which is reflected in the analysis of the judgment.¹⁰¹ When one scrutinizes the judicial application of the concept of common sense, it reveals individual and often idiosyncratic interpretations of what constitutes both “common” and “sense.” Thus, although courts do not employ “policy” as a term, similar considerations as those found in the decisions from the United Kingdom, which specifically refer to policy considerations, drive the underlying process.¹⁰² These policy considerations range from views of the purpose of negligence law as a whole to individual interpretations of what is just and right in the particular circumstances. As demonstrated above, underpinning all of this is the values framework; despite specific references to policy and principle, individual values drive the conclusions.

Later decisions overtly acknowledge the role of individual values as expressed in policy considerations, indicating that something more than a strict application of principle can drive judicial decision-making processes. *Elbourne v. Gibbs*¹⁰³ acknowledges this role when, following an analysis of post-*Chappel* decisions, Basten J.A. emphasized that establishing the principles of causation in tort law must “satisfy the policy

97. See, e.g., *Travel Comp. Fund v. Tambree* (2005) 224 CLR 627, 639 (Gleeson CJ) (Austl.).

98. For examples of overt values discussion, see *Montgomery v. Lanarkshire Health Bd.* [2015] UKSC 11; *Aintree Univ. Hosps. NHS Found. Tr. v. James* [2013] UKSC 67.

99. *Chappel v. Hart* (1998) 195 CLR 232 (Austl.).

100. *March v. Stramare* (1991) 171 CLR 506 (this would now involve consideration and application of the relevant legislative provision).

101. See *supra* Fig. 1.

102. See, e.g., *Chester v Afshar* [2005] 1 AC 134, [21]. Lord Steyn refers to the consideration in *Chappel* as a decision between two policy considerations. “This Australian case reveals two fundamentally different approaches, the one favouring firm adherence to traditionalist causation techniques and the other a greater emphasis on policy and corrective justice.” *Id.*

103. *Elbourne v. Gibbs* [2006] NSWCA 127 (Austl.).

underlying the legal attribution of responsibility.”¹⁰⁴ Similarly, in *Dr. Ibrahim v. Arkell*,¹⁰⁵ Fitzgerald JA noted¹⁰⁶ that “the policy requirement entitling a competent person to make his or her own decisions about his or her life” drives these decisions.¹⁰⁷

Thus, the broad notion of policy, which serves to preserve the rigor of the law, appears alongside a narrower, individual needs-based policy aimed at preserving the personal integrity of the plaintiff-patient. This thought presents several questions regarding the dominant policy consideration, how it is formed, and how potentially conflicting policies may be reconciled. The inability to answer these questions with any certainty lies at the heart of the argument that objective, externally driven concerns do not drive these decisions, but rather by an internal set of values that are given expression in the language of policy drives the decisions.

The role of policy is, therefore, to lend flexibility to the judicial decision-making process. The problem with the breadth of the term “policy,” is that judges employ it to appeal to some apparently external measure used as a calculation of the decision reached. There is no consistency or clarity surrounding the term—policy can dictate opposing conclusions. Policy is thus a flexible term best viewed as the means by which judges are able to address the complexities presented by “[t]he whole confused, shifting helter-skelter of life parades before [them].”¹⁰⁸ In short, the nature of the issues that come before the courts call for a willingness to be flexible, an application of a clear mix of established legal tests, and the more loosely defined considerations collectively labeled “policy.” Judges apply this process with a liberal hand as in the decisions outlined above.¹⁰⁹

An inflexible judiciary would result in injustice and deny the very nature of humanity that seeks resolution through the application of the law. Courts must balance the need for flexibility, however, against the need for coherent law. Although basing judicial conclusions upon individual statements of “broad values . . . [may well be] beguiling,”¹¹⁰ it is

104. *Id.* ¶ 74.

105. *Dr. Ibrahim v. Arkell* [1999] NSWCA 95 (Austl.).

106. As *Chappel* addressed the question of pre-treatment advice, this discussion focuses on decisions addressing the same legal issue.

107. *Dr. Ibrahim*, NSWCA 95 ¶ 33.

108. FRANK, *supra* note 1, at 6.

109. See generally *Chester v. Afshar* [2005] 1 AC 134 (UK); *Chappel v. Hart* (1998) 195 CLR 232 (Austl.).

110. *Cattanach v. Melchior* (2003) 215 CLR 1 ¶ 77 (McHugh & Gummow JJ) (Austl.).

“misleading simplicity”¹¹¹ and unlikely to result in the development of coherent law.

VI. SEEKING COHERENCE AND CONCLUSION

The overarching problem is the potential for a lack of coherence and transparency. Judges employ the term “policy” in the words of McHugh and Gummow ACJ, to “glide to [a] conclusion,”¹¹² based upon individually formed assumptions of what is appropriate in the circumstances. Judges employ this device when the chaos of human relations collides with apparently rigid legal principles. In this way, policy may serve to mask the true nature of judicial reasoning.

Although it is easy to refer simply to the notion of policy, it is exceedingly difficult to give it specific content. As Francis Bennion pointed out, “the content of public policy (and therefore legal policy) is what the Court thinks and says it is.”¹¹³ In the absence of clear and consistent content, reasoning based upon policy cannot provide clarity or certainty in the law. To appeal to policy is to appeal to uncertain, 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 deduction [and one] lose[s] the illusion of certainty.”¹¹⁴ It is from certainty and consistency that confidence in the law grows.

Assuredly, a call for certainty does not connote a call for a concrete or inflexible law. Indeed, the law must remain inherently flexible, as it is not, and ought not be, a machine.¹¹⁵ Flexibility, however, does not generate incoherent or opaque—as opposed to transparent—law. Rather, flexibility creates a system that is able to shift and change with the needs and expectations of society.

The law must evolve, and society must acknowledge this evolution. To appeal to policy as though it were a concrete and fixed notion is to deny the nature of the law and conceal the true rationale underlying the decision. The problem here lies in the absence of clarity. Justice Kirby in *Cattanach v. Melchior* explains,¹¹⁶ “[I]f the application of ordinary legal principles is to be denied on the basis of public policy, it is essential that such policy

111. *Id.*

112. *Id.*

113. F.A.R. BENNION, STATUTORY INTERPRETATION: A CODE 657 (Butterworths 4th ed. 1997).

114. Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7 (1894–95).

115. FRANK, *supra* note 1.

116. *Cattanach v. Melchior* (2003) 215 CLR 1 (Austl.).

be spelt out so as to be susceptible of analysis and criticism.”¹¹⁷ Flexibility of the law is not something to hide; the process of judicial decision-making is more than a mechanical application of rules.¹¹⁸ Despite the uncertainty surrounding the language of policy, clear advantages are associated with value-based decisions policy enables. Jerome Frank takes this argument further and argues that courts ought to openly acknowledge the flexibility, embrace the “unavoidably human, fallible character of the law,” and if society were to do this, the “retreat into policy” may not be necessary.¹¹⁹

117. *Id.* ¶ 152 (Kirby J).

118. *Id.* ¶ 121.

119. FRANK, *supra* note 1.