Judges as Law Makers

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A. Introduction

A contentious issue, which underpins the development of common law liability of professional people, is whether judges make law or merely declare what it is. This article examines the debate of the controversial issue, both amongst judges and academic writers, on whether judges make law or merely declare what the law is. The author draws the conclusion that to ensure certainty, judges in most lawsuits merely declare, by use of precedent (previous cases) and analogy, what the law is. It is only in novel situations found in a handful of cases[1] that it can truly be said that judges do make law. The research findings would be of interest when analyzing the case-law of the ECJ and also worthy of being taken into consideration by the judges with a view to their work in CEECs and also hopefully by the lawyers appearing for the litigants.

B. The Doctrine of the Common Law

Historically, courts created common law in the very process of deciding cases before them. The common law has evolved through a process of reasoning based on legal principles and precedents. In deciding cases, judges determine what law is applicable and its meaning, and apply law to the facts of the case. The court, out of the simplest of notions – that it is wrong to harm or injure others – largely created the law of negligence, which forms part of the law of torts (civil wrong).[2]

Today, English law is the product of the continuous development by judges who

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1 *See*, e.g., *Donoghue v. Stevenson*, [1932] AC 562; [1932] 3 WLR 101; All ER 1 HL (*Donoghue*), *Hedley Byrne & Company v. Hellers & Partners Ltd*, [1964] AC 465 (*Hedley Byrne*), *White v. Jones* [1995] 2 AC 207 and *Anns v. London Borough of Merton* [1978] AC 728 (*Anns*).

2 *See*, ibid. *Donoghue*.

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have extended it through their decisions over the last eight or nine centuries. An important factor in the judicial law-making process, which is often ignored, is that judges must decide cases over which lawyers have pondered and argued. The lawyers' arguments are not limited to binding cases, that is, cases decided in the same jurisdiction, but they also include persuasive cases decided either in other common law jurisdictions or other jurisdictions altogether.

Also, whenever a novel point of law arises for which there is no clear answer, it is the higher courts that decide the issue one way or another. The higher courts' decisions are reported in law reports, act as precedent and bind the lower courts. Therefore, the superior courts 'have a quasi-legislative function which is interwoven with their primary function of actually deciding the case in front of them'.[3]

Judicial decision-making involves two main phases – discovery and justification. Discovery involves a judge's initial determination of how a case ought to be resolved, while justification involves establishing the legal basis for an opinion. It is crucial for the judges to publicly justify their ruling.

The common law relies heavily on the doctrine of precedent (or *stare decisis*). In a hierarchical court structure, lower-court judges are obliged to decide cases in conformity with precedent (prior judicial decisions) established by the higher court. The four advantages of judges adhering to precedent are predictability, reliance, equality, and efficiency.

The history of common law has tended to be one of incremental change rather than abrupt and revolutionary revision. Law making is the function of parliament. Only in novel cases (or where the Parliament appears to be disinterested, as is often the case, to attend to important issues of law reform) will the judges modify or change the law to ensure that a particular rule or principle is not out of touch with social needs. A judge might modify law by overruling an older legal principle (and there are several ways in the armoury of judges for doing this) if the 'new' principle does not fit with existing doctrine. The previous legal principle may no longer be appropriate in the changing circumstances. Also, a judge can take into account contemporary values in developing and modifying the law. Kitto J has remarked:

> It is a mistake to suppose that the case is concerned with 'changing social needs' or with 'a proposed new field of liability in negligence,' or that it is to be decided by 'designing' a rule ... to discuss the case in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the waters of the common law – in which, after all, we [judges] have no more than riparian rights.[4]

According to Brennan J:

> The tension between legal development and legal certainty is continuous and it has to be resolved from case to case by a prudence derived from experience and

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[3] P.S. Atiyah, *Law and Modern Society* (Oxford Oxford University Press 1995, 2d ed) at p. 5.
[4] *Rootes v. Shelton* [1967] 116 CLR 383, at pp. 386–387.

> governed by judicial method of reasoning ... Changes in common law are not made whenever a judge thinks a change is desirable. There must be constraints on the exercise of power, or else the courts would cross 'the Rubicon that divides the judicial and legislative power'.[5]

This explains why there are few cases in which it can be said that judges actually do make law. As for the future, the judges will surely continue to respond to the changing needs of their times.

C. The Flexibility of the Common Law

Judges are obliged to decide similar cases in a similar way by following precedent. Does this reduce the discretion of the judges? Some judges believe they have limited discretion when deciding cases in the common law context. In most cases they are not free merely to incorporate their own policy preferences into law. The common law tends to reflect the values and practices of the community.

However, the common law principles that a court pronounces have limited authority. When subsequent cases arise that appear similar to the initial case, the court must decide whether to apply, extend, modify, or abandon the principle it initially pronounced. G. Allan Tarr has remarked:

> [A]lthough common law is dynamic rather than static, decisive breaks from the past decisions are rare. Change in the common law tends to be incremental, a gradual case-by-case modification of legal standards in response to shifts in the character and value of the society. At each step of the process, the movement can be halted or reversed if it appears to be heading in the wrong direction.[6]

In the absence of statutory provision the courts' responsibility is to resolve disputes and this obliges them to make law.

Judges, in enunciating the common law and 'in their interpretation and development of the common law', do make policy. This is natural and desirable as, in the 19th century, law could hardly serve the legal needs of 20th or 21st century society. New interpretation emerges and the law must be sufficiently flexible to permit its fulfilment.

Atiyah shares a similar opinion with Allan Tarr, as can be seen in his observation that 'a large part of the law of England does not derive from legislation at all, but from case law'. Most of the law of tort derives decisions of the courts. Even when law is found in the Acts of Parliament, case-law plays a significant role through the judges' interpretation of the legislation.

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[5] *Dietrich v. The Queen* (1992) 177 CLR 292.
[6] G. Allan Tarr, at p. 314.

The courts tend to take an incremental approach and move slowly one step at a time. The reason for this approach is that 'their law making powers can only be exercised step by step, case by case. They are largely confined to filling gaps in the law, or developing existing principles in new directions'.[7]

Over many years the case-law has built great new legal principles. The law of tort, which is almost entirely the creation of the courts, has taken several decades to get where it is now. Judges in the appeal courts make law where a law has not been clearly established before they are in a position to apply it.

D. Judges as Lawmakers[8]

The function of the law of torts, just as for equity, is, in appropriate circumstances, to fill what otherwise was perceived to be gaps in what should be one coherent system of law. The task of the judge has been to 'search for solution to the particular case with the illumination of legal authority, legal principle and legal policy'.[9]

E. The Role of Judges

The common law trial process is based on accusatorial rather then an inquisitorial process. This, Atiyah explains, means that the 'English trial is designed to resolve a dispute between two contesting parties, rather then to conduct an investigation, or even to ascertain the truth. The judge is to a great extent an umpire who presides over a contest between the parties'.[10]

Courts are much better adapted to making decisions in cases that are adverse in nature, where parties oppose each other with a defined number of contentions or claims. Judges law making arises from deciding cases, but unlike legislation, the

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[7] Atiyah, *supra* note at pp. 193 and 194.

[8] *See* for details John A.G. Griffith, *The Politics of the Judiciary* (London Fontana press 1991, 4th ed.); Lord Patrick Devlin, 'Judges, Government and Politics' in (1978) 41 *Modern Law Review* 501; Lord Patrick Devlin, *The Judges* (Oxford Oxford University Press 1979); D. Pannick, *Judges* (Oxford Oxford University Press 1987); S. Lee, *Judging Judges* (London Faber 1988); A. Paterson, *The Law Lords* (London Macmillan 1982); (1980) 9 *Journal of Legal Studies* 189; M. Zander, *The Law Making Process* (London Butterworths 1944, 4th ed.); McCrudden and Chambers (eds) *Individual Rights and the Law in Britain* (Oxford Clarendon Press 1884); P.S. Atiyah 'Judges and Policy' in 15 *Israel Law Review* 346; L. Jaffe, *English and American Judges as Lawmakers* (Oxford Clarendon Press 1969).

[9] M. Kirby, 'Judicial Activism' in (July 1997) 27:1 *University of Western Australia Law Review*, 1 at p. 19.

[10] Atiyah, *supra* note at p. 68.

judges give reasons for their decisions which are based on issues such as fairness, justice, the rights of individuals, and public interest.[11]

F. The Legal Rules

The common law resides most fundamentally in the decisions of the court in which judges apply legal rules. A legal rule is one that prescribes an issue of fact on which a legal consequence depends. A particular proposition of the law must be apposite in order to be applied in the resolution of a particular case. A legal rule based on reasonableness tends to import broad community standards. A rule without specific content confers discretion termed judicial discretion which might be reviewed on appeal. However, damages in tort are not granted or refused on judicial discretion.[12]

A judge must also have regard to common sense, legal principle and policy. Common sense is a value that reflects the community's current thinking on a subject rather then legal doctrine.

G. Logic

Has the life of the law been logic or experience? One notices that in *Donoghue v. Stevenson*, decided in 1932, logic gave way to justice. It was Lord Atkin's sense of justice, and not logic, that gave rise to the general principle which has dominated the law of negligence since 1932. In Lord Atkin's view there must be some general principle of negligence which explains the case. His Lordship's decision (in spite of the fact that Lord Buckmaster's dissent showed that the case could be explained logically without enunciating a general principle of negligence) was based on what he thought justice required and not what was compelled by logic.

The problem with logic one observes is that, first, although logic may take a judge a long way in determining a novel situation, it cannot take him or her all the way. Secondly, law is not a completely logical, self-contained set of clear rules of determinate meaning which will provide an answer to every legal problem by logical process of induction and deduction from case law (and legislation).[13] This makes it impracticable, if not impossible, for judges to formulate logical emerging principles. In such cases, they have tried to identify the necessary factors to be present before granting a remedy. As regards recovery of economic loss in negligence, McLaren J stated:

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[11] Ibid. at p. 196.
[12] Per Brennan J in *San Sebastian Pty Ltd. v. The Minister* [1986] 162 CLR at pp. 367–368.
[13] Hon. Justice M.H. McHugh, 'The Judicial Method' in (January 1999) 73:1 *Australian Law Journal* at 44.

> [T]he answers to the question of recovery of economic loss in negligence are not easy, as the uncertain history of the cases attests. On the other hand, the jurisprudence of the past three decades discloses a resurgent feeling on the part of judges that in some cases beyond physical damage and reliance, economic loss should be recoverable in negligence. On the other hand lies the fear of indiscriminately opening the floodgate of liability.[14]

H. Reasoning by Analogy

Judges also reason by analogy from decided cases. The process utilized is induction and deduction informed by, rather than divorced from, policy considerations and is dependent upon the fact that something more than reasonable foreseeability is required to establish a duty of care. The validity does not depend on those cases sharing an underlying conceptual consistency.[15]

For example, in Toohey J's opinion judges focus their attention on:

> [E]stablished categories in which a duty of care has been held to exist; analogies are then drawn and policy considerations are examined in order to determine whether the law should recognise a further category, whether that can be seen as a new category or an extension of the old law.[16]

I. A Wider Agenda/Debate

Historically, courts in common law jurisdictions started from a narrow rule that excluded most pure economic loss cases. Judges, however, on a case-by-case basis persisted in awarding damages for economic loss outside the categories.[17] The plaintiff in *Cattler Stockton Waterworks Co*,[18] for example, had suffered economic loss as a result of physical damage and the plaintiff in the *Hedley Byrne* case[19] had suffered economic loss as a result of negligent misstatements. Each of the plaintiffs in these cases was awarded damages for economic loss. In *Junior Books v. Veitchi*[20] liability for financial loss, which did not create any danger to person or property,

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[14] *Canadian National Railway v. Norsk Pacific Steamship Co* 91 DLR (4th) at p. 366 (*CNR v. Norsk*).
[15] Dawson J in *Hill v. Van Erp* [1995-1997] 188 CLR 159 at p. 177.
[16] Ibid. at pp. 189–190.
[17] *See* C. Lewis, 'Negligence and Economic Loss' in (7 October 1982) *The Law Society Gazette* at 1238.
[18] (1875) LR QB 453.
[19] [1963] 2 All ER 573.

was allowed. However, the fear of the floodgates and unlimited liability is, and has remained, the strongest deterrent. This paper will consider factors such as social change, value, the concept of justice, flexibility versus certainty, the recognition of duty, the notion of fair, just and equitable, reasonable conduct, insurance and the adversary mode of trial.

J. Social Change

The law is seen as a means to an end and not an end in itself. Law changes as society changes. When the legal rules and principles are no longer efficient or do not meet social needs, they must be reviewed or even changed. Judges make law only when changes in the society require the law to be developed to meet the consequences of those changes. Judges, unlike politicians, tend to 'develop law more cautiously and only when it is clear that the needs of society demand it or the state of law require that the existing rules or principles be rationalised'.[21] This is one of the law-making constraints on the judiciary. The other constraints are that courts only make law in the context of determining a legal dispute as defined by the parties in the dispute in court; most judges prefer certainty and predictability, which are important characteristics of a stable legal system.

K. Value

Whenever judges extend the scope of a legal rule, change its content or reject it altogether, they rely on rules or practical considerations outside the legal system. 'Values and practical workings of legal rules have as much a part to play in creating, extending or modifying a legal rule as logic does.'[22] Contemporary community values can be taken into account in developing or modifying the law. Community values could encompass such values as freedom, equality before the law, good faith and reasonableness. The problem noted by the Honourable Justice M.H. McHugh is that a multicultural society is constantly undergoing rapid social change. It therefore becomes exceedingly difficult for present-day judges to know what are the permanent or enduring values in the community and McHugh J concludes that in future extra-legal values will have only a small role to play.[23]

However, in the sphere of tort and contract law less attention is given to

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[20] [1982] 3 WLR 477.
[21] Hon. Justice M.H. McHugh, *supra* note at pp. 42–43.
[22] Ibid. at p. 46.
[23] Ibid.

community values as law is modified by such practical considerations as a cost-benefit analysis. For example, in *Esanda Finance Corp. Ltd v. Peat Marwick Hungerfords*,[24] in rejecting a claim that auditors should be liable to third parties whom they could foresee might rely on the auditor's accounts, the Court considered factors such as withdrawal of insurance protection for auditors, the potential decline in the availability of audit services, the capacity of plaintiffs in the likely class to protect themselves and the effect of long trials on the justice system.

L. The Concept of Justice

The judicial law-making function arises from the necessity to do justice between the parties who have brought a dispute before the court. Judges must repudiate rules developed in earlier times when these rules (e.g., a privity of contract rule which disallows third party from claiming) have become out of touch with the contemporary notion of justice. That situation might also arise where it is manifestly fair and just that recovery for economic loss be permitted. Faced with these situations, courts had to strain to allow recovery provided the case did not open the door to a plethora of undeserving cases. The cases in point are *Hedley Byrne* and *White v. Jones*.[25] In such deserving situations the Judges refused to be confined by arbitrary forms and rules where justice indicated otherwise.

Atyah's objection on the concept of justice is based on it being controversial and value-ridden. Moreover judges' perception of what is fair or just may not accord with the fairness or justice of other groups in society such as professionals. Therefore 'courts should be chary of using their law-making powers very extensively, especially where there is no obvious consensus about issues'.[26]

To ensure public confidence in the rule of law the courts have little alternative but to maintain their law-making function since 'the purpose of judicial development of legal principle is to keep the law in good repair as an instrument of resolving disputes according to justice as is understood in the contemporary society'.[27] If in a contemporary society social justice requires that a doctrine be overturned, it may be incumbent upon the courts to do so. Justice requires law to be practical and its application is based on consistency in judges' decisions. At the same time discrimination between cases is needed and is based on articulation and application. The principles of law ought to be adequate to resolve disputes and at the same time sufficiently precise to be applied by the litigants without requiring that they resort to court proceedings.

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[24] (1995-1997) 188 CLR 241.
[25] [1995] 2 AC 207. A case concerning disappointed third-party beneficiaries who, due to solicitor's negligence, could not benefit under the Will.
[26] Atiyah, *supra* note at p 25.
[27] See Brennan J in *Gala v. Preston* [1990-1991] 172 CLR at pp. 262 and 263.

Duties created by judges as a matter of positive law to answer the apparent justice of the individual case are not conducive to the orderly development of the law, or to the certainty which practical convenience demands. In a unique but limited situation the court on an *ad hoc* basis may grant a remedy without causing serious harm to the general structure of the law. However, even in such cases the judges must discern a principle, reasonably, when recognizing an extensive new area of potential liability.

Lord Denning used law as an instrument of doing justice and did not shy away from being unorthodox and innovative if justice so demanded. The concept of justice changes as society changes. Lord Denning thought law was an instrument of doing instant justice. He thought of the result he wanted to achieve before considering legal reasoning on which the case before him was founded. He first examined principles in order to ascertain whether they really compelled an unjust solution and in doing so he arrived at the answer which was more adequate to modern needs.[28] For example, in *Candler v. Crane Christmas & Co. Ltd.* he stated in his dissenting judgement: 'I think the law would fail to serve the best interest of the community if it should hold that accountants and auditors owe a duty to no one but their clients.'[29]

The judges in *Murphy*[30] rejected the search in *Anns*[31] for a universal rule and favoured an incremental approach by elaborating categories where recovery for economic loss was justified on a case-by-case basis. What can be gauged from *Murphy* is that in addition to the rule of the law being defended on moral and economic terms, certainty in law was of paramount importance. The rule of the law had to provide a logical basis upon which individuals could predict their conduct and courts could decide future cases. This certainty in law has to be sacrificed if justice is to prevail.[32]

A fair and functional legal system could not accept that all economic loss related to negligence should be recoverable. Nevertheless, there was a need to allow recovery of economic loss for negligence even where the criteria of physical damage and reliance did not apply. However, the judges, rather then picking and choosing cases, then have to formulate rules based on policy grounds and explain why they allowed recovery for economic loss in some cases and not in others.

Indeed, modern judges tend to adopt a comparative law argument approach presented by the parties' advocates as a useful tool. In *Esanda* the judges referred to several US cases. Although cases decided outside the jurisdiction are persuasive they are not binding upon the local courts. Nevertheless, they do provide direction to the development of current law and the judicial reasoning for their decisions on the point of law.

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[28] C.M. Schmitthoff, 'Lord Denning and the Contemporary Scene' in (1979) *Journal of Business Law* at 97–98.
[29] [1951] 2 KB 164 at p. 184.
[30] [1991] 1 AC 398.
[31] [1978] AC 728.
[32] See McLachlin J's judgment in *CNR .v Norsk supra* note p. 365.

In modern times legislative law is on the increase but Parliament cannot find enough time continuously to monitor and amend legal rules. Even if they have time, it is not possible for them to formulate rules that are exact and at the same time comprehensive enough to cover every dispute that is brought to court.

M. Legal Reasoning

It is through the ordinary process of legal reasoning that judges resolve a question of law by searching for a requisite element of proximity in comparable relationships or with respect to comparable acts and/or damages. McLachlin J opined:

> As more cases are decided, we can expect further definition on what factors give rise to liability for pure economic loss in particular categories of cases. In determining whether liability should be extended to new situations, courts will have regard to factors traditionally relevant to proximity such as relationship between the parties, physical propinquity, assumed or imposed obligations and close casual connection.[33]

The desirability of developing the law of negligence has been generally accepted. Judges can be criticized for 'seeking to find any general principle which will serve as a touchstone for all cases'.[34] Instead judges ought to be 'guided by situation in which the existence, scope and limit of a duty of care had been held to exist rather than by a single general principle [of foreseeability]'.[35]

N. Flexibility vs. Certainty in Law

The problem with judges propounding a broad theory as a legal principle to explain a diversity of cases is that it sacrifices the precise content of the law. The possible alternative is for judicial development to be based on each judge freely giving the case such content as the individual judge chooses. The law will then become an invitation for litigants to litigate rather then an instrument of dispute resolution, as is at present the case.

Where the law remains static, such as in the area of professional negligence, or where Parliament's time is at a premium to bring about necessary legislative reforms, it then becomes the duty of the court, based on flexibility, to develop the law to keep

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[33] *See CNR v. Norsk supra* note at pp. 369-370.
[34] Lord Oliver in *Caparo Industries v. Dicman & Others* [1990] 1 All ER 568 at 587 (*Caparo*).
[35] *Caparo* following *Al Saudi Banque and Ors v. Clark Prixley* [1989] 3 All ER 361.

with the changes in modern society. This is especially important where the social relationship in a progressive society becomes more heterogeneous and societal values continue to change.

The technique of development of law requires the judges to craft legal principles. This is done from the contents of actual decisions in the multitude of cases, with precision as regards the subject matter in dispute. This at times has been difficult to achieve, but where it has been achieved, the end result has been that previous working principles are made absolute and have been replaced by other working principles.

Judges have tried to develop coherent rules in the area of pure economic loss through precedent. Rigid adherence to precedent has been necessary to create certainty in the law. When an existing decision is disapproved but cannot be overruled, the judges have attempted to distinguish it.[36]

O. The Recognition of Duty

If a judgment in favour of a deserving plaintiff cannot be sustained by the direct application of the existing authorities, the question that then arises is whether a new rule should be devised. The judges have used two options. First, a judge might start with an established principle and then by incremental process, recognized and adopted in previous cases, extend the law to encompass a new situation. Secondly, a judge may proceed directly to the recognition of the duty without using any of existing law as a starting point.[37]

The *prima facie* duty – a defendant owes duty to a plaintiff where no such duty of care exists – in a given situation may go far beyond anything so far contemplated by the law of negligence. A broad new type of relationship may properly meet a broad type of claim, as happened in *Hedley Byrne*. Since the decision of *Caparo* it seems possible to create a specialist pocket of tort law, with a special type of proximity, distinct from the main body of doctrine, sufficient to provide a remedy consistent with a policy of enlarging the law of negligence by the process of accretion.

Two views emerge. One is that judges make law because no settled rules appear to decide the case before them. In such cases, according to Atiyah, 'judges must examine the policy issues involved in cases before them, weigh up the private rights of the parties and the public interest as best as they can, and then decide what they think is best, just as a legislator might'.

The second view entirely rejects the idea of judges' concern with the policy. Their main concern is with rights. Atiyah explains that 'courts are concerned with enforcing private rights, and are not well equipped for deciding major policy issues

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[36] For example, *Caparo* was distinguished in *Dixon v. Deacon Morgan McEwen Easson* 70 DLR (4th) 600.

[37] See Lord Mustill, *White v. Jones* [1995] 2 AC 207 at 289 CA.

... judges have nothing to do with policy, their duty is to apply law'.[38] The second view is too limited and facile a view of the judicial role.

In a novel case, legal material will take the judges only part of the way whereas applying a theory, principle or value representing some policy would persuade judges to make a better choice. Some judges consider it to be the task of the Parliament, through legislative functions, to make policy decisions. Judges holding such opinion think they are ill equipped to make policy decisions. The reason given is that deciding on policy grounds is carrying out an administrative function which is the remit of the Parliament.

Atiyah argues this point of view holding that in many of the judges' decisions policy issues are considered. Likewise, not all administrative decisions are policy decisions. Judges do consider policy questions in those 'cases in which they actually have to decide new points of law'.

P. Fair, Just and Equitable

The traditional and typical judicial function was deciding questions of fact and law and then applying the law to facts. Judges in modern times 'often exercise other functions which involve extensive use of discretions'. An example is whether it is fair, just and equitable that professional people like auditors should be made liable for negligence to third parties who are not in contractual relationship with the auditors. Common law judges would hitherto decide cases in accordance with a pre-defined and fixed rule of the law. The recent trend has been for judges to use their power 'to decide various questions as they think fit, or as may seem just and equitable'.

If Atiyah's argument is to be considered correct, it means that in deciding whether it is fair, just and equitable to hold professional people liable for negligence is a matter of judicial discretion. It could also be argued that, based on *Caparo*, a decision based on the grounds of fairness, justice and equity is actually a policy decision. The author subscribes to the view based on the *Anns* case: the policy issue is a separate issue from what is fair, just and equitable.

Q. Reasonable Conduct

For over a hundred years, judges have continued to use the concept of 'reasonableness' to describe the required standard of conduct. Reasonable conduct means people and especially professional people must act with reasonable care. Whether a particular

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[38] Atiyah, *supra* note at p. 195.

conduct meets the standard of reasonableness is a question of fact, and being evaluative involves value-judgements. However, judges may make value judgement derived from the community standard rather then using their personal inclination.

R. Protection Against Liability via Insurance

Until recently, the courts felt that professional people were able to insure against liabilities. In *Smith v. Eric S. Bush* the court held that 'surveyors can insure against their liability and so are not threatened by catastrophic losses if they commit professional negligence'.[39] Similarly, Atiyah opined that professional people such as 'surveyors will have to pay for their insurance protection, and they may need to add something to their bills to cover additional cost, but that seems a small price'.[40] The small shareholders, creditors and lenders, as individuals, however, face overwhelming financial loss if the company, whose accounts are negligently audited and in which they have invested or to which they have lent money, becomes insolvent.

The above concept is erroneous and misconceived as it does not conform to reality. Where corporations are concerned, for example, it does not apply to large shareholders who may have a representative on the board. Large creditors and lenders, in most cases, would have security on the assets of the company. Companies who engage professional auditors do not get direct benefit. On the contrary, they may have to pay higher charges for it. It is only through competition (e.g., wills drafting, conveyancing and auditing) that the prices for professional services have been kept at low levels. There might be some truth in that the users of professional services get an indirect benefit. In case of company audits, the shareholders, creditors and lenders make use of the audited accounts before investing or lending money into a company. Otherwise, in general, such professionals as solicitors and auditors provide such services as drafting wills, conveyancing or auditing as a loss leader expecting to make some money from other lucrative services (e.g., solicitors managing the deceased's estate or auditors doing consultancy work).

S. The Adversarial Mode of Trial

In reality, judges do not create causes of action but depend on the adversarial system to shape the case.[41] Adversarial trials are nothing but contests between specific

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[39] [1989] 2 All ER 514, HL.
[40] Atiyah, *supra* note at p. 24.
[41] S.G. Pollack J, 'The Art of Judging' in 71 NYUL Rev 591 at 593.

parties who rarely have any interest in purely legal development which imposes a measure of restraint on the role of the judges. The adversarial trial 'tends to limit the material available to the judge, particularly on the social and economic consequences of alternative solutions to the problem in hand'. The stimuli to new legal authority often comes from the judges' own perception of grave injustice to which the law or legal procedures might seem to be directed. At the same time judges are 'conscious of the need to avoid large changes which would have large economic and social ramifications' and which would lead to unpredictability in law.[42]

T. Conclusion

The role and part played by judges has been the main focus of this article. In a multicultural society people do not adhere to permanent values. As societies undergo rapid social and economic changes the need for judicial innovation is created. However, judges do not make large or bold moves as judicial law making is tied to existing doctrines. Judges have no authority to change the law merely because they find the precedents of earlier generations unpalatable. The role of common law courts is a far more modest one. A judge has to proceed on the basis of the identification and enunciation of principles that unify and explain earlier decisions. 'Advances in the common law must begin from a baseline of accepted principles and proceed by conventional methods of legal reasoning.' Judges have no authority to invent legal doctrines which either distort accepted rules and principles or where the accepted rules and principles are neither extended nor modified.[43]

Two schools of thought emerged from the sample of academic writers and the views of judges discussed. Some believe that judges make law based on their belief that categories of negligence are infinite while others believe that the task of the judge is merely to interpret the law.

The traditional role of the judges has been the development of common law. It has been a healthy development and a powerful influence on the law and the protection to people.[44] If law is clear and certain then judges have to pronounce the law as it is and should not change it. In novel cases judges will undoubtedly make law but such situations are rare. Where such an attempt was made in *Anns*, whose legal rules were then applied to professional auditors,[45] it gave rise to a considerably more open-ended form of third-party liability. The preference is for law to be developed at incremental stages, as the obvious advantage of such an approach is that it creates certainty in law.

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[42] *See* Kirby, *surpa* note at p. 17.
[43] *Breen v. Willaims* (1996) 186 CLR 71 at 115.
[44] Lord Mackay of Clashfern, Hansard, 5 June 1996 1254 at p. 1309.
[45] *JEB Fasteners Ltd v. Mark, Bloom & Co* [1993] All ER 583 CA; affg [1981] All ER 289; *Twomax v. Dickson, McFarlane and Robinson* (1983) SLT 98; *Scott Group Ltd v. MacFarlane & Ors* [1976] 1 NZLR 553.