Judicial Method and Advocates’ Immunity in the High Court of Australia and the House of Lords

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Abstract – The article takes an analytical approach to the examination of judicial method in two decisions of the High Court of Australia and the House of Lords concerning advocates’ immunity. The article identifies four approaches to legal reasoning. Principle-based judicial method recognizes the interaction between principles, rules and the limits within which consequentialist arguments are justified in law. This approach also recognizes the importance of consistency and coherence. Coherence-based incrementalism recognizes the need for incremental development of the law within a coherent body of rules. Identification of ratio decidendi forms part of this approach. Policy-based incrementalism recognizes the need for incremental development of the law within the context of competing policy considerations. Identification of ratio decidendi forms part of this approach. Policy-based judicial method analyses competing policy considerations and recognizes the legitimacy of prospective overruling. The coherence-based approaches retained the immunity while the policy-based approaches rejected the immunity. The article questions the legitimacy of prospective overruling and presents a model of judicial method as a contribution to the jurisprudence on legal reasoning.

1. Introduction

The issue of formalism versus judicial activism in legal reasoning has been the subject of recent debate between commentators in Australia.¹

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members of the High Court of Australia, writing ex curia, have expressed their views. The recent debate in Australia has focused on the extent to which the approach to judicial method favoured by a former Chief Justice of Australia, Sir Owen Dixon, has influenced the current High Court of Australia. Sir Owen Dixon was Chief Justice from 1952 to 1964. In an address on the occasion of receiving the Howland Memorial Prize at Yale University in 1955, Sir Owen Dixon stressed the importance of ‘high technique and strict logic’ in the development of common law principles. This reference to ‘high technique and strict logic’ could have been made in the context of an address at Yale University in 1955 as a response to the prevailing influence of legal realism at the time in the United States. As Oliver Wendell Holmes said 75 years earlier, ‘[t]he life of the law has not been logic: it has been experience’. However, on the occasion of being sworn in as the Chief Justice of Australia in 1952, Sir Owen Dixon also referred to the safeguard in ‘strict and complete legalism’ in common law judicial method.

The current debate on judicial method in Australia has not been approached from an analytical point of view. The opportunity for an analytical approach to the examination of judicial method has been provided by two decisions of the High Court of Australia and the House of Lords concerning advocates’ immunity. While a majority of the High Court of Australia retained the immunity in both civil and criminal matters in D’Orta-Ekenaie v Victoria Legal Aid, the House of Lords unanimously rejected the immunity in civil matters and a majority of the House rejected the immunity in criminal matters. This article identifies four approaches to legal reasoning: principle-based judicial method; coherence-based incrementalism; policy-based incrementalism; and policy-based judicial method.

The joint majority of the High Court of Australia adopted a principle-based approach to judicial method in D’Orta-Ekenaie. This approach is consistent
with Professor Sir Neil MacCormick’s theory of legal reasoning. McHugh J, in an individual majority judgment, adopted an incremental approach which recognized the importance of coherence in legal reasoning. Identification of ratio decidendi formed part of this approach. Callinan J, in another individual majority judgment, adopted a ‘weak’ form of McHugh J’s coherence-based incrementalism. Kirby J adopted a policy-based incremental approach in delivering a dissenting judgment in D’Orta-Ekenaike. This approach emphasized the importance of identifying ratio decidendi before addressing issues of legal policy. The House of Lords adopted a policy-based approach in Arthur J S Hall & Co. This approach recognized the legitimacy of prospective overruling. Although their Lordships were unanimous in agreeing that the three appeals should fail on the grounds that the negligence of the solicitors in each appeal fell outside the existing immunity, the House heard submissions on whether the immunity should be retained in civil and criminal matters.

This article analyses the different approaches to legal reasoning in the High Court of Australia and the House of Lords from a theoretical point of view and presents a model of judicial method which contains four distinct approaches. This model has important implications for future decisions of the High Court of Australia and the House of Lords in matters of private law.

2. MacCormick’s Theory of Legal Reasoning

A. Background

MacCormick’s theory of legal reasoning is essentially Hartian and as such is ‘fully compatible with Hart’s legal-positivistic analysis of the concept of law’. With H. L. A. Hart’s encouragement, MacCormick developed his theory in response to criticism that Hart failed to provide a satisfactory account of legal reasoning in The Concept of Law. MacCormick’s theory ‘presents legal reasoning as a species of practical reasoning’. He develops and illustrates the theory through an analysis of cases. This method of ‘rational reconstruction’ is then used to test the theory’s validity.

MacCormick’s theory of precedent, his subsequent model of ratio decidendi and an established doctrine of precedent form part of a coherent system of

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9 The issue of prospective overruling was addressed by the House of Lords in National Westminster Bank Plc v Spectrum Plus Limited and Others [2005] UKHL 41. The issue of prospective overruling is examined below in relation to the analysis of Arthur J S Hall & Co.
12 Above n 10 at xii.
13 Ibid at xiii-xiv.
14 MacCormick, ‘Why Cases Have Rationes and What These Are’ in L. Goldstein (ed), Precedent in Law (1987) 153 at 170. According to MacCormick, ‘[a] ratio decidendi is a ruling expressly or impliedly given by a judge which is sufficient to settle a point of law put in issue by the parties’ arguments in a case, being a point on which a ruling was necessary to his [or her] justification (or one of his [or her] alternative justifications) of the decisions of the case’.
‘complex interplay between considerations of principle, consequentialist arguments and disputable points of interpretation of established valid rules’.  

The constraint of formal justice is central to MacCormick’s theory as it provides the link to legal justification. MacCormick adopts the differentiation made by Rawls between the formal concept of justice and specific conceptions of justice. MacCormick uses his theory of precedent, in conjunction with a doctrine of precedent, to determine when like cases should be treated alike. The constraint of formal justice is considered within the context of this complex interplay which MacCormick refers to as ‘second-order justification’. ‘Second-order justification’ requires:  

(a) consistency with pre-established and binding law in the sense of a judicial decision’s consistency with an existing binding ratio decidendi;  
(b) coherence with established law in the sense of a judicial decision’s coherence with established general principles;  
and (c) taking account of consequentialist arguments by ‘showing that the ruling is, in light of its logical – perhaps also its behavioural – consequences, preferable to any alternative’ proposed by the litigants. The difference between consistency and coherence is examined below. The constraint of formal justice and second-order justification involve both ‘forward-looking’ and ‘backward-looking’ aspects in the sense that in addition to applying to the particular case before the court, a judicial decision must be capable of universal application in like cases in the future.

B. Principles, Consistency and Coherence

MacCormick uses ‘coherence in the sense that the multitudinous rules of a developed legal system should “make sense” when taken together’. Where sets of rules in a legal system are not inconsistent with the accepted general principles, those rules are ‘more specific…manifestations’ of the principles. Rather than being part of a theory of law, MacCormick considers coherence as ‘an interpretative tool’ in his theory of legal reasoning. In doing so he makes a distinction between ‘narrative coherence’ and ‘normative coherence’. ‘Narrative coherence’ refers to ‘drawing inferences of fact from evidentiary facts’ and ‘normative coherence’ refers to coherence in relation to norms or general principles. Bertea points out that ‘[n]ormative coherence

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15 Above n 10 at 156. MacCormick refers to a ‘theory of precedent’ in the context of determining the theoretical basis of the concepts of ratio decidendi and obiter dictum. MacCormick refers a ‘doctrine of precedent’ in the context of the rules within a particular court hierarchy which determine the extent to which courts within that hierarchy are bound by the ratio decidendi of other courts in the hierarchy.  
17 Above n 14 at 161-2.  
18 Above n 10 at 75.  
19 Ibid.  
20 Ibid.  
23 Ibid at 235.
applies to points of law rather than to matters of fact'.

Although disagreement exists regarding the actual relationship between the concepts of consistency and normative coherence, it is generally accepted that consistency is a precondition of normative coherence.

An appreciation of the distinction between consistency and coherence is important in relation to normative coherence and second-order justification. According to Guest:

"The requirement of coherence in the law is more than just consistency or, what Dworkin prefers to call it, 'bare consistency'. Bare consistency just amounts to the absence of logical contradiction between two statements of law. Coherence must, rather, be consistency 'in principle', that is, it must 'express a single and comprehensive vision of justice'."

Two concepts of consistency are referred to here by Guest. First, Dworkin's 'bare consistency' is similar to MacCormick's notion of consistency in his second-order justification in that both relate back to consistency between different statements of law or rationes decidendi. This article refers to this type of consistency as 'horizontal consistency'. Second, MacCormick and Dworkin both recognize consistency in the sense of consistency being a precondition to coherence in the law. For example, Peczenik believes that '[c]onsistency is the most fundamental requirement for rationality, and a necessary condition of coherence'. In this second sense consistency refers to the consistency between a set of rules and a general principle which results in coherence in the established legal order. Consistency in this second sense does not refer to consistency within a set of rules. The consistency in this second sense exists between the rules and the general principle. This article refers to this second sense of consistency as 'vertical consistency'.

Coherence in the law is then a consequence of the existence of horizontal consistency within a set of rules and vertical consistency between the set of rules and the general principle. Thus MacCormick has said that 'a set of rules is coherent if they all satisfy or are instances of a single more general principle'. It is important to appreciate, however, that there are two levels of coherence in the law. For example, Levenbook divides coherence into 'global (or system-wide) systemic coherence' and 'local (or area-specific) systemic coherence'.

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25 See Schiavello, above n 21 at 236.
28 Dr Darryn Jensen refers to this as ‘horizontal coherence’ in his unpublished PhD thesis titled ‘Informal Property Sharing Arrangements: A Study of Adjudicative Coherence’ at 21.
30 Above n 22 at 236.
Horizontal and vertical consistency can exist within either global or local systemic coherence.

C. Consequentialist Reasoning

MacCormick argues that consequentialist reasoning has a proper role to play in judicial decision making. The issue to consider is the extent to which legal decisions can be justified by consequences and MacCormick approaches this through an examination of different ‘kinds of consequences’. This examination commences with an analysis of the difference between ‘results’ and ‘consequences’ and is based on Kenny’s explanation of the difference.

In the context of judicial decision making, the decision of a court is a public act which is defined by a specific type of result; namely, a valid legal order. In other words, ‘producing a valid order is the result definitive of the legal act of deciding a case’. Consequently, ‘since this result is simply definitive of the act of deciding, it is the very thing which has to be justified, not a factor in the justification process’. MacCormick examines different kinds of consequences in the justification process of making a judicial decision. In this sense consequences ‘go beyond’ results.

The starting point of the analysis of consequences is the distinction between ‘causal consequences’ and ‘ulterior outcomes’. MacCormick uses the example of a court order requiring a defendant to pay a plaintiff a large sum in damages. The defendant’s despair at having to pay the amount is a causal consequence of the result, that is, the court order. As MacCormick points out, ‘[i]n general terms, whatever is caused by the result of an act is the causal consequence of the act’. An ulterior outcome of the court order may be that the defendant can no longer contribute to a particular charity. The judicial decision is a ‘necessary precondition’ of the ulterior outcome. Whereas causal consequences are ‘the events or states of affairs of which the decision is itself the cause’, the decision is one of the ‘necessary conditions or preconditions’ of an ulterior outcome.

Causal consequences and ulterior outcomes do not assist, however, in the process of justifying judicial decisions. MacCormick turns to Rudden’s analysis of ‘juridical consequences’ for assistance. A juridical consequence

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33 Ibid at 246-254.
35 Above n 32 at 247.
36 Ibid.
37 Ibid.
38 Ibid at 247-9.
39 Ibid at 247.
40 Ibid at 248.
41 Ibid.
is a consequence which is relevant to the justification of a judicial decision.\textsuperscript{43} Judicial consequences involve ‘legal evaluation’ through a consideration of ‘a plurality of values’.\textsuperscript{44} Judicial consequences are then tested against those values which are relevant to the particular legal claim.\textsuperscript{45} The process of taking into account juridical consequences involves consideration of the rights that flow from the application of coherent principles and rules. The rights flow from the principles and rules. The principles and rules do not flow from the rights. This leads to an examination of the approaches in the advocates’ immunity cases.

3. \textit{D’Orta-Ekenaike v Victoria Legal Aid}

A. Background

Ryan D’Orta-Ekenaike was committed to trial for rape. Notwithstanding a belief in his innocence, on the advice of his lawyers, a solicitor employed by Victoria Legal Aid and a barrister practising at the Melbourne Bar, D’Orta-Ekenaike pleaded guilty at the committal hearing in the belief that he would receive a suspended sentence. However, he changed his plea to not guilty on arraignment and stood trial. Evidence of the earlier guilty plea was admitted at trial and D’Orta-Ekenaike was found guilty. On appeal the conviction was quashed on the grounds that although evidence of the earlier guilty plea was admissible at trial, the trial judge had failed to properly instruct the jury regarding the earlier plea. Evidence of the earlier guilty plea was not admitted at the retrial and D’Orta-Ekenaike was acquitted.

Following his acquittal D’Orta-Ekenaike commenced civil proceedings in the County Court of Victoria against Victoria Legal Aid and the barrister alleging negligence in respect of the advice to plead guilty at the committal hearing. He claimed damages for loss of liberty during his term of imprisonment between the conviction and the subsequent quashing of that conviction, loss of income during this period and after this period caused by psychotic illness, and the costs of the appeal, the retrial and the civil proceeding. The trial judge ordered that the proceedings be stayed permanently on the basis of the immunity. The Court of Appeal of Victoria refused to grant D’Orta-Ekenaike leave to appeal. The High Court of Australia granted D’Orta-Ekenaike special leave to appeal against the order of the trial judge.

B. \textit{The Joint Majority and Principle-based Judicial Method}

(i) \textit{Ratio decidendi and horizontal consistency}

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\item 43 Above n 32 at 249-250.
\item 45 Above n 32 at 257.
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The joint majority of Gleeson CJ, Gummow, Hayne and Heydon JJ addressed whether it should reconsider the High Court of Australia's previous decision concerning advocates’ immunity in *Giannarelli v Wraith*. A majority of the Court in *Giannarelli* decided in favour of retaining the common law immunity. The joint majority in *D’Orta-Ekenaie* said that the issue was whether the Court should reconsider the decision in *Giannarelli* that ‘at common law an advocate cannot be sued by his or her client for negligence in the conduct of a case in court, or in work out of court which leads to a decision affecting the conduct of a case in court’. This was taken from the judgment of Mason CJ in *Giannarelli*. However, there were four individual majority judgments in *Giannarelli*; namely, Mason CJ, Wilson, Brennan and Dawson JJ. The joint majority in *D’Orta-Ekenaie* took the ‘rule’ from *Giannarelli* from the judgment of Mason CJ in *Giannarelli*. The joint majority did not analyse the other majority judgments in *Giannarelli*.

The joint majority identified the advocates’ immunity rule from an individual majority judgment of *Giannarelli*. This is an example of MacCormick’s ‘weak’ doctrine of precedent in which ‘precedents are best treated as more or less persuasive rather than absolutely binding’. Horizontal consistency also existed as the advocates’ immunity rule was consistent with the following rules: the restriction upon the reopening of final orders after entry; the setting aside of a final judgment on the grounds of fraud; *res judicata*; issue estoppel; the fresh evidence rule; and immunity from suit.

(ii) *Vertical consistency, principles and coherence*

As a ‘central and pervading tenet of the judicial system’, the principle of finality formed a critical part of the joint majority’s legal reasoning in *D’Orta-Ekenaie*. The joint majority referred to the tenet (the norm or general principle of finality) which found reflection in rules such as *res judicata* and issue estoppel. The principle of finality was the normative expression of the reason for these rules. In particular, the principle of finality provided ‘the central justification for the advocate’s immunity’. As vertical consistency existed between these rules and the principle of finality of litigation, coherence in an established legal order existed in view of the fact that horizontal consistency existed between the rules. This is an example of global systemic coherence as the principle of finality of litigation applies to the legal system as a whole.

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46 (1988) 165 CLR 543.
47 In *Giannarelli* the High Court of Australia considered the immunity at common law and also the impact of the *Legal Profession Practice Act 1958* (Vic) on the issue. In *D’Orta-Ekenaie* the issue of the immunity at common law and the impact of *Legal Profession Practice Act 1958* (Vic) was also considered. However, for the purposes of this article only the issue of immunity at common law is considered.
48 *D’Orta-Ekenaie v Victoria Legal Aid and Another* (2005) 214 ALR 92 at 93.
50 Above n 14 at 158.
51 *D’Orta-Ekenaie v Victoria Legal Aid and Another* (2005) 214 ALR 92 at 100.
52 Ibid at 103.
(iii) Consequentialist reasoning

The joint majority in *D’Orta-Ekenaike* referred to the consequentialist reasoning in *Giannarelli*\(^3\) concerning ‘the adverse consequences for the administration of justice which would flow from the relitigation in collateral proceedings for negligence of issues determined in principal proceedings’.\(^4\) According to the joint majority in *D’Orta-Ekenaike*, consideration of the adverse consequences of relitigation was ‘determinative’ in the reasoning of the majority judgments in *Giannarelli*.\(^5\) The adverse consequences of relitigation included the possibility of reopening final orders after entry, the impact on doctrines such as *res judicata* and issue estoppel, and the implications for the immunity of judges and witnesses from suit.

The reference to the adverse consequences for the administration of justice could be viewed as a reference to public policy considerations. In fact, the joint majority in *D’Orta-Ekenaike* said that ‘the immunity is sustained on considerations of public policy’.\(^6\) Consideration of consequentialist arguments in this context was consistent with MacCormick’s theory as the reasoning of the joint majority was universalizable in the sense that it was ‘a commitment to the universal’\(^7\) which took account of ‘the injury to the public interest that would arise in the absence of immunity’.\(^8\) The joint majority did not approach the issue of adverse consequences for the judicial system flowing from relitigation as a policy factor to be taken into account in determining whether to retain the immunity. The joint majority approached the issue of adverse consequences as a consequentialist argument to be considered within the context of the overriding principle of finality and the various rules related to this principle such as *res judicata* and issue estoppel.

Consideration of potential consequences of a judicial decision within the context of a general norm (such as the need for finality) within the context of associated rules (such as *res judicata* and issue estoppel) constitutes principle-based reasoning even if the potential consequences are referred to as policy factors. The labelling of the potential consequences as ‘policy factors’ is not the issue. The issue is whether the reasoning is end-independent or end-dependent. Although the joint majority said that ‘the immunity is sustained on considerations of public policy’\(^9\), their Honours’ analysis of the immunity of advocates was consistent with MacCormick’s theory.

The joint majority considered the different kinds of consequences that could flow from the fact that the negligence of a client’s advocate could not be

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\(^3\) (1998) 165 CLR 543 at 555 per Mason CJ; at 574 per Wilson J; at 579 per Brennan J; at 595-6 per Dawson J.

\(^4\) *D’Orta-Ekenaike v Victoria Legal Aid and Another* (2005) 214 ALR 92 at 99.

\(^5\) Ibid.

\(^6\) Ibid.

\(^7\) Above n 14 at 162.

\(^8\) *Gibbons v Duffell* (1932) 47 CLR 520 at 529 per Starke J.

\(^9\) *D’Orta-Ekenaike v Victoria Legal Aid and Another* (2005) 214 ALR 92 at 99.
‘sufficiently corrected within the litigation in which the client was engaged’. Consideration of different kinds of consequences forms a central part of MacCormick’s approach to consequentialist reasoning. The joint majority identified ‘three chief consequences’ that could flow from an inability to correct an advocate’s negligence: ‘(a) a wrong final result; (b) a wrong intermediate result; and (c) wasted costs’. A ‘wrong final result’ is an incorrect judicial decision and this amounts to a ‘result’ in MacCormick’s analysis. A ‘wrong intermediate result’ resulting in the client being wrongfully incarcerated for a period of time amounts to an ‘ulterior outcome’ in MacCormick’s analysis. ‘Wasted costs’ in the form of unnecessary expenses amount to ‘causal consequences’ in MacCormick’s analysis. The joint majority’s analysis of consequences was consistent with MacCormick’s analysis of consequentialist reasoning.

(iv) Legal justification and universalizability at law

The decision in D’Orta-Ekenaike was a ‘lawful result’ in the sense that it was justified legally. The decision was ‘lawfully reached’. The imprisonment was ‘lawful imprisonment’. The adverse consequences were inflicted lawfully. The joint majority considered D’Orta-Ekenaike’s claim in the context of a normative proposition; namely, the principle of finality. The decision to retain the immunity was not ad hoc in character. The joint majority engaged in ‘second-order justification’ through an application of the rule from Giannarelli in the context of the principle of finality and consequentialist reasoning consistent with MacCormick’s theory. The joint majority satisfied the requirement of universalizability at law through a process of legal reasoning which was both ‘forward-looking’ and ‘backward-looking’.

(v) Rights are a necessary consequence of a general principle

Rights flow from principles and associated rules in MacCormick’s view. Principles and rules do not flow from rights. The joint majority in D’Orta-Ekenaike said the ‘immunity of advocates is a necessary consequence’ of the ‘need for certainty and finality of decision’. A client’s right to succeed in an action for negligence against an advocate is related to the issue of the immunity of an advocate. The client has a right to succeed in the action against the advocate if the immunity is abolished and the negligence is proved. The client has no right to succeed in the action for negligence against the advocate if the immunity is retained and the conduct of the advocate falls within the scope of the immunity. The joint majority concluded that the need for finality in litigation was paramount. The immunity was ‘a necessary consequence of that need’.

60 Ibid at 108.
61 Ibid.
62 Ibid.
63 Above n 14 at 161-2.
64 D’Orta-Ekenaike v Victoria Legal Aid and Another (2005) 214 ALR 92 at 112.
65 Ibid.
C. McHugh J and Coherence-based Incrementalism

(i) Incrementalism

Strict identification of the *ratio decideni* of previous cases forms part of incremental legal reasoning. McHugh J analysed the reasoning of the majority judgments in *Giannarelli* and concluded that *Giannarelli* contained no discernable *ratio decideni* in view of the ‘difference in reasoning among the majority justices’. After concluding that *Giannarelli* contained no discernable *ratio decideni*, his Honour said:

>[A] court, bound by a previous decision whose *ratio decideni* is not discernible, is bound to apply that decision when the circumstances of the instant case ‘are not reasonably distinguishable from those which gave rise to the decision’.

McHugh J concluded that the material circumstances of *D’Orta-Ekenaik* were not ‘reasonably distinguishable’ from the material circumstances of *Giannarelli*. McHugh J’s approach in *D’Orta-Ekenaik* was incremental. It is recognised that incrementalism does not escape criticism. According to Professor Keith Stanton, ‘[t]he central problem is that incrementalism is capable of holding different meanings’. The problem with incrementalism as an approach to legal reasoning is that ‘the very term “incremental” invites inquiry because what is incremental is to an extent in the eye of the beholder’.

(ii) Coherence

McHugh J’s judgments contain various references to the importance of coherence in the law. However, these references to coherence are made in a different context to the concept of coherence under principle-based judicial method. McHugh J refers to the need for coherence between different areas of law such as tort and contract. His Honour does not refer generally to coherence in the sense of vertical consistency and a general principle. It is recognized that the need for finality of litigation influenced McHugh J’s legal reasoning in *D’Orta-Ekenaik*. His Honour agreed with the joint majority on the ‘fundamental issue’ of finality in litigation as the ‘preservation of finality’...
was a ‘compelling reason’ to retain the immunity of advocates.\(^{73}\) Although McHugh J outlined the ‘public policy basis’ for the immunity,\(^{74}\) his Honour arrived at his conclusion through a careful analysis of *ratio decidendi* in the context of the need for finality in litigation. However, his Honour approached the need for finality of litigation from the point of view of adverse consequences rather than from the point of view of a general principle of law.

D. Callinan J and Coherence-based Incrementalism

Callinan J used a ‘weak’ form of coherence-based incrementalism in an individual majority judgment in *D’Orta-Ekenaie*. His Honour used a ‘weak’ form as less emphasis was placed on identification of *ratio decidendi* and the need for coherence in different areas of the law. Callinan J identified the rule from *Giannarelli* without undertaking a detailed analysis of the majority judgments in the case.\(^{75}\) Callinan J said that ‘the common law in general changes only incrementally’.\(^{76}\) His Honour agreed with the reasons of the joint majority in respect of the need for finality in litigation.\(^{77}\)

E. Kirby J and Policy-based Incrementalism

(i) The Caparo three-stage test

In contrast to the majority, Kirby J approached *D’Orta-Ekenaie* on the basis of alleged professional negligence. The *Caparo*\(^{78}\) three-stage test has had a significant influence on his Honour’s approach to legal reasoning in cases involving negligence. In fact, Kirby J’s policy-based incrementalism developed as a consequence of the influence of the *Caparo* three-stage test. His Honour uses the methodology of the three-stage test as the basis for a general approach to judicial method in matters of private law.

Kirby J adopted the *Caparo* three-stage test in 1998 in *Pyrennes Shire Council v Day and Anor; Eskimo Amber Pty Ltd and Anor v Pyrenees Shire Council*.\(^{79}\) His Honour remains convinced that despite its deficiencies, when combined with reasoned analysis, the *Caparo* three-stage test provides a conceptual framework for determining the duty of care issue in cases involving claims for negligence. Kirby J believes an ‘integrated approach’\(^{80}\) to judicial method should be adopted so that ‘in every case which is not covered by an established category, a question of legal policy disciplined by the application of analogies derived as far as possible from past authority’\(^{81}\) should assist the court in its determination. Kirby J’s approach is disciplined in

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\(^{73}\) *D’Orta-Ekenaie v Victoria Legal Aid and Another* (2005) 214 ALR 92 at 133.

\(^{74}\) Ibid at 138-143.

\(^{75}\) Ibid at 180-1.

\(^{76}\) Ibid at 183.

\(^{77}\) Ibid at 187.

\(^{78}\) *Caparo Industries Plc v Dickman and Others* [1990] 2 AC 605.


\(^{80}\) Above n 70 at 51.

the sense that his Honour examines legal policy factors after careful consideration of past authority. Notwithstanding Kirby J’s attempts to have the Caparo test accepted in Australia, the High Court of Australia rejected the Caparo three-stage test in Sullivan v Moody and Ors; Thompson v Connolly and Ors\(^{82}\) on the basis that policy ‘is often ill-defined’ and ‘the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision making in individual cases’.\(^{83}\)

(ii) Ratio decidendi

In D’Orta-Ekenaike Kirby J analysed the majority judgments in Giannarelli in an attempt to ascertain the ratio decidendi of Giannarelli. In undertaking this analysis Kirby J explained the basis of identifying ratio decidendi in terms which were similar to MacCormick’s ‘formalist’ model of ratio decidendi.\(^{84}\) His Honour described the process in the following terms:

It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order.\(^{85}\)

Kirby J concluded that Giannarelli contained ‘no clear ratio’.\(^{86}\) His Honour disagreed with McHugh J’s conclusion that the material circumstances of D’Orta-Ekenaike were not ‘reasonably distinguishable’ from the material circumstances in Giannarelli. Kirby J concluded that the material circumstances in both cases were reasonably distinguishable as D’Orta-Ekenaike involved ‘out-of-court advice by a barrister,’ whereas Giannarelli concerned a failure by a barrister to raise an objection in court.\(^{87}\) Kirby J said, ‘[a]s a matter of law, Giannarelli is confined to holding that a Victorian barrister is immune from liability for negligence in the conduct of his or her client’s case in court during a hearing’.\(^{88}\) In Kirby J’s opinion, as D’Orta-Ekenaike involved ‘out of court’ advice by a solicitor and barrister, the decision in Giannarelli did not apply to the circumstances in D’Orta-Ekenaike. Kirby J did recognize that the High Court of Australia could reconsider its own past decisions where a past decision was applicable to a present case. This issue did not arise for Kirby J as his Honour distinguished the circumstances of Giannarelli from those in D’Orta-Ekenaike.

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\(^{82}\) (2001) 207 CLR 562.
\(^{83}\) Ibid at 579 per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ. It should be noted that Kirby J did not sit in this case.
\(^{84}\) Above n 14 at 170.
\(^{85}\) D’Orta-Ekenaike v Victoria Legal Aid and Another (2005) 214 ALR 92 at 153.
\(^{86}\) Ibid at 156.
\(^{87}\) Ibid.
\(^{88}\) Ibid at 159.
(iii) Policy considerations

According to Kirby J, policy should form an integral part of the reasoning process in cases involving negligence:

[I]t is preferable to adopt an approach which accepts honestly that exact precision and certainty are ultimately unattainable in this area of the law. In particular, it is preferable to accept the outer boundary of liability in negligence is fixed by reference to a ‘spectrum’ of factors of the kind examined by Lord Nicholls of Birkenhead in *Stovin*\(^89\) and by the candid evaluation of policy considerations in the same case by Lord Hoffmann\(^90\).\(^91\)

The reference to the ‘spectrum’ of factors examined by Lord Nicholls of Birkenhead and the ‘candid evaluation of policy considerations’ by Lord Hoffmann is important. The requirement of a disciplined ‘application of analogies derived as far as possible from past authority’, consideration of a ‘spectrum’ of relevant factors and a ‘candid evaluation of policy considerations’ forms the basis of Kirby J’s policy-based incrementalism. After concluding that the decision in *Giannarelli* did not apply, Kirby J considered various competing policy factors. His Honour agreed with the reasoning of Lord Steyn and Lord Hoffmann in *Arthur J S Hall & Co*. Kirby J concluded that policy considerations did not support the retention of the immunity. These policy factors are examined below in the analysis of *Arthur J S Hall & Co*.


A. Background

Three appeals concerning negligent ‘out of court’ advice by solicitors were heard together by the House of Lords in *Arthur J S Hall & Co v Simons*.\(^92\) The Court of Appeal had held that the actions of the solicitors fell outside the scope of the existing immunity of advocates as decided in *Rondel v Worsley*\(^93\) and *Saif Ali and Another v Sydney Mitchell & Co (A Firm) and Others*.\(^94\) Prior to hearing the appeals their Lordships had concluded that the Court of Appeal’s decision was correct.\(^95\) Notwithstanding, the House heard submissions on whether the immunity should be retained in civil and criminal matters. Lord Steyn and Lord Hoffman, in individual majority judgments, concluded that the immunity should be abolished in both civil and criminal

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\(^{89}\) *Stovin v Wise and Anor* [1996] AC 923 at 939-941.

\(^{90}\) Ibid at 956-958.

\(^{91}\) *Pyrenees Shire Council v Day and Anor; Eskimo Amber Pty Ltd and Anor v Pyrenees Shire Council* (1998) 192 CLR 330 at 419.

\(^{92}\) [2002] 1 AC 615.


\(^{95}\) *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 735 per Lord Hobhouse of Woodborough.
matters. Lord Brown-Wilkinson and Lord Millett agreed with the reasoning and conclusions of Lord Steyn and Lord Hoffman. Lord Hope of Craighead, Lord Hutton and Lord Hobhouse of Woodborough concluded that the immunity should be abolished in relation to civil matters but retained in relation to criminal matters.

The important point to appreciate is that virtually all of the reasoning in the judgments of the House in *Arthur J S Hall & Co* was not in respect of whether the three appeals should succeed. Their Lordships had already concluded that the three appeals should fail on the basis of the existing immunity. The negligence of the solicitors in each appeal fell outside the existing immunity of advocates. Their Lordships considered competing policy factors to determine whether to retain or abolish the immunity in future cases. This raises three important issues. First, their Lordships’ analysis was based on considerations of public policy. Their Lordships’ reasoning was influenced by external factors of competing policy rather than by coherence in the law. Second, abolishing the immunity for future cases involved prospective overruling. Their Lordships recognized the legitimacy of prospective overruling which, by its very nature, is end-dependent and amounts to an unacceptable expansion of judicial power.

The policy-based approach to judicial method in *Arthur J S Hall & Co* accepted prospective overruling as a legitimate exercise of judicial power. This does not mean that prospective overruling must form part of a policy-based approach. It is not an essential component of policy-based judicial method. It is compatible, however, with policy-based judicial method as both are end-dependent in nature. Prospective overruling is not compatible with the other approaches to legal reasoning identified in this article as the other approaches are restricted by the application of a decision to the actual legal claim before the court. Third, as virtually all of the reasoning in the judgments of the House was not in respect of the parties before the House, the conclusions regarding the fate of the immunity must have been *obiter dicta*. These conclusions could not have been part of any *rationes decidendi*. The House abolished the immunity through *obiter dicta*.

### B. The Competing Policy Factors

After some introductory comments in *Arthur J S Hall & Co*, Lord Steyn said ‘[i]t is now possible to take stock of the arguments for and against the immunity’.  

In other words, his Lordship stated an intention to take a policy-based approach through the analysis of competing policy factors. His Lordship then considered the following factors: the ‘cab rank’ rule; analogy with the public policy which encourages freedom of speech in court; the public policy against relitigation; and the duty of a barrister to the court. Lord Steyn concluded that it was no longer in the public interest to retain the immunity.

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96 Ibid at 678.
97 Ibid at 683.
Lord Hoffmann analysed the following policy arguments: the divided loyalty of a lawyers’ duty to the client and the court; the cab rank rule; the witness analogy; the issue of collateral challenge; the equal treatment of professionals; vexatious claims; wasted costs orders; and abuse of process by relitigation. 98 His Lordship concluded that the immunity should be abolished. As stated above, Lord Brown-Wilkinson and Lord Millett agreed with Lord Steyn and Lord Hoffmann. Their Lordships’ reasoning was policy-based. Although their Lordships addressed the issue of finality of litigation, it was addressed as one competing policy factor to be taken into account in the overall analysis. Their Lordships did not consider the issue of finality in the context of coherence within an established legal order.

C. Prospective Overruling

(i) Background

Prospective overruling has been the subject of previous academic 99 and judicial comment 100 in England and Australia. Lord Devlin, writing ex curia in 1976, expressed the following thoughts on prospective overruling:

I do not like it. It crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators…If judges can make law otherwise than by a decision at the Bar, why do they wait for a case? 101

Prospective overruling is accepted practice in the United States at appellate court level under the ‘Sunburst’ doctrine. 102 It is also accepted practice in the European Court of Justice. The position regarding prospective overruling in the High Court of Australia and the House of Lords is examined below. Whether or not the European Court of Justice has influenced the House of Lords’ position on prospective overruling is outside the scope of this article.

(ii) The House of Lords

98 Ibid at 686-704.
102 Great Northern Railway Co v Sunburst Oil & Refining Co (1932) 287 US 358.
According to Lord Hope of Craighead in *National Westminster Bank Plc v Spectrum Plus Limited and Others*, Arthur J S Hall & Co ‘was a highly unusual case’:

…I said at the outset of my speech that the grounds which the Court of Appeal had given for its decision were entirely sound, sufficient and satisfactory… But the opportunity had been taken of arranging for the case to be heard by seven Law Lords so that it could be considered whether the rule…could still be justified. The focus of attention was shifted, quite deliberately, to this issue. The House was no longer interested in the question whether the Court of Appeal had been right to say that the solicitors’ conduct was such as not to attract the core immunity. So I did not regard it as necessary for the disposal of the appeal to say that any change as regarded the immunity should operate retrospectively. On the contrary, as I said at p 710B: ‘I consider it to be a legitimate exercise of your Lordships’ judicial function to declare prospectively whether or not the immunity – which is judge-made rule – is to be available in the future and, if so, in what circumstances.’


The *National Westminster Bank Plc* case provides an example of seven Law Lords supporting the future use of prospective overruling. For the reasons set out below, this amounts to support for a considerable expansion of judicial power in the House of Lords. This is so even if the House uses prospective overruling in ‘exceptional’ cases only. The issue here, of course, is how to decide which cases are ‘exceptional’. Any decision regarding an ‘exceptional’ case is itself outside the scope of legitimate judicial power. This recent recognition of the legitimacy of prospective overruling represents a significant development in legal reasoning in the House of Lords. As Lord Nicholls of Birkenhead said in *National Westminster Bank Plc*, ‘[p]rospective overruling has not yet been adopted as a practice in this country’. According to Lord Goff of Chieveley in *Kleinwort Benson Ltd v Lincoln City Council and Others*, prospective overruling ‘has no place in our legal system’.

Lord Hope of Craighead’s statement that Arthur J S Hall & Co ‘was a highly unusual case’ is important. His Lordship acknowledged that the House of Lords sat to determine an issue which did not have any impact on the parties to the appeals. Their Lordships had decided that the Court of Appeal’s

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103 [2005] UKHL 41.
104 Ibid at [72].
105 Ibid at [39], [45], [126], [161], [162] and [165].
106 Ibid at [12].
108 Ibid at 379.
decision was correct. Lord Hope of Craighead’s comment that the ‘focus of attention was shifted, quite deliberately’ is a clear and unequivocal statement of the House’s position. The House decided unanimously that the immunity should be abolished in civil cases and a majority decided that it should be abolished in criminal cases notwithstanding that the hearing did not dispose of any legal claim. The House of Lords sat as a judicial legislature. This has obvious and important ramifications for future decisions of the House of Lords.

(iii) The High Court of Australia

The High Court of Australia has rejected the use of prospective overruling. Brennan CJ, McHugh, Gummow and Kirby JJ said in Ha v State of New South Wales:

This Court has no power to overrule cases prospectively. A hallmark of the judicial power has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law.\(^{109}\)

According to Kitto J in The Queen v Gallagher and Another; Ex parte Aberdare Collieries Pty Ltd,\(^{110}\) the power of judicial determination involved ‘the giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct’.\(^{111}\)

D. Judicial Power

An exercise of judicial power involves: (1) rights or obligations which arise from the operation of the law; and (2) past events or conduct. These are the two essential elements. This description of judicial power is consistent with MacCormick’s theory of legal reasoning. Legal principles, as normative expressions of the reasons for specific rules, provide a rational and justified basis for any extension of the existing law by analogy. According to MacCormick, rights and obligations flow from established principles and rules in a coherent legal order. In other words, the adjudication of a legal claim

\(^{110}\) (1963) 37 ALJR 40.
\(^{111}\) Ibid at 43. Mason CJ, Brennan, Deane, Dawson and Toohey JJ approved of this description of judicial power in Re Cram and Ors; Ex parte The Newcastle Wallsend Coal Company Pty Ltd (1987) 163 CLR 140 at 148-9. Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ also approved of this description in Precision Data Holdings Ltd and Ors v Wills and Ors (1991) 173 CLR 167 at 188.
takes place in respect of rights and obligations which arise from the operation of the law. MacCormick’s theory also recognizes that adjudication is legitimate in respect of past events or conduct only. It is not legitimate in respect of future events or conduct. This is so notwithstanding MacCormick’s recognition that judicial decision making is both ‘forward-looking’ and ‘backward-looking’. Prospective overruling involves the creation of rights or obligations to be applied in the future to litigants who are not parties to the matter before the court. The future application of rights and obligations is the critical point. This constitutes a significant expansion of legitimate judicial power as the decision of the court is not delivered in respect of the litigants making the legal claim. This was ignored by the House of Lords in Arthur J S Hall & Co.

This development constitutes a fundamental change. It is contrary to the way in which judicial decisions have been made in the common law in England since at least the 13th century. Sir John Salmond said over 100 years ago that ‘ [] judicial declaration, unaccompanied by judicial application, is of no authority’. The reference to ‘judicial declaration’ is not a reference to the orthodox declaratory theory of judicial method. Sir John Salmond made this clear by acknowledging that the declaratory theory ‘was never much better than an admitted fiction’. It is recognized that during the 18th and 19th centuries in England the status stare decisis changed within the context of the development of a doctrine of precedent. At the end of the 18th century the practice of adhering to previous decisions through the principle of stare decisis was firmly established in England. This did not involve adherence to a ‘set of rules’ which identified ‘any class of case as strictly binding, irrespective of circumstances’.

According to Evans, the concept of rules constituting a strict doctrine of precedent setting out when courts would be bound by decisions of other courts consolidated in England during the period 1862 to 1900. This consolidation culminated in the 1898 decision of the House of Lords in The London Tramways Company, Limited v The London County Council that the House would be bound by its own previous decisions. Since 1966, of course, the House of Lords has not been bound by its own previous decisions. The High Court of Australia decided early last century in Australian Agricultural Co v Federated Engine-Drivers and Firemen’s Association of Australia that it was not bound by its own previous decisions. The issue to appreciate is that any development in the status of the

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113 Ibid at 376.
114 Ibid at 376.
115 Ibid at 57.
116 Evans, Change in the Doctrine of Precedent During the Nineteenth Century in L. Goldstein (ed), Precedent in Law (1987) 35 at 45.
117 Ibid.
118 [1898] AC 375.
119 Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
120 (1913) 17 CLR 261.
principle of *stare decisis* or the rules of the doctrine of precedent has not involved the concept of prospective overruling. The House of Lords’ recognition of the legitimacy of prospective overruling in ‘exceptional’ cases must amount to one of the most significant developments in common law judicial method in England.

**E. Ratio Decidendi and Obiter Dictum**

The conclusions of the House of Lords regarding the fate of the immunity must have been *obiter dicta*. These conclusions could not have been part of any *rationes decidendi* of *Arthur J S Hall & Co* as their Lordships had already agreed that the decision of the Court of Appeal was correct on the basis that the three appeals fell outside the existing immunity. The House abolished the immunity through *obiter dicta*. It is recognized that disagreement exists regarding the actual concept of *ratio decidendi*.\(^{121}\) Notwithstanding, prospective overruling must be inconsistent with any recognized concept of *ratio decidendi* or *obiter dictum*. Prospective overruling must be based on a new concept of binding *obiter dictum*. It is also recognized that *obiter dicta* of final courts of appeal can be highly persuasive within a particular court hierarchy. There is a view, in fact, that in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*\(^{122}\) the House of Lords overruled *Candler v Crane, Christmas & Co*\(^{123}\) prospectively.\(^{124}\)

Notwithstanding, the highly persuasive nature of *obiter dicta* in the judgments of a final court of appeal is something entirely different from the binding nature of *obiter dicta* in the judgments of a final court of appeal. Their Lordships overlooked this issue in *Arthur J S Hall & Co* and in *National Westminster Bank Plc*. In rejecting the legitimacy of prospective overruling, the High Court of Australia has rejected any form of binding *obiter dictum*. In recognizing the legitimacy of prospective overruling, the House of Lords has adopted a form of binding *obiter dictum*.

**5. Conclusion**

This article identifies four approaches to legal reasoning: principle-based judicial method; coherence-based incrementalism; policy-based incrementalism; and policy-based judicial method. The joint majority’s approach in *D’Orta-Ekenaïke* is consistent with MacCormick’s theory of legal


\(^{122}\) [1964] AC 465.

\(^{123}\) [1951] 2 KB 164.

\(^{124}\) See Cross and Harris, above n 121 at 230-1.
reasoning. The joint majority's approach provides an example of Levenbook's global systemic coherence in the context of the need for finality in judicial decisions. In view of MacCormick's theory of precedent and formalist model of \textit{ratio decidendi}, MacCormick's theory of legal reasoning must also apply to local systemic coherence. Principle-based judicial method is end-independent as the reasoning process takes place within the context of principles, rules and the limits within which consequentialist arguments are justified in law. Consideration of competing policy factors and prospective overruling do not form part of this approach. Principle-based judicial method is within the scope of legitimate judicial power as it identifies rights and obligations which flow from established principles and associated rules. The joint majority's approach provides an illustration of coherence in the law flowing from the horizontal consistency within a set of rules and the vertical consistency between that set of rules and a general principle.

McHugh J's approach to legal reasoning provides an example of coherence-based incrementalism. Identification of \textit{ratio decidendi} is important in the context of coherence between different areas of law. Prospective overruling does not form part of this approach. Although McHugh J retired from the High Court of Australia on 31 October 2005, his Honour's approach to legal reasoning contributes to the jurisprudence of judicial method. McHugh J's approach appears to have influenced Callinan J's 'weak' form of coherence-based incrementalism. Coherence-based incrementalism is within the scope of legitimate judicial power as it determines rights and obligations through an analysis of \textit{ratio decidendi} in the context of coherence between different areas of law.

The \textit{Caparo} three-stage test has influenced Kirby J's acceptance of policy-based incrementalism. The first step in policy-based incrementalism involves the identification of any binding precedent through a careful analysis of judgments in a search for the \textit{ratio decidendi} of relevant cases. If a binding precedent exists, it must be applied unless the final court of appeal reconsider its own previous decision. The next step in the process involves a consideration of competing policy factors. This step is possible only where a binding precedent does not exist or where a binding precedent is reconsidered. Consideration of general principles, coherence in the law and prospective overruling does not form part of policy-based incrementalism. This approach is within the scope of legitimate judicial power as its consideration of 'legal policy' is 'disciplined by application of analogies derived as far as possible from past authority.'

The House of Lords' approach to legal reasoning in \textit{Arthur J S Hall & Co} provides an example of policy-based judicial method which recognizes the legitimacy of prospective overruling. This approach considers competing policy factors without taking into account the need for a coherent legal order consisting of principles, associated rules and consequentialist arguments. This approach is end-dependent in the sense that it focuses on the outcome.

\footnote{125 \textit{(1998)} 192 CLR 330 at 427.}
of the decision rather than on the process of legal reasoning used to achieve that decision. The concept of prospective overruling is consistent with this end-dependent approach. Prospective overruling is not, however, an essential element of policy-based judicial method. Although it is compatible with policy-based judicial method as both are end-dependent, a policy-based approach to legal reasoning is still possible where the court does not overrule prospectively.

The legitimacy of prospective overruling should be challenged as it requires that judges act as judicial legislators. It amounts to recognition of a form of binding *obiter dictum*. The issue of prospective overruling lies at the heart of common law judicial method. This is so whether or not a case is ‘exceptional’. As Lord Devlin said in 1976, ‘If judges can make law otherwise than by a decision at the Bar, why do they wait for a case?’.

Recognition of prospective overruling amounts to an extraordinary expansion of legitimate judicial power. The House of Lords’ recognition of the legitimacy of prospective overruling constitutes a significant development in common law judicial method in England. This development sets the House apart from the High Court of Australia on the issue of legal reasoning. The potential impact of this development should not be underestimated. It requires critical debate and reconsideration by the House of Lords. This cannot be said to be just another logical development in the common law. Prospective overruling amounts to a ‘perversion of judicial power’.

It is recognized that the analysis in this article is restricted to an examination of decisions involving advocates’ immunity. The issue to consider is whether this model of judicial method has general application in cases of private law, particularly in cases involving negligence. The conclusion reached in the immunity cases under principle-based judicial method and coherence-based incrementalism differs from the conclusion reached under policy-based incrementalism and policy-based judicial method. It would appear that the issue of coherence versus policy is the determining factor. While coherence in an established legal order is an ‘internal’ influence on legal reasoning, competing policy considerations are an ‘external’ influence on legal reasoning. The different approaches to legal reasoning could have important implications for future decisions of the High Court of Australia and the House of Lords. While an internal influence on legal reasoning could restrict the development of the law, an external influence could promote development of the law.

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126 Above n 101 at 11.