INFORMED CHOICE — THE RATIONAL WAY

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Summary

The claim by Julius Stone that it is extremely rare for the laws of precedent to force decisions upon Appellate Court judges is largely accepted as being a truism. But choice cannot be made without information and preconceptions can only be challenged by evidence. The following is an attempt to demonstrate the accuracy of the Stone thesis but at the same time point out the dangers which flow from the failure of the courts to treat non legal information with the same degree of importance as traditional legal material.

For almost the total period of his academic life Julius Stone asserted that appellate court judges, when required to make decisions, are provided with "leeways of choice".[1] This, in spite of the fact that the judges often state that they are imperatively bound by a particular precedent. Stone asserted that it was a

> rather self-evident but also often overlooked truth that, where the applicable law is seriously in dispute, appellate judgment always requires the court to choose between more than one legally and/or logically available alternatives. The law being disputed, the pre existing law cannot *ex hypothise* compel. Equally, in such a situation, neither can logic compel: for it is common ground among lawyers that conclusions, even if drawn with logical validity from an indubitably legal precept, are not *necessarily* binding legal conclusions. And since in the situation supposed the law is disputed, no legal precept may in any case be available as a major premise which can be said to be *indubitably* applicable.[2]

Stone, in agreeing with Barwick C.J., opines that "what the law is" and "what the law ought to be" are the same question.[3] That this can only make sense in terms of socio-economic conditions and values. And because these

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1 J. Stone, *Precedent and Law, Dynamics of Common Law Growth,* (Hereafter Stone).

2 *Id.,* 221.

3 *Id.,* 233.

are being constantly changed they in turn "ensure(s) a steady re-examination of conflicting policies underlying change in the law."[4]

It is submitted that the spate of medical cases which have recently been before the courts both in the United Kingdom and Australia serve as ideal examples of the Stone thesis. They highlight the problems which arise when the decision maker's perception of the appropriate "social and economic condition and value" is at variance with general community standards and expectations. They also highlight the problems which arise when those responsible for placing arguments before the courts are prevented from indulging in the intellectual rigour which was always demanded by Stone by archaic rules of evidence.[5]

It has been submitted elsewhere that both the scientific and social framework in which medicine is practiced has dramatically changed over the past few decades[6] yet there appears to have been little 're-examination of conflicting policies.'

What follows is an attempt to give some examples in support of the Stone thesis but at the same time submit that where judicial perceptions of the 'ought' do not coincide with community perceptions of the same 'ought' or judicial perceptions of reality are at variance with the actual situation then the 'choice' made by the courts isolates them from the public they are meant to serve.

In the recent case of *Thake* v. *Maurice*[7] the Court of Appeal was forced to consider the contract status of statements made to a patient by a doctor. The particular procedure concerned was a vasectomy. Before agreeing to perform the operation on Mr Thake the surgeon wanted to be absolutely certain that both the patient and his wife understood the consequences of their decision. The first step taken by Dr Maurice was to try and persuade the Thakes not to go ahead with it. It was pointed out to them that their family circumstances might change, and that Mr Thake may wish to start another family, or, alternatively, they may at some time in the future wish to increase the size of their existing family. These choices would not be available should Mr Thake be sterilized. In order to reinforce the seriousness of the step to be taken by the Thakes, the surgeon, Dr Maurice, described in some detail the manner in which the operation would be carried out. He demonstrated how the vas would be secured, a piece removed, and the severed ends tied back. He explained that the only way the operation could be reversed was by minor surgery, but emphasised, that the success rate of the reversal procedure was not high. The patient and his spouse were obliged to sign a consent form which described the procedure as 'irreversible', and were told that the operation could not be declared as satisfactorily completed until two tests had been carried out which showed no sperm in Mr Thake's ejaculate. Mr Thake

4 *Ibid.*
5 See Note 79 *supra.*
6 B. Bromberger, "Patient Participation in Medical Decisionmaking" (1983) 6 *UNSWLJ* 13.
7 [1986] 1 ALL ER 497.

and his wife complied with all these requirements and two months after the operation Mr Thake was declared sterile. Unfortunately the severed ends of Mr Thake's vas rejoined (an unusual but documented occurrence) and his wife became pregnant again.

In a subsequent action the Thake's claimed, *inter alia*, that the contract between Mr Thake and Dr Maurice was for sterilization and the fact that this had not occurred resulted in Dr Maurice being in breach and thus liable for contract damages. The contract issue depended for its resolution on the legal effect of the preoperation instructions and their description, the contractual effect of the consent form, and the final pronouncement of the success of the operation by Dr Maurice. The plaintiff claimed that the combination of events amounted to a contractual promise that Mr Thake would be sterilized. The defendant doctor asserted that because the word 'guarantee' had not been used there was no promise of success, but rather an expression of hope and expectation. In Stone's terms a typical example of the law being seriously in dispute.

The defence found favour with the majority [Neill, Nourse LJ's] both of whom took judicial notice of the inherent difficulty of predicting medical consequences with absolute certainty, and, imputed knowledge of this lack of medical certainty to the reasonable man. They held that in the absence of an express promise, or the performance of a procedure such as amputation, medical practitioners cannot be deemed to have promised the outcome of a medical procedure. This decision highlights the problems caused when judges exercising their choice, single out specific groups for specific treatment, because, in reality, it is extremely difficult to claim contractual uniqueness in the absence of hard evidence for any group of individuals. Furthermore, when making these exceptions, 'doctrinal' heresy is often committed.[8] In *Thake*, the majority of the court held that the uncertainty of medical practice is so commonplace that it should override (a) the belief of a state of affairs by one of the contracting parties, (b) an acknowledgement by the other contracting party that what was said and done by him would have, and in fact did, induce that belief, (c) the known reason that the procedure was consented to because of that belief, and (d) the fact that only those medical practitioners involved in the particular procedure were likely to be aware of the possible failure of the operation.[9] In other words the specific contract was interpreted in the light of some rather vague general concept of public awareness. Nourse L.J. also succeeded in turning the contractual clock back to the mid nineteenth century when he apparently without remorse, held that; "I am afraid that, in my view, if they had wanted a guarantee of the

8 At no time did Stone deny the existence of precedent. He merely suggests that any particular precedent is rarely imperative. "For in so far as the issue concerns the pros and cons of the appellate court treating precedents as binding, the present themes point out that appellate decisions as to the law are rarely, in any case, the compelled consequence of 'binding' precedents" Stone 83.

9 [1986] 1 ALL ER 497.

nature which they now assert, they should have specifically asked for it"![10] The return of *caveat emptore*?[11]

It is submitted that expressions such as the above only serve to demonstrate the enormous gap in the knowledge possessed by many members of the bench of societal attitudes towards the medical profession. The relationship between the medical practitioner and his patient is still one of trust, certainly in the lay if not the legal sense, and even though medicine has been brought more and more into the public forum, the general effect has been to highlight the miraculous, publicize the scandalous, but more often to perpetuate half truths and myths.

The Court of Appeal has a history of reacting extremely favourably towards the medical profession and interpreting the law accordingly. In *Whitehouse* v. *Jordan*[12] Lawton L.J. held:

> The standard of proof which the law imposed on the infant plaintiff was that required in civil cases, namely proof on the balance of probabilities, but as Denning L.J. said in *Hormal* v *Lleuberger Products Ltd:* 'The more serious the allegation the higher the degree of probability required'! In my opinion allegations of negligence against medical practitioners should be considered as serious. First, the defendant's professional reputation is under attack. A finding of negligence against him may jeopardise his career and cause him substantial financial loss over many years. Secondly, the public interest is at risk... If courts make findings of negligence on flimsy evidence ... doctors ... [may adopt] procedures which are not for the benefit of the patient but safeguards against the possibility of the patient making a claim in negligence.

Fortunately the House of Lords in *Whitehouse* v. *Jordan* [13] rejected this example of special pleading. However, the general proposition as put forward in *Thake*'s case; namely, that assertions and inferences in the law of contracts should be viewed not only as between the parties but in the light of some judicial concept of the general knowledge of the population at large can be seen as adhering to the same general philosophy. If such be the general rule then the law of contracts will produce some extraordinary results.

It is submitted that it would be a strange state of affairs if a used car dealer could successfully argue that, when a contract between the dealer and a customer is being interpreted, any reputation for dishonesty and shady dealing is a relevant factor and can be used to protect the car dealer from being bound by his promises. Those who would deny this argument are pinioned on the horns of their own dilemma. To hold that language used by a medical practitioner should be interpreted in the light of some judicial perception of the community's knowledge of medicine yet at the same time

10 *Ibid.*

11 "English law has always taken the view that there is no general duty imposed on one party to a contract to apprise the other of facts unknown to him and which might affect his inclination to enter into the contract ... The principle of caveat emptor applies outside contracts of sale. Each party must look out for himself and ensure that he acquires the information necessary to avoid a bad bargain" *Anson's Law of Contract*, (25th Ed) 1979 The submission that the relationship between a medical practitioner and patient is fiduciary was rejected in Thake but see Bromberger, Patient Participation 1983 6 *UNSWLJ* 13.

12 [1980] 1 ALL ER 650, 659.

13 [1981] 1 ALL ER 276.

ignore the community's perception of the profession's veracity is to leave a vital factor out of the so called objective test. A recent survey[14] reports that medical practitioners are respected by the population at large and are considered as being the most honest professional group in the community. Used car salesmen are at the bottom of the list.[15]

That the decision of the majority of Lords Justice of the Court of Appeal has been to treat members of the medical profession as if they are not part of the general community becomes more apparent when a number of leading cases in the law of contracts are reviewed. There is no lawyer in the common law world who, at some time during any law course has not read *Carlill* v. *Carbolic Smoke Ball Company.*[16] One of the issues raised by the facts of this important case was whether the advertisement, which was the subject matter of the dispute, constituted a contractual promise or was a mere puff. Lindley L.J., in answering this question, asks why was the $1000 deposited with the Alliance Bank.[17] The only purpose for which the money was to be placed in the account was to demonstrate the sincerity of the advertisement and thus the intention of the advertiser. Looking at this set of facts Lindley L.J. says "There is a promise, as plain as words can make it although the words 'promise' or 'guarantee' are not used." Bowen L.J. was of a similar mind.

> It seems to me that in order to arrive at the right conclusion we must *read* this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it?... And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published,... he would be entitled to the reward.[18]

Looking at the advertisement A.L. Smith L.J. asks "How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell?"[19] Had the majority of the Court in *Thake's* case been on the bench at the time of the *Carbolic Smoke Ball* case they would have added "It seems to me that it is essential to consider the words of... and the words the defendant used against the background of the advertisers' aims. It is common experience of mankind that most (advertisements exaggerate)...", per Neill L.J. and "In the end the question seems to be reduced to one of determining the extent of *knowledge* which is to be attributed to the reasonable person... ." Per Nourse L.J. [emphasis mine]. It would have been inevitable that the answers to both these questions would be that the public is aware that advertisers exaggerate and that most people living at the later half of the 19th Century would be extremely skeptical about any *promise* of any miracle cure. It is of vital importance to any analysis of *Thake's* case that the Lords Justice in *Carlill's* case looked at the

14 Reported, Sydney Morning Herald 22nd May 1986, 7.
15 63% acceptance for medical practitioners against 3% for used car salesmen.
16 [1893] 1 QB 256.
17 *Id.*, 261.
18 *Id.*, 266.
19 *Id.*, 273.

actual words and did not find it necessary to indulge in some vague speculation of the public's precise knowledge of medical science [or the advertiser's craft]. Had they done so there would have been a totally different result.

In *Thornton* v. *Shoe Lane Parking Ltd*[20] the question arose concerning the amount of notice that was necessary to be given to a customer of a parking station in order that the proprietor should be able to rely on an exemption clause on the back of a ticket.

Applying the rational of the majority of the Court in *Thake's* case it would be necessary for the court to hazard a guess about the state of knowledge of the *general community* with regard to exemption clauses generally. By 1964 the answer would have been clear. Yet Lord Denning M.R. chose to ignore this fact in arriving at his decision.

In *Oscar Chess Ltd* v. *Williams* [21] the Court of Appeal was asked to determine the status of a representation made to a used car dealer that a car was a 1948 model when it turned out in fact to have been made in 1939. The registration book having been altered. The question for determination was whether the representation constituted a 'condition' or a 'warranty', or merely a statement of opinion and belief. It is interesting to note that in the *Oscar Chess* case the expertise was held by the purchaser, he being a used car dealer. Denning L.J. held that "It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes."[22] The Thakes' however did not even have a registration book. They were entirely dependent on whatever information they had been given by Dr. Maurice. In *Dick Bentley Productions Ltd* v. *Harold Smith (Motors) Ltd*[23] Lord Denning, in distinguishing the *Oscar Chess* case held "Here we have a dealer, Mr Smith, who was in a position to know, or at least to find out, the history of the car. ... When the history of the car was examined, his statement turned out to be quite wrong. He ought to have known better."[24] It would have been surprising indeed if Lord Denning had have added that any representation made by Mr Smith must be looked at in the light of the general reputation of representations made by used car dealers and therefore be treated with skepticism by customers. In the light of the aforementioned survey regarding the acceptance of statements made by different occupations [25] it would be far more reasonable to impute skepticism of statements made by used car dealers than medical practitioners, especially as the Sydney Morning Herald survey on community attitudes showed 63% of the community accepted what

20 [1971] 2 QB 163.
21 [1957] 1 WLR 370.
22 *Id*, 376.
23 [1965] 2 ALL ER 65.
24 *Ibid*
25 See note 14 *supra*

they were told by medical practitioners whereas only 3% accepted statements made by used car dealers. It is surprising that senior members of the bench, who constantly remind those appearing before them that the unruliness of public policy necessitates the riding of a skilful jockey should themselves stumble at the same hurdle.

The special treatment received by the medical profession from the Court of Appeal in *Thake's* case is not an isolated instance, either in that court or in others. In *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*[26] the House of Lords held that the amount of information about a particular procedure, that *must* be given to a patient by a doctor is to be determined by the medical practitioner using ordinary skill [Lord Bridge & Lord Keith] or by the medical practitioner provided it was supported by a reasonable body of medical opinion [Lord Diplock]. Because patients are often forced to choose between a number of alternate possibilities the withholding of information by the medical practitioner makes the choice impossible. This was pointed out in the recent case of *Gold* v. *Haringay Health Authority.*[27] In this case the plaintiff Mrs Gold, had attended her health authority in order to seek contraceptive advice. At this time she had two children, was pregnant with her third, and did not want any more. Her husband concurred and volunteered to have a vasectomy. Mrs Gold was advised that a sterilization operation could be performed on her at the time when the third child was born. This was done and there was no evidence that the operation was not carried out skilfully. Unfortunately for the Golds, Mrs Gold became pregnant some five years later. Mrs Gold claimed that the medical practitioner and hence the health authority was negligent in that it had not been explained to her that there was a possibility that the operation might not be successful. She further claimed that this failure to give her relevant information prevented her (and her husband) from taking other contraceptive steps which they certainly would have done had they been so warned. It appears from the report that the trial judge, Scheimann J. was not satisfied that the law, as expounded in *Sidaway,* adequately dealt with the Golds' problem and was not therefore a legal imperative. He was therefore forced to distinguish *Sidaway* from the instant case because he was of the opinion that Mrs Gold was entitled to receive sufficient information so as to enable her to organize her life accordingly.

In distinguishing *Sidaway,* Scheimann J. suggests that there are two categories of medical treatment. One being the provision of therapy and the other the giving of medical advice. His Lordship held that the former was subject to the *Sidaway* test, as gleaned from *Bolam* v. *Friern Hospital*[28]: That an action will not lie if there is a reasonable body of medical opinion which accepts or supports the medical procedures adopted.[29] However, in the latter

26 [1985] AC 87.
27 Times June 16, 1986.
28 [1957] 2 ALL ER 118.
29 *Id*, 121.

the medical gloss is removed. The test for the giving advice simply being "was it reasonable to withhold the information from the plaintiff?"[30] Having identified these two categories his Lordship held that he could think of no reason why Mrs Gold should not have had those things mentioned to her that would have helped her make up her mind and pointed out that no reason why it was withheld had been suggested in evidence.

By making this distinction his Lordship creates as many problems as he solves. Patients always attend medical practitioners seeking advice. Sometimes this advice results in further 'treatment' and sometimes it does not. On occasions, the advice may show that there are alternative treatments available. Furthermore many ailments can be 'lived with' and treatment is only warranted if the benefits of treatment outweigh, *in the mind of the patient* any attendant risks of treatment. In the overall span of medical services most 'therapies' are not imperative or life saving, and the decision to *accept* therapy is itself *not* therapy. It therefore makes neither medical nor legal sense to artificially divide the provision of medical services into the above categories. It is, however, more unfortunate from a legal perspective, that in order to grant relief to Mrs Gold, Scheimann J. was forced to draw the distinction that he did.

Why was it necessary for Scheimann J. to indulge in this rather meaningless exercise of hair splitting? The answer is found in an analysis of the language and facts of two leading medical negligence cases. *In Roe* v. *Ministry of Health*[31] a group of medical practitioners, in attempting to solve one medical problem were surprisingly confronted with another. It was the new problem which caused damage to the plaintiff. Denning L.J. in holding that the defendant doctors and hence the Ministry of Health were not negligent concluded his opinion in a way which demonstrated the special regard held by him for the medical profession.

> Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks... . Doctors like the rest of us, have to learn by experience; and experience often teaches in a hard way... But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for *everything that happens to go wrong*.[32] Doctors would be led to think more of their own safety than the good of the patients.[33] Initiatives would be stifled and confidence shaken.[34]

McNair J. was obviously impressed by these sentiments[35] and provided what he thought to be the correct test for medical negligence.

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... A doctor is not negligent if he is acting in accordance with such practice merely because there is a body of opinion that takes a contrary view.[36]

30 *Gold* v. *Haringay Health Authority*, Times June 16, 1986.
31 [1954] 2 ALL ER 131.
32 *Id*, 137. The language used by Denning L.J. underscores his personal attitude because there was never any claim of 'strict liability' only a claim that the behaviour was unreasonable.
33 *Id*, 139.
34 *Ibid*.
35 *Bolam* v. *Friern Hospital Committee* (1957) 2 ALL ER 118.
36 *Id*, 122.

The facts of Bolam did not require the creation of what has become known as the medical exception.[37] In Bolam the plaintiff led *no* expert evidence regarding the appropriateness or otherwise of the treatment whereas the defendant called two experts who gave evidence that while they themselves did not use the particular procedure under challenge it was in their opinion an acceptable method of providing electro-convulsive therapy.

The consequences of these two cases have been dramatic. In many jurisdictions[38] it can be argued that provided a defendant doctor can find 'a responsible body of medical opinion' albeit a minority opinion, which supports the action taken or the procedure adopted then there is an absolute defence to an action in negligence. In a jury trial, acceptance by the trial judge that such a body of opinion exists will result in the matter being withdrawn from the jury. In other words the judges are asserting that a form of practice accepted by a group of doctors, even a minority group — cannot be negligent. Rousseau may have been delighted at this outcome[39] but it is doubtful whether Julius Stone would have been amused. King C.J.[40] recognised that the medical exception was leading the law into a blind alley when he held that:

> The ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.[41]

Whether subsequent courts will realise the correctness of this reasoning remains to be seen[42] but the fallacy of not so doing is clearly seen from an analysis of the now infamous *Chelmsford* Case. At the Chelmsford Private Hospital patients received Electro-Convulsive therapy in conjunction with deep sleep therapy. In *Hart* v. *Herron* [43] evidence was given by judicially accepted medical experts that —

(i) The doses of barbituates as prescribed by the medical practitioners far exceeded that which could be safely prescribed.[44]

(ii) The level of sedation of the patients necessitated the provision of resources and nursing staff equivalent to an intensive care hospital and that neither the hospital nor its nursing staff complied with these requirements.[45]

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37 Clarke, "The Solicitor's Role, Professional Negligence Doctors and Hospitals", 1983 College of Law, Sydney.

38 *E.g.* South Australia, *F* v. *R* 33 SASR 189, 206 (Bollen J).

39 See generally — Jean Jacques Rousseau, *The Social Contact* 1968.

40 *F* v. *R* 33 SASR 189.

41 *Id*, 194.

42 *Amsworth* v. *Levi*, No. 7984, Unreported Supreme Court of N.S.W. 24 September 1984.

43 Unreported No 12781 Supreme Court of N.S.W., 10 July 1980.

44 See N.S.W. Hansard Wed. 12 September 1984, 780 Statement of Claim, *Hart* v. *Herron*, Evidence given by Professor D. Wade, St Vincents Hospital.

45 *Ibid.*

(iii) Electro-convulsive therapy was continued long after physical examination revealed that such treatment should be terminated.[46]

(iv) The medical practitioners who ordered the treatment were only in attendance on spasmodic occasions.[47]

(v) The method of selection of patients who were to receive the treatment deviated substantially from that suggested by a Dr Sargeant whose ideas were the foundation of the treatment.[48]

(vi) The treatment continued to be given even after the College of Psychiatrists had passed a resolution declaring it to be outmoded and dangerous.[49]

One hesitates to suggest that the fact that a number of misguided medical practitioners follow the above procedure in some way legitimizes it. Or to put the point more starkly; group negligence ceases to be negligence! A result not forced upon any court either by law or by logic. Yet this argument was seriously put by defense counsel in *Hart* v. *Herron* [50] and may well have succeeded with respect to the minority view held by Dr Heron had the two other medical practitioners who carried out this procedure been called as witnesses.[51]

It may be thought that the N.S.W. Court of Appeal, in *Albrighton* [52] finally put to rest the Bolam exception in that state. In *Albrighton,* Reynolds J.A. held that "if all or most of the medical practitioners in Sydney habitually fail to take an available precaution to avoid a foreseeable risk or injury to their patients, then none can be found guilty of negligence... is plainly wrong."[53] The issue in *Albrighton* involved the admissibility of evidence from overseas which was designed to discredit the activities of the local practitioners. The net effect is that *discredited* group activity will not be withdrawn from the jury but where there remains legitimate differences of opinion there will be no issue for the jury.[54] It has been suggested that "... it must ... be a universally accepted practice in the sense that it is followed by a respectable minority of practitioners. It is not sufficient if the practice is that of a particular community only, if there is evidence that the community in question is out of step with general practice".[55] Nowhere however, is it explained when group activity becomes a respectable body of minority medical opinion. Was the icepick surgery[56] of the 1940's respectable merely because articles were

46 *Ibid.*, evidence given by Dr J. Sidney Smith.
47 *Id.*, nursing notes produced at the trial demonstrated this.
48 Evidence J. Sidney Smith and Dr Herron in *Hart* v. *Herron.*
49 Hansard note 44 *supra.*
50 Fisher J., summing up 10 July 1980, 60
51 *Ibid.*
52 [1980] 2 NSWLR 542.
53 *Id.*, 562.
54 *Albrighton* v. *Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 Reynolds J.A., 562.
55 Clarke, "The Solicitor's Role, Professional Negligence doctors and hospitals", 1983 College of Law, Sydney.
56 E. Cunningham Dax, *History of Prefrontal Leucotomy, Psychosurgery and Society,*

written about it or was it always *per se* negligent? Would the activities of Chelmsford have been found to be negligent if one of the medical practitioners involved had written a paper and had it published in a local or overseas medical publication and maybe even managed to convince some of his colleagues that they were offering a respectable therapy? Surely King C.J. was correct when he held that the law cannot be dictated to by the opinions of any professional body.[57]

If King C.J. is wrong there is absolutely no justification for allowing a jury to assess the expert evidence given at a criminal trial. It is possible to suppose an action brought against a medical practitioner where it was claimed that a particular test should have been carried out in order to prevent a patient from being injured. The difference of scientific opinion about the availability and suitability of the test would prevent the issue from being decided by the jury and in fact as a matter of law would be decided in favour of the defendant. This situation juxtaposed against the criminal law looks strangely out of place. In the now infamous *Chamberlain* case there was evidence that two experts took dramatically opposite positions about both the availability and suitability of a particular test.[58] If a medical practitioner cannot be found guilty of a tort where this situation arises it makes no sense to allow a jury to ponder the same conflict of expert opinion in a criminal trial. Especially as in a criminal trial the quantum of proof is higher and the consequences of conviction greater.

Faced as he was with the authority of the House of Lords which supports the *Bolam* fallacy[59] Scheimann J. in *Gold* was 'forced' to divide the 'treatment' received by Mrs Gold into two parts — advice and the actual performance of the operation.

It has been suggested[60] that one of the reasons that consentual questions in medical cases should not be decided by the medical exception is that they are not purely medical but Scheimann J. goes one step further. He distinguishes advice from therapy entirely, and in so doing creates a new category[61] to which others may later refer should they be so inclined. In so doing

57 *F* v. *R* 33 SASR 189.

58 Professor Barry Boucher is reported to have given evidence that the serum used by the N.S.W. forensic science laboratory was not suitable to distinguish between foetal blood and adult blood. Proceedings, Law and Technology Seminar UNSW 1986

59 That it is doctors' standards rather than judicial requirements that measure the standard of care for medical practitioners.

60 Bromberger note 6 *supra*.

61 Stone used this term to describe "patterned features of legal materials — which means, of course, language found in legal contexts — which, whenever we find them, signal that leeways exist for choice by courts which seek to use them as a basis for decision. Here as elsewhere we mean by 'leeways' areas in which not logic, nor law, nor language compels the court to any one decision as being the only correct one." Stone 61.

Scheimann J. demonstrates a judicial role submitted by Stone as being paramount.[62] Stone submits that "wise judicial choicemaking must necessarily require the court to envisage in terms of the whole community all claims likely to be affected by the alternate precepts considered, and not only those of the parties adversely."[63] Stone's inimical language for describing what others would call a policy decision.

In terms of the Stone thesis, because the law is not imperative, there must be some overiding policy which, in the opinion of many of the members of the bench, is more important than the apparent legal rule which precedent could decide was binding.

In most instances, those who criticize or comment on judicial decisions are forced to speculate upon any underlying *non legal* issues that are uppermost in the individual judge's mind and which in reality dictate the final decision. In fact, while judges rarely articulate these non legal reasons they often develop reputations for reacting in a predictable manner when faced with particular problems. 'Liberal', 'Conservative', 'Federalist', 'Consumer Oriented' are examples of appelations given by lawyers to members of the bench in a short hand attempt to explain the underlying rational for some of their decisions. In cases involving medical practitioners, members of the bench have, in this regard, been less inhibited. While this lack of inhibition might explain the otherwise confusing, it will inevitably change some of the ground rules which underscore our adversary system.

It is clear from the language of both Denning L.J. and McNair J. that they were concerned lest the law inhibited medical research.[64] The granting of relief to the individual claimant being viewed as of less benefit to the community than the benefits to be received from improvements in medical technology. Lawton L.J. felt great concern for the careers of the medical profession[65] as well as showing fear about the development of what has been called 'defensive medicine'.[66] Kilner-Brown J. has shown himself anxious to protect the 'reputation' of a medical practitioner.[67] Fisher J. was of the opinion that the motives of the medical practitioner were relevant[68] and King C.J. believes that in medical negligence cases the fact that the doctor is conscientious and concerned about the welfare of the patient is "crucial" to

62 While Stone would approve of the spirit behind the decision it is doubtful if Stone would agree with the method used by Scheimann J. The creation of new categories increases choice except for those who fail to recognise the inherent flexibility of the law and feel doubly constrained.

63 Stone 112. It is convenient to categorize certain decisions as being based on policy but Stone would not have drawn the distinction. 'Policy' in Stone's eyes was just a tool to be used in wise choicemaking.

64 *Roe* v. *Ministry of Health* [1954] 2 ALL ER 131.
Bolam v. *Friern Hospital* [1957] 2 ALL ER 118.

65 *Whitehouse* v. *Jordan and Anor* [1980] 1 ALL ER 650, 659.

66 *Ibid.*

67 *Ascroft* v. *Mersey Regional Health Authority* [1983] 2 ALL ER 245, 248.

68 *Hart* v. *Herron* note 44 *supra.*

any legal determination.[69] Diplock L.J.[70] is of the opinion that any deviation from the Bolam test will inhibit medical development and Templeman L.J. regards the conscientious *attempt* by a doctor as a relevant consideration causing the court to be "slow to conclude" liability.[71]

Furthermore some members of the bench demonstrate a lack of confidence when deciding cases involving medical practitioners which is quite foreign to their normal presentation.

Yeldham J. seems to have permitted the eminence of a defendant medical practitioner to cause him to commit a classic non-sequiter.

> Dr. Tyer was described in evidence as an eminent and experienced orthopaedic surgeon who specialises in the correction of sediotic spines. While this does not of course mean that a jury could not find that he was negligent in a particular case, it draws attention to the fact that this case is one where, before it can be said that he departed from proper medical standards, those standards must be established.[72]

Bollen J. is obviously anxious to preserve the integrity of the court "... The court does not merely follow expert evidence slavishly to a decision"[73] but his good intentions break down when some six pages later in the same case he asserts that "It is certainly true that a surgeon is not to be condemned in negligence merely because he follows one or two or more procedures each or all acceptable to the medical profession".[74]

Browne-Wilkinson L.J. does not want the actions of medical practitioners to be judged by judges and juries because he believes that such an occurrence will inhibit the practice of medicine.[75]

In holding that the Bolam test should be followed Dunn L.J. was not regretful that the plaintiff did not succeed because such a result "would be damaging to the relationship of trust and confidence between doctor and patient, and might well have an adverse effect on the practice of medicine".[76]

If the judges are prepared to openly express their opinion about the *social* consequences of a particular holding it is not unreasonable to submit that litigants should, in anticipation of such an opinion, lead evidence in support of or to contradict it. Of course it is difficult to decide what evidence would be appropriate.

The judges have on many occasions[77] expressed concern that the imposition of stricter standards on medical practice would *inter alia* "inhibit medical development" "damage the relation of trust and confidence", "have an adverse effect on the practice of medicine". There is unfortunately no evidence in appellate decisions that witnesses [either doctors or patients]

69 *F* v. *R* 33 SASR 189.

70 *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] 1 ALL ER 643, 657.

71 *Id*, 665.

72 *Albrighton* v. *Royal Prince Alfred Hospital* [1979] 2 NSWLR 165, 175.

73 *F* v. *R* 33 SASR 189, 201.

74 *Id*, 206.

75 *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] 1 ALL ER 1018, 1035.

76 *Id* 1030.

77 See footnotes 43-51.

have ever been asked whether or not they believe such would be the case or whether there has been any empirical research carried out that would support these assertions.

If a reasonable body of 'right' medical opinion[78] is sufficient to remove liability for negligence; is a reasonable body of 'patient' opinion or sociologist opinion or even medical opinion sufficient to demonstrate that the evils referred to above will or will not eventuate? Or are we forced to leave these apparently vital issues in the hands of the judiciary who are no more informed as to their relevance than is any other lay member of the community? When the judges make it clear that their 'choice' is made on policy grounds then it behoves counsel to ensure that these issues are addressed in evidence.

The in court revelation that it is not only the particular plaintiff who anticipated a course of behaviour by a medical practitioner but others as well might force those who decide appropriate standards of conduct to at least base their opinion on information rather than mere speculation.

As the preceding instances cannot be said to be 'law based' their relevance to the decisionmaking procedure can only arise in terms of 'policy'. And once this steed is mounted judges need to be extremely alert to the possibility that their perceptions of public policy and public good accords with the true position.

The need for information regarding community attitudes and the importance of extra-legal material in medical cases has become apparent although our courts often feel uncomfortable with type of evidence.[79] King C.J. has asserted that it is for the court to decide on appropriate standards.[80] Nevertheless he sets a standard without any apparent recourse to statistical evidence. The statistical likehood of 0.5% of a bad result occurring was held by the Chief Justice to be minimal[81] and the House of Lords has held that the same can be said when the incidence rises to 1%.[82] These decisions are certainly not 'law' based and when compared with other situations can only be seen as demonstrations of extreme deference to the medical profession. A 1% risk of an accident occurring at Sydney Airport would result in *five* accidents per day.[83] It requires no imagination to estimate the public outcry if this situation arose. It is indeed a paradox that those responsible for formulating the law seem to demand a lower standard from those whom the public trust the most.

The need for judges to be armed with extra-legal material in an attempt to ensure that any choice be wisely made tends to be treated with suspicion in some jurisdictions[84] although it is openly recognised and used in the United

78 *Amsworth* v. *Levi*, No. 7984, Supreme Court of NSW 24 September 1984 Finlay J. citing Donaldson M.R. *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] 1 ALL ER 643, 792.

79 *Todorovic & Anor* v. *Waller* 37 ALR 481.

80 *F* v. *R* 33 SASR 189.

81 *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] 1 ALL ER 1018.

82 *Ibid.*

83 Personal communication with the Federal Department of Aviation reveals that there was 192,578 movements at Sydney airport in 1985.

84 *Todorovic* v. *Waller* 37 ALR 481. *Cookson* v. *Knowles* [1979] AC 556.

States of America.[85] In *Brown* v. *Board of Education*[86] the Supreme Court of the United States was forced to apply the equal protection clause of the Fourteenth Amendment of the Constitution to public education. Put simply the issue was whether 'separate but equal' is 'equal'. Language, logic and some law,[87] dictated no constitutional breach, however the sterility of restricting analysis in this way was made patently obvious.[88] The court received evidence that in some jurisdictions black schools *in fact* received less per capita funding, had poorer facilities, poorer qualified teachers, larger pupil-teacher ratios and less extra-curricular activities. The court also accepted a mass of sociological data which conclusively demonstrated that 'separate but equal' was inherently impossible.[89] Cases such as *Brown* clearly demonstrate the need for courts to receive *all* relevant available information whether or not the judiciary continue to pretend that they simply declare the law[90] or whether, as in the aforementioned medical cases clear statements of policy are made.[91]

Again, if it be discovered that the *policy base* of many of these decisions is misplaced then the decision falls between two stools. Bad law and bad policy, a combination which in Stone's terms is simply bad decisionmaking.

Stone has been quick to point out that members of the bench are often conservative in their perception of society[92] and have, to a considerable extent, developed their view in the previous generation. In the absence of direct evidence this would help explain the rather soft attitude taken by the judges when dealing with actions against medical practitioners. There is no doubt, that both in the mind of the medical consumer and in reality the medical practitioner, in practice only thirty years ago, provided services unavailable today. In the past the medical profession was able to come to grips with political change which affected the way in which medical services were offered to the public in a dignified *non* political manner. And it provided a service to its consumers unequalled by any other profession. Primary health care, i.e. the family physician, offered a twenty four hour seven days per week service. Historically, the medical practitioner performed both a social and a

85 In *Muller* v. *Oregon* 208 US 412 Mr Louis Brandeis (as he then was) submitted a brief to the US Supreme Court. The issue related to maximum working hours for women. Brandeis submitted no less than ninety reports of committees, bureaus of statistics, commissions of hygiene, inspectors of factories relating to the effect of long hours on the safety of employment. He also submitted a collection of literature which generally supported the use of shorter hours of work on economic grounds. This style of presentation is now known as the Brandeis Brief.

86 347 US 481.

87 *Plessy* v. *Ferguson* 163 US 537.

88 347 US 481, 483.

89 *Ibid.*

90 "[M]ost British judges and lawyers all the time, and all of them some of the time, do regard judicial decisions as either direct applications of existing law, or logical deductions from some existing principle" Stone, *Province and Function of Law*, Sydney 1946, 168.

91 Footnotes 65-77

92 *Stone* 45-6.

medical role.[93] In times of economic hardship payment was never seen as a prerequisite for service[94] and during the depression years in Australia many country doctors received their fee in the form of farm produce. In this atmosphere it is not surprising that when faced with 'choice' the judges should view the medical profession favourably. It should not be forgotten that it was rare for the medical consumer even to contemplate legal action.[95] This public reaction to the special services offered by the medical profession can be seen by examining the cost of medical indemnity insurance at this time.[96] Insurance being the ultimate measure of risk. Problems arise when decisionmakers, armed with choice, fail to adjust to a radical change of circumstances. Medical practice has been normalised. In Australia and elsewhere primary health care is usually delivered on a two tier system. The family physician providing services during extended office hours[97] and commercial, deputising services or hospital casualty wards providing after hours attention.[98] Fees are now customarily demanded at the time of consultation with most doctors opting to charge more than the fee offered by 'bulk billing'.[99]

Medical practitioners now freely enter the political arena[100] and their representatives have on a number of occasions successfully called upon their colleagues to strike.[101] In New South Wales the effect of political activity has been to alter drastically the manner in which public hospitals are able to offer certain specialist services.[102] All these changes have been the subject of much media coverage, with accusation and counter-accusation being made by affected parties. Medical consumers, now better educated and less inhibited than in the past, are demanding greater accountability from the medical profession generally[103] and governments have responded by establishing

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93 J. Peterson, "Consumers Knowledge of and Attitudes Toward Medical Malpractice" — U.S.A. Secretary's Commission on Medical Malpractice 1973, Department of Health Education and Welfare.

94 The decision to pay medical practitioners 85% of the standard fee under the Medicare scheme was based to a considerable extent on the fact that a large percentage of consultations were not remunerated.

95 This was also the case in USA — Medical Malpractice, Report of the Secretary's Commission on Medical Malpractice, Department of Health Education and Welfare 1973.

96 Between 1982 and 1986 the premiums for Medical Indemnity Coverage increased by over 900%. Personal communication — Medical Defence Union of NSW.

97 Campbell & Southwell, M.H.A. Thesis, School of Health Administration, UNSW.

98 *Ibid.*

99 *Consumer's Guide to Sydney G.P.'s*, Australian Consumers' Association — October 1986.

100 This is an international development. The formation of associations such as IATROS — The International Organisation of Private and Independent Doctors — is evidence of this. Organisations such as the militant lobby group, Australian Associations of Surgeons, are affiliated with IATROS.

101 At various times medical practitioners have withdrawn services in Toronto (Canada), Israel, United Kingdom and NSW

102 The withdrawal of services from public hospitals, by procedural specialists in NSW hospitals did not result in these services not being offered. The effect was to transfer the services to private hospitals. This has in turn had the effect of forcing the University of Sydney medical school to send students to private hospitals as part of their clinical training.

103 Hence cases such as *Thake*, *Gold*, *Sidaway*, *F* v. *R*, see also Bromberger, note 6 *supra*.

medical complaints departments and by introducing legislation aimed at increasing control over medical practice.[104] At a time when medical science has more to offer than ever before, the growth of 'alternate' medicine may seem paradoxical. It has been suggested that the failure of the medical profession generally to come to grips with societal changes and needs has been directly responsible for this.[105] That judicial decisionmaking should be based on a social situation long since buried provides society with the worst of both worlds.

Over the past fifty years the law of torts has taken a new direction. This direction is based upon the *fact* that, irrespective of the law, insurance now plays an important part in all aspects of commercial and professional life. The increasing strictness of liability in some areas[106] and the elimination of 'faults' entirely in others[107] reflects this.

Fleming asserts, as do other writers[108], that the modern law of torts is based upon a determination of which party to the action is better able to bear the loss. All medical practitioners carry indemnity insurance[109] whereas it would be most unusual for patients to insure against the possibility of damage caused as a result of the treatment. It would therefore be expected that the courts, when provided with a clear choice about the liability of a party or otherwise, would find against the party more able to bear the loss. In actions against the medical profession this trend has been reversed. The "body of opinion" test which has found its way into the law of medical negligence, the failure to recognise the role of the patient in medical decisionmaking and the apparent belief that by applying the same standards to the medical profession as are applied to the general population will in some way inhibit medical progress, has resulted in decisions such as *Thake & Sidaway* which can only be alleviated by even more unreality such as demonstrated in *Gold*.

The failure of the courts to exercise their choice in a manner seen by governments as responsive to community needs and desires often necessitates legislative action. The tortured history of the law of contracts

104 In January 1986 the NSW Department of Health issued a discussion paper titled "Proposals for Amendment to the Medical Practitioners Act, 1938" The then Minister for Health, Mr Ron Mulock announced "The proposed changes to the Act include the incorporation of the Medical Board, more effective investigation of professional standards and improved disciplinary procedures" Media Release 15 January 1986.

105 See Alternative Medicine, Preventive and Community Medicine Committee, N.S.W. Faculty, Royal Australian College of General Practitioners. The authors identify no less than thirty-five examples of alternative medicine with the proviso "These articles do not cover the whole field of alternative medicine ...." The publication concludes "Perhaps our attitude to the patient should change to a degree but still adhere to the truth".

106 SJ. Rees and L. Gibbon 1986. *A Brutal Game*

107 NSW Law Reform Commission, Working Paper 1, Accident Compensation, May 1983.

108 J.G. Fleming, *Law of Torts* (4th ed) 1971, *Nettleship* v. *Weston* [1971] 2 QB 691 per Denning M.R.

109 Personal communication with Medical Defence Union of N.S.W. It is not compulsory for medical practitioners to carry an indemnity policy, it is not insurance, but see Chiropractors Registration Act 1972 (NSW).

provides ample evidence of this with many legislative attempts to rectify doctrine seen as being out of date and out of step.[110]

There is ample evidence to suggest that the medical consumer is flexing muscles and asserting rights.[111] It is submitted that the courts often see the assertion of these rights as a threat to the medical profession and exercise 'leeways of choice' against the interests of patients.[112] In Stone's terms the application of policy to judicial decisionmaking is to "help rather than hinder an orderly and circumspect adjustment to change in social life". [113] It would be a shame if a failure of the courts to recognize this duty resulted in governmental intervention into a relationship which, in order to be successful requires a degree of flexibility often not available when made the subject of legislative action.

It is often extremely difficult to demonstrate clearly, by way of argument, that a particular decision is or is not wrong. Or to show that factors taken into account by judges are or are not appropriate. What follows is an attempt to place the reasoning in *Thake's* case in its correct perspective and to permit the reader to draw conclusions about the law, logic and policy which underscores this important case. It is of course presented with apologies to the late Lon Fuller.[114] The similarity between the language in the hypothetical opinions and that used by the members of the bench in *Thake's* case is not accidental and is here acknowledged.

FACTS:

Mr Jones is a paraplegic but has full mobility of the upper part of his body. His disability was caused by a car accident which terminated a promising sporting career. Although he has recovered physically (as far as possible) he is extremely depressed. He had received a large financial settlement and part of his rehabilitation treatment has been designed to make him as independent as possible. As well as being able to manage his wheelchair Mr Jones is able to drive a specially designed motor car. This has added to his depression because he feels that these skills are largely futile. At this time Mr Jones' family were extremely concerned about his future and finally persuaded the New South Wales government to employ Mr Jones as a consultant in its accident prevention programme.

The Government was prepared to do this only on condition that Mr Jones arranged for and purchased his own vehicle. The prospect of a new career had an amazing psychological effect upon Mr Jones. He obtained the precise specifications of the rehabilitation vehicle and took them to Jack M. Motors,

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110 *E.g.* See Sale of Goods Act 1958 (NSW), Good (Sales & Leases) Act 1981 (Victoria), Trade Practices Act 1974 (Cth), Misrepresentation Act 1971-2 (South Australia).

111 A reaction to this has been the alteration to the Articles of Association passed by resolution by the NSW Medical Defence Union. Members are now not insured but coverage is at the discretion of the Board of Directors.

112 *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] 1 ALL ER 1018, 1030 (per Dunn L.J.).

113 *Stone*, 271.

114 Fuller, "The case of the Speluncean Explorers." 62 *Harv L Rev* 616.

a well-known Sydney car dealer. Jack M., a trained and highly experienced mechanic, examined the specifications and informed Jones that he would be able to provide a fully modified car for $25,000. Jones was still skeptical about the possibility of the modified car being as reliable as a normal vehicle although he was aware that other cars had been successfully modified and used. In order to allay Jones' fears Jack M. explained the manner in which the car would be modified. During this explanation Jack M. constantly emphasized the fact that the modification was merely an equivalent way of organizing the mechanics of the car and that it would be perfectly satisfactory. Furthermore, the order form included the words ".... modified by way of linkages in order that the car function as efficiently and as reliably as a normal factory produced model."

The order form was signed by Jones.

The car was subsequently completed and delivered to Mr Jones. It was tested by him and by Jack M. and pronounced to be in perfect condition. Mr Jones drove the car satisfactorily for two weeks when, while driving in heavy traffic, one of the linkages stuck, he could not operate the brakes and he collided with another car.

Jones has subsequently been informed that Jack M. was aware of the possibility of a linkage jam but had neglected to mention this, as it rarely happened.

In his subsequent action against Jack M., Jones claimed, *inter alia*, that Jack M. was in breach of contract in that the car as modified was not equivalent to a factory produced model, as had been warranted by Jack M.

At trial, in judgment given by Colin Cure J., the judge found *inter alia* that the defendant was in breach of contract, in that he had failed to make the vehicle equivalent to a factory made vehicle.

BOW L.J.

I have had the advantage of reading in a draft the judgment of John L.J. and save on one issue, I find myself in complete agreement with it.

I regret to say, however, that I am unable to agree with his conclusion as to the claim in contract. It is common ground that the defendant contracted to carry out a modification of the driver operated equipment of a motor vehicle and that in the performance of that contract he was subject to the duty implied by law to carry out this modification with reasonable skill and care. The question for consideration is whether in the circumstances of the instant case the defendant further undertook that he would provide Mr Jones with a vehicle equivalent in mechanical reliability to that of a factory produced mode.

On behalf of the plaintiff it is conceded that the defendant never used the word 'guarantee' in relation to the outcome of the modification, but it is submitted that what the defendant said and did at their various meetings would have led a reasonable person in the position of the plaintiff to the conclusion that the defendant was giving a firm promise that the operation would lead to a mechanical equivalent in all respects.

It is not in dispute that the task of the court is to seek to determine objectively what conclusion a reasonable person would have reached having regard to;

(a) the words used by the defendant;
(b) the demonstration which he gave; and
(c) the description of the procedure on the order form.

Counsel for the plaintiff placed particular reliance on the following matters:

(1) That on more than one occasion the defendant explained to the plaintiff that the modification was a mechanical means of achieving the same result as the factory produced model. This was reinforced by the order form which stipulated the requirement that the effect of the modification was to produce an 'equivalent' vehicle.
(2) That the defendant agreed in evidence that the word equivalent would have been understood by the plaintiff as meaning 'identical' in performance but different in mechanical operation.
(3) That the demonstration of the way in which the linkages were designed to work in fact rendered the vehicles as safe as a factory produced model.
(4) That the defendant test drove the vehicle after the modification and pronounced it to have been successfully modified.

I recognise the force of the submissions put forward on behalf of the plaintiff and I am very conscious of the fact that both the trial judge and John L.J. have reached the conclusion that the case in contract has been established. For my part I remain unpersuaded. It seems to me that it is essential to consider these events and the words the defendant used against the background of a car dealers' showroom. It is the common experience of mankind that the assurances of used car dealers are to some extent unreliable and that any promises about any car may be affected by the special characteristics of the particular vehicle.

I accept that there may be cases where because of the claims made by the salesman about the qualities of a particular vehicle the court may be driven to the conclusion that their qualities are guaranteed or warranted. But in the present case I do not regard the statements made by the defendant as to the qualities of the vehicle as passing beyond the realm of expectation and assumption. It seems to me that what he said was spoken partly by way of what is sometimes called 'salesman's license'.

Both the plaintiff and the defendant expected that the vehicle would be suitable for the purpose and the defendant appreciated that that was the plaintiff's expectation. This does not mean, however, that a reasonable person would have understood the defendant was going further than to give an assurance that he expected and believed that it would have the desired result. Furthermore, I do not consider that a reasonable person would have expected a responsible used car salesman to be intending to give a guarantee. Knowledge with respect to the quality of used cars is a highly skilled occupation but is not generally regarded as an exact science. The reasonable

man would have expected the defendant to exercise all the proper skill and care of a used car salesman; he would not in my view have expected the defendant to have given a guarantee of the quality of the vehicle.

Accordingly, though I am satisfied that a reasonable person would have left the dealer's yard thinking that the vehicle purchased would have been fit for the purpose for which it was purchased such a person would not have left thinking that the defendant had given a guarantee that the car would be suitable.

VIKING L.J.

I also have had the advantage of reading in draft the judgment of John L.J.. I also agree with the views which he has expressed in regard to all issues other than the claim in contact. In regard to the claim in contract, my opinion differs from that of John L.J. & Colin Cure J. and is the same as Bow L.J.

The question then is whether the defendant contracted to carry out mechanical repairs or to produce a mechanically equivalent machine. The latter alternative necessarily involved a guarantee; in other words, a warranty that there was not the remotest chance, not one in ten thousand, that the modification would not succeed. Colin Cure J. held, in my view correctly, that the contract was contained partly in the words used between parties and partly in the words of the order form. The object of the modification as stated on the order form was to produce a vehicle which could be driven by a paraplegic but which would be equivalent in operation to a factory produced model. The contract did not contain an implied warranty that, come what may, the objective would be achieved. The only question is whether it contained an express warranty to that effect. Would the words and visual demonstrations of the defendant have led a reasonable person standing in the position of the plaintiff to understand that, come what may, the variation in mechanical operation of the vehicle would not result in it being in any way less safe than a factory produced model.

The function of the court in ascertaining objectively, the meaning of words used by contracting parties is one of everyday occurrence. But it is often exceedingly difficult to discharge it where the subjective understanding and intentions of the parties are clear and opposed. Here the plaintiff understood that the vehicle would be as mechanically safe as a factory produced model. The defendant himself recognised that he would have been left with that impression. On the other hand, he did not intend, and the known custom of his trade would support that he would not have intended to guarantee that that would be the case. Both the understanding and the intention appear to them, as individuals, to have been entirely reasonable, but an objective interpretation must choose between them. In the end the question seems to be reduced to one of determining the extent of knowledge which is to be attributed to the reasonable person standing in the position of the plaintiff. Would he have known that the success of the modification, either because a variation in any design is not likely to produce an identical result or because negotiations with used car dealers are nearly always uncertain, could not be

guaranteed? If he would, the defendant's words could only have been reasonably understood as forecasts of an expectation and hope and that the demonstrations of the way in which the linkages were to work could have been no more than demonstrations as to how the modifications would be done. He could not be taken to have given a guarantee of its success.

I do not suppose that a reasonable person standing in the position of the plaintiff would have known that the system of linkages suggested by the defendant depended on a system which could not be guaranteed. But it does seem to me to be reasonable to credit him with the general knowledge that used car dealers are prone to exaggerate the excellence of their product. That knowledge is part of the general experience of mankind, and in my view it makes no difference whether what has to be considered is some form of representation as to mechanical quality or the efficiency of an engineering modification. Doubtless the representation that a manually driven motor car is in fact automatic will provide contractual relief because such is the general experience of the motorised age. But where a modification is unusual would a reasonable person, confronted with the words and demonstrations of the defendant in this case, believe that there was not one chance in ten thousand that the object would not be achieved? I do not think that he would.

With the reputation of the used car business being what it is, is it likely that a reputable dealer such as the defendant would have given a guarantee of the kind claimed by the plaintiff? As stated by SLADE L.J. in *Eyre* v. *Measday* [1986] 1 ALL ER 488, 495 "I am afraid that, in my view, if they had wanted a guarantee of the nature which they now assert, they should have specifically asked for it".

The history of the motor car industry is long and troubled and I would have thought that by now the general public would be extremely skeptical of apparent guarantees given by any used car dealer and consequently in my view a used car dealer cannot be objectively regarded as guaranteeing any aspect of his merchandise unless he says as much in clear and unequivocal terms. The defendant did not do that in the present case.

For these reasons, I am of the opinion that the defendant did not contract to produce a vehicle equivalent in all respects.

John L.J. [dissenting]: This is an appeal by the defendant, a trained and highly qualified motor mechanic now the proprietor of a large retail car firm, from the judgment of Colin Cure J. The facts are rather unusual and it is desirable to set them out in full. [John L.J. recited the facts as set out above and proceeded].

The judge reached the conclusion that in the unusual circumstances of this case the plaintiff had established that the failure of the linkages gave rise to a breach of the contract between the defendant and the plaintiff. He expressed this in the following terms:

"I have hesitated before arriving at this conclusion. It is a decision which engineers will regard with alarm. I accept that they would not deliberately guarantee any result which depended on a prediction of the quality of a piece

of machinery; but there is no reason in law why a mechanic should not contract to produce a particular result. I have to ascertain what the terms of the contract were on the unusual facts of this case. I have been driven by the logic of the argument which counsel presented for the plaintiff to the conclusion that the contract was to make the redesigned car equivalent to that of a factory manufactured model".

It was forcefully submitted by counsel for the defendant that the word equivalent should be taken to mean 'as nearly as possible' and should not be taken to be a promise that the modifications would be 100% equivalent to that of a factory model. Taken in isolation such may well be the case but that would be to ignore *all* the surrounding circumstances of the case.

In the present case it was common ground that the defendant never said that he was giving a guarantee; nor that the result of the modification was 100% certain. But in evidence at trial the defendant acknowledged that without any qualification his description about the operation of the linkages Jones would have left the showroom with the impression that the car would operate in the same way as a factory produced model.

On this appeal it is common ground that the court's task is to determine objectively the terms of the contract whereby the defendant offered and agreed to provide Jones with a suitable vehicle. What would a reasonable person in the position of Mr Jones have concluded in that regard? Was it merely that the defendant would perform a modification procedure subject to the duty implied by law that he would do so with reasonable skill and care? Or was it that the defendant would perform this mechanical modification so as to produce a car equivalent to that of a factory model? Counsel for the defendant submitted that, even if the latter was the correct objective construction of the terms of the offer made by the defendant, it was nevertheless not so understood by Mr Jones. He said that this was merely what he believed the defendant had undertaken to do, and he relied on the decision of this court in *Allied Marine Transport Ltd.* v. *Vale do Rio Doce Navegacao S.A. The Leohindas, D.* [1985] 2 ALL E.R. 796. But in my view no such further question arises here since it is plain in the evidence that Mr Jones intended to operate a vehicle equivalent in safety to a factory produced model and the defendant agreed to produce it. The only issue is as to the objective interpretation of the offer made by the defendant once he had agreed to carry out the proposed modification.

Having regard to everything that passed between the defendant and the plaintiff at the various meetings, coupled with the absence of any warning that the new linkages might not work *exactly* as a factory model, even after it had been driven by Jack M. after it had been modified, it seems to me that the defendant could not reasonably have concluded anything other than his agreement to perform the modification meant that, subject to testing, he had undertaken to produce a factory equivalent model. In my view this follows from an objective analysis of the undisputed evidence of what passed between the parties, and also what the plaintiff understood and intended to be the effect of the contract with the defendant.

The considerations which lead me to this conclusion can be summarised as follows. First, we are here dealing with something mechanically desirable not quantitively predictable with inevitably uncertain results. The nature of the procedure was the modification of the driving mechanism of a car in such a way as to ensure that it could be driven by a paraplegic and at the same time ensure that it was as mechanically reliable as a factory produced model. This was vividly demonstrated to the plaintiff by the defendant by showing him the way in which the modified linkages would work. The defendant constantly reassured a skeptical Mr Jones that the result would be equivalent to a factory model. Subject to the final testing after the work was completed, at which time the work was pronounced as satisfactorily completed, I cannot see that one can place any interpretation on what the defendant said and did other than that he undertook to provide Mr Jones with a modified motor vehicle, equivalent in all respects to that of a factory produced model. Nor can I see anything in the transcripts of evidence which leads to any other conclusion and the defendant himself agreed that in the context of the discussion as a whole, the word 'equivalent' would have been understood by the plaintiff as meaning 'identical in function but different in mechanical operation!' If the defendant had explained to Mr Jones that he had on occasion seen linkages of the nature being installed in his car jam the objective analysis of what he conveyed would have been quite different.

Accordingly, I would uphold the judge's conclusion that the plaintiff succeeds in his claim that the jamming of the linkages gave rise to a breach of contract on the part of the defendant.