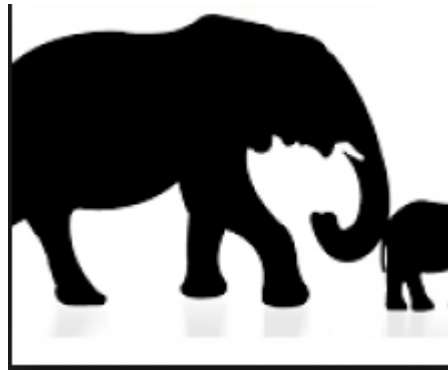


# Judicial Use of Common Sense and “Nudging Judging”



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1. Judicial “Common Sense”
2. Judicial Cognition
3. Nudging Judging

# Judicial Common Sense

*“The driving force of the common law is experience and common sense.”*

Lord Neuberger (2012)

*“If the life-blood of the law is experience and common sense, then whose experience and common sense are we talking about? ....As I was once rude enough to say publicly, ‘one man’s common sense is another woman’s hopeless idiocy’”*

Lady Hale (2013)

# Judicial Common Sense

*“No jury would be likely to award heavy damages to a truculent, foulmouthed ruffian—an expression used by Jordan CJ—who in filthy, obscene language questioned the chastity and parentage of a decent woman, as on the evidence this barmaid appears to have been, even if she retaliated by destroying both his eyes.” (Webb J)*

*Deatons Pty Ltd v Flew (1949) 79 CLR 370*



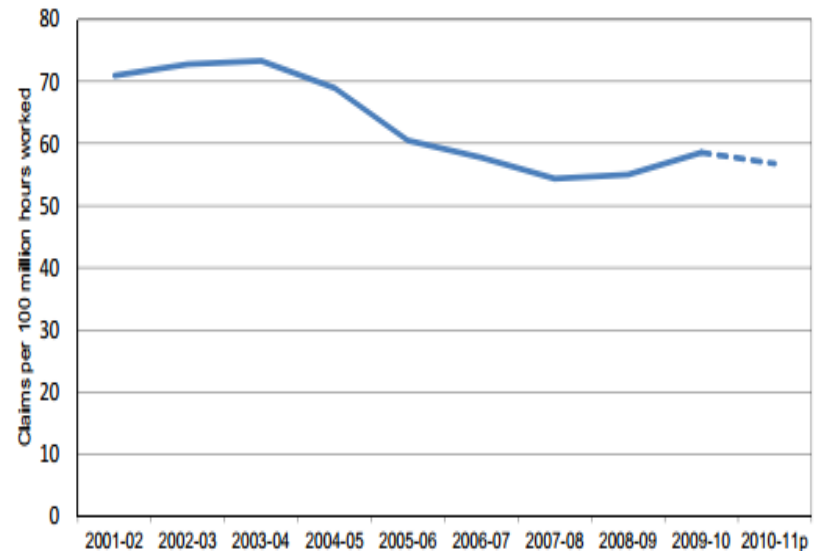
<http://www.dailytelegraph.com.au/newslocal/northern-beaches/a-sight-for-sore-eyes-manly-hotel-a-premier-attraction-for-nearly-60-years/story-fngr8hax-1226961239763>

# Judicial Common Sense

*“It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work.”*

*Koehler v Cerebos (Australia) Ltd*  
(2005) 222 CLR 44, 57 (McHugh J,  
Gummow J, Hayne J, Heydon J).

Figure 1 Mental stress: Frequency rates (claims per 100 million hours worked), Australia, 2001–02 to 2010–11p



<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/769/The-Incidence-Accepted-WC-Claims-Mental-Stress-Australia.pdf>

# Judicial Common Sense

*“One change that may have occurred, I cannot say whether it has or not, is that many women, of which this appellant may be one, transform their lives as their children grow older, by studying and working and ceasing to be dependent at all upon their husbands: indeed they sometimes become the, or the principal provider.”*

*De Sales v Ingrilli (2002) 212 CLR 338 (Callinan J)*

## Older women left out of workforce

EXCLUSIVE LAURA SPERANZA THE SUNDAY TELEGRAPH MARCH 10, 2013 12:00AM

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Older worker Rosaria Raineri happy at work in her Deli in Five Dock. Picture: Craig Greenhill

**MATURE age women are not only finding it hard to get a job - they also earn a lot less than their male colleagues.**

A study by the Diversity Council Australia has revealed women aged 45 upwards earn only two thirds of the income of men, retiring with half their superannuation.

The discrimination is being investigated by the Australian Human Rights Commission which encourages businesses to better utilise the skills and talents of older workers in an ageing population.

<http://www.dailytelegraph.com.au/older-women-left-out-of-workforce/story-e6freuy9-1226593749191>

# Judicial Common Sense

*“For all I know the child was in court to witness her mother's rejection of her. Perhaps, on the other hand, the plaintiff had the taste to keep her child out of court. Even if that be so, it does not mean the unfortunate infant will never know that her mother has publicly declared her to be unwanted. When she is at school some amiable charitable - perhaps the mother of one of her "friends" - can be trusted to direct her attention to the point. That a court of law should sanction such an action seems to me improper to the point of obscenity.”*

*CES v Superclinics (Australia) Pty Ltd*  
(1995) 38 NSWLR 47 at 86 (Meagher J)  
See also *Cattanach v Melchior* (2003)  
215 CLR 1 (Heydon J)



[http://en.wikipedia.org/wiki/Family\\_Court\\_of\\_Australia](http://en.wikipedia.org/wiki/Family_Court_of_Australia)

## Judicial Common Sense

*I agree with the trial judge that, when all of the circumstances are taken into account, the signs conveyed that serious injury or death might result from “running and diving” rather than from “running or diving”. To put that another way, in all of the circumstances the signs did not effectively communicate that running down the dune into the lake involved the risk of serious injury which materialised.*

*State of Queensland v Kelly* [2014] QCA 27, [43] (Fraser JA)







<https://www.travelblog.org/Photos/958884>

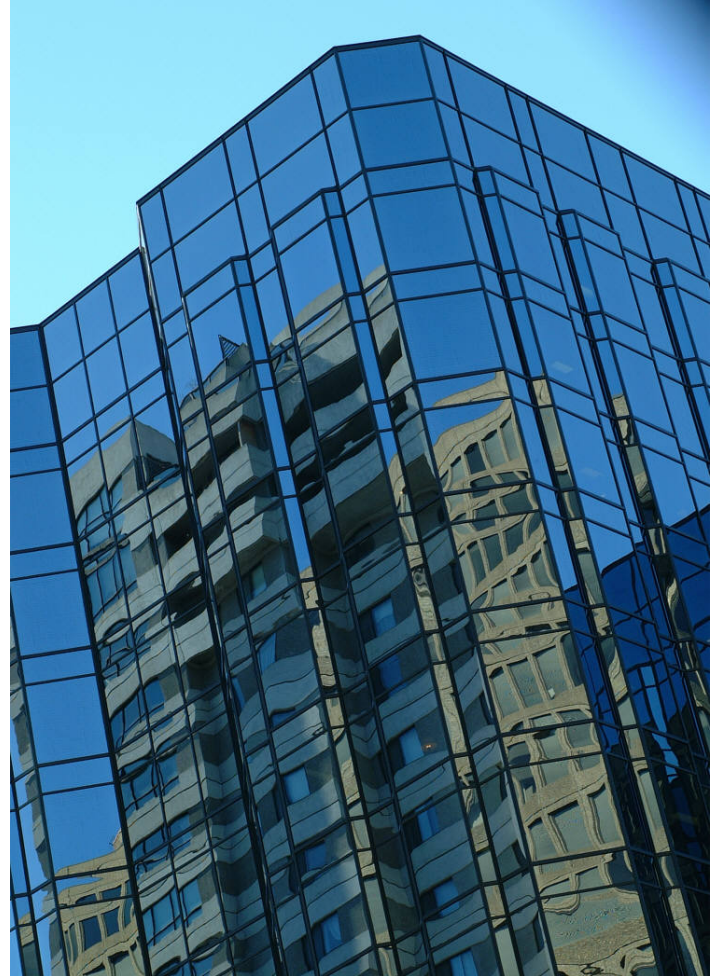
## The Problem of Judicial Use of “Common Sense”

- Common sense may be useful and efficient
- Judicial use of “common sense” is widespread (Burns, 2012)
- “Common sense” may be used in a variety of ways-> legislative facts, evaluation of adjudicative facts, “background”
- There may be “multiple” common senses
- Common sense may be empirically wrong, or incomplete
- Common sense may be the vehicle for unconscious judicial bias
- Common sense may lead to judicial error

## 2. Judicial Cognition: Judging as an Unconscious Process

“a window that judges try to look through, but that has reflective glass in it: so it is really a mirror. When judges look at it, they see what they think is ‘human nature’, ‘human experience’ and ‘ordinary or reasonable people’. What they are really seeing is the society they know. (And they do not see that they are looking in a mirror).”

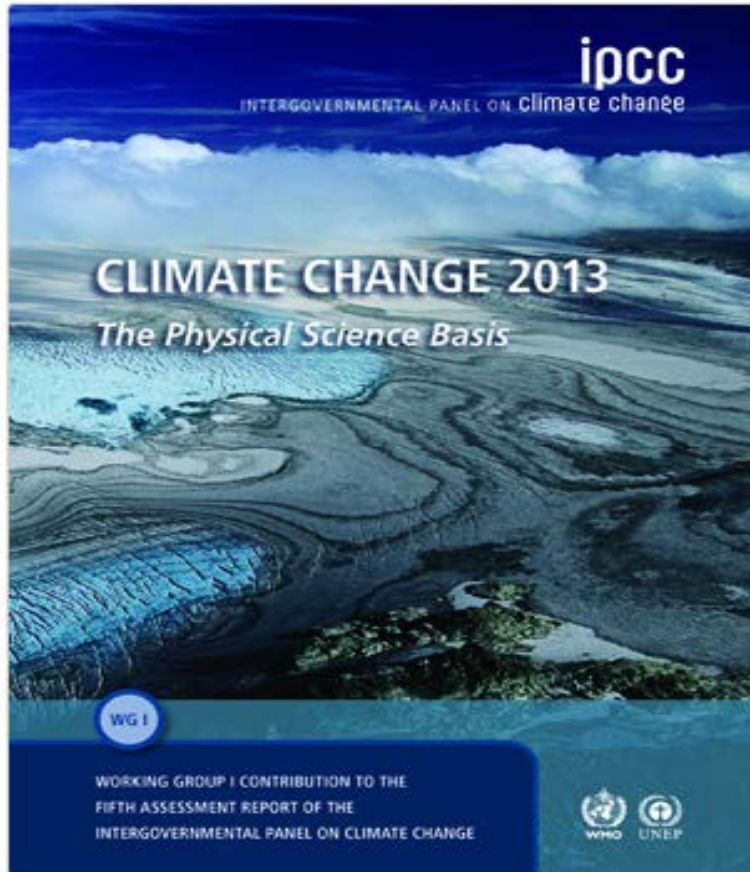
Graycar



# Judicial Bounded Rationality



# Cognitive Dissonance/Confirmation Bias/Cultural Cognition/Naïve Realism



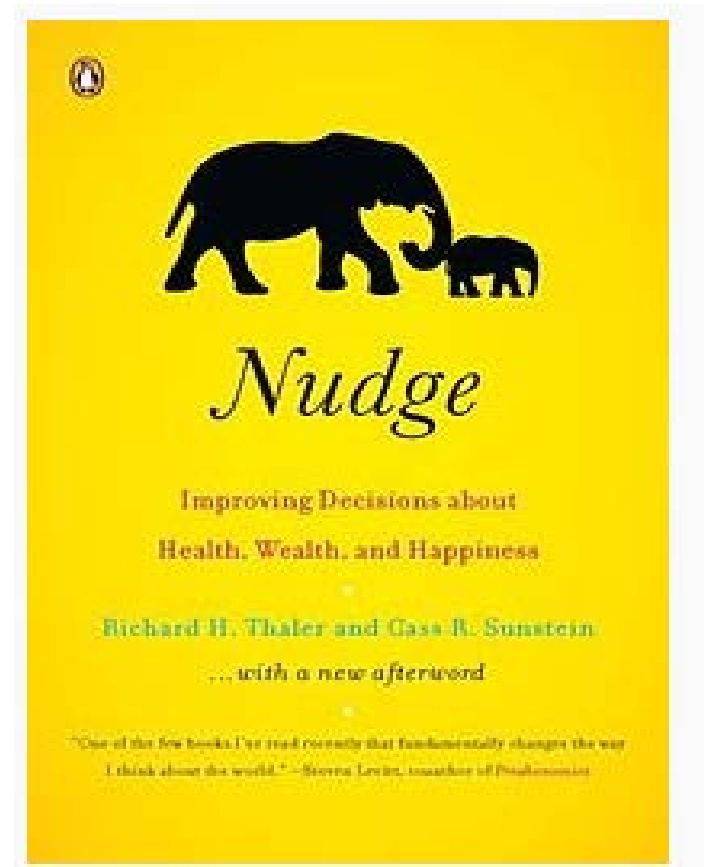
- Guthrie, Rachlinski, Wistrich
- Kahan and Bramam

## Judicial Cognition: Heuristics and Biases

- Availability Heuristic
- Representative Bias-> stereotyping
- Status Quo Bias
- Hindsight Bias
- Optimism, self-serving, egocentric bias-> we don't know what we don't know and we don't want to know it
- Status Quo Bias
- Group Deliberations and the impact of group dynamics

### 3. Nudging (Feminist, Evidence Based) Judging

- The “Wicked” Problem of “common sense” judging
- Inter-related, interdependent legal, institutional, individual, cognitive, cultural factors
- “Nudge”-> change decision-making environment to encourage better decisions ie overcome effects of cognitive limitations/ heuristics and biases.
- No single factor solutions



## Nudging Judging

- **Legal factors**-> rules of evidence and judicial notice (eg *Aytugrul*, *Norrie*, *Lindsay v R*)
- **Institutional Factors**-> improving the flow of good “quality” empirical evidence to judge, expert evidence, third parties, guidelines for judicial use of empirical information, legal and judicial education
- **Cognitive and Cultural Factors**
  - » Judicial diversity and addressing “legal” culture
  - » “Come clean, get real” on effect of cognitive factors on judges (Justice Mason)
  - » Responding to Cognitive factors->eliminating judicial intuition impossible and countering cognitive bias/cultural cognition very difficult and research continuing
  - » Judicial acknowledgement of uncertainty/Judicial humility