TOWARDS AN AUSTRALIAN LAW OF TORTS

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The law of torts has its roots in English law. But the High Court has, over the past 30 years, taken major steps to "indigenise" the law with the result that there is now a distinctively Australian law of torts. The author analyses the reasons for this development before going on to discuss the new and conceptually difficult structure imposed by a majority of the High Court on the law of negligence. The author also touches on a number of other important aspects of the law of torts, including exemplary damages, causation, occupiers' liability and res ipsa loquitur. In each case the High Court has consciously moved away from English law and established principles unique to this country.

In a recent article in an English law journal the Regius Professor of Civil Law at the University of Oxford stated that it is "an obvious but nevertheless neglected truth that, legislation aside, the modern common law is made in partnership between the university law schools and the courts".[1] Whether that be the truth or a myth, it is occasions like this which confirm the veracity of that statement or help to perpetuate the myth.

When I was invited by the organisers of this Conference to reflect on the contribution made by the High Court of Australia to the development of the law of torts over the last 30 years I thought I should take the opportunity to emphasise how indigenous, how Australian, the law of torts has become over the last three decades. Hence the title of this paper.

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1. P Birks "'When Money is Paid in Pursuance of a Void Authority ...' — A Duty to Repay?" (1992) PL 580, 591.

INTENTIONAL TORTS: THE INDIGENOUS LAW

This development has been so marked that 10 years ago I was encouraged (together with a co-author) to embark on the writing of a legal treatise which would examine and present the law of torts from a truly Australian perspective.[2] A decade later that decision has been vindicated. As Brennan J of the High Court recently reminded us in *Mabo v State of Queensland [No 2]*[3] (in a context outside the law of torts), "the law which governs Australia is Australian law" and, increasingly since 1968, when the progressive abolition of appeals from Australia to the Privy Council began,[4] the common law of Australia has been substantially in the hands of the High Court. While acknowledging that "Australian law is not only the historical successor of, but ... an organic development from, the law of England" Brennan J leaves us in no doubt that the "ultimate responsibility of declaring the law of the nation" rests with the High Court.[5] So it is to the decisions of the High Court that we must turn in any attempt to discern the extent to which we have an Australian law of torts.

In *Australian Consolidated Press Ltd v Uren*[6] ("*Uren*"), the Privy Council, on an appeal from Australia, had itself held that the common law of Australia might legitimately develop independently of English precedent even though there were doubtless advantages if, within those parts of the British Commonwealth where the law is built upon a common foundation, development proceeds along similar lines. When *Uren* was before the High Court,[7] the Court decided that the categories of cases in which an award of exemplary damages (as distinct from aggravated damages) may be made in Australia were much wider than the three categories postulated by Lord Devlin in the decision of the House of Lords in *Rookes v Barnard*[8] and that

2. F A Trindade & P Cane *The Law of Torts in Australia* (Oxford: Oxford University Press, 1985). See also R P Balkin & J L R Davis *The Law of Torts* (Sydney: Butterworths, 1991) and now F A Trindade & P Cane *The Law of Torts in Australia* 2nd edn (Oxford: Oxford University Press, 1993).
3. (1992) 175 CLR 1, 29.
4. Privy Council (Limitation of Appeals) Act 1968 (Cth) and Privy Council (Appeals from the High Court) Act 1975 (Cth).
5. Supra n 3.
6. [1969] AC 590; (1967) 117 CLR 221.
7. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 and *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185.
8. [1964] AC 1129. Lord Devlin in *Rookes v Barnard* restricted the categories of cases in which exemplary damages could be awarded in England to 3 classes. First, where there has been oppressive, arbitrary or unconstitutional action by the servants of the government; secondly, where the defendant's conduct has been calculated by him to make a

the limiting circumstances of that decision should not be followed in Australia. By declining to say that the High Court was wrong in refusing to change the law in Australia, with regard to the awarding of exemplary damages in defamation cases, to accord with the decision of the House of Lords in *Rookes v Barnard*, the Privy Council set the basis for the divergence of the paths of the common law in Australia and England which until that time were virtually identical. The decisions of the High Court in *Uren* can therefore reasonably be regarded as seminal in the development of an Australian law of torts.

Since those decisions, courts in Australia have felt free to award exemplary damages in a variety of cases of conscious wrongdoing where there is outrageous conduct on the part of the defendant in contumelious disregard of the plaintiff's rights.[9] These awards are intended to punish the defendant for his outrageous conduct and to make an example of him, thus deterring him and perhaps other like-minded persons from engaging in similar conduct in the future. Despite some criticisms of exemplary damages in the law of torts, principally because it is felt by some that "there are sound reasons why punishment should be confined to the sphere of the criminal law",[10] support for the award of exemplary damages in actions in tort in Australia has recently been strongly re-affirmed by the High Court in *Lamb v Cotogno*.[11] It is a position that I support and the Australian decisions in which exemplary damages have been awarded in relation to tortious conduct in the last two or three decades[12] indicate that they have been valuable in marking the disapproval and detestation of the courts for such conduct and perhaps in deterring potential tortfeasors from engaging in such conduct in

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profit for himself which may well exceed the compensation payable to the plaintiff; and thirdly, where exemplary damages are expressly authorised by statute. In *Broome v Cassell & Co Ltd* [1972] AC 1027 the House of Lords by a majority reaffirmed the restrictions imposed in *Rookes v Barnard* on awards of exemplary damages in tort.

9. See the statement of the High Court of Australia in *Lamb v Cotogno* (1987) 164 CLR 1, 8, that "notwithstanding that their Lordships [in the Privy Council] confined their remarks to the law of libel, it is plain that what was said by this Court in *Uren v John Fairfax & Sons Pty Ltd* was not so restricted and that the well-settled judicial approach in Australia extends exemplary damages to a wider range of torts".

10. See H Luntz *Assessment of Damages* 3rd edn (Sydney: Butterworths, 1990) 65.

11. (1987) 164 CLR 1, 8.

12. See *Henry v Thompson* [1989] 2 Qd R 412; *Lamb v Cotogno* (1987) 164 CLR 1; *Johnstone v Stewart* [1968] SASR 142; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448; *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584; *Pollack v Volpato* [1973] 1 NSWLR 653; *Pearce v Hallett* [1969] SASR 423; *Lackersteen v Jones* (1988) 92 FLR 6; *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251 and *Coloca v BP Aust Ltd* (1992) Aust Torts Reports 81-153.

the future. In my view, exemplary damages serve a useful purpose in vindicating the strength of the law.[13]

It is interesting to note that in England there has been recent discussion as to whether the restrictions on the award of exemplary damages imposed by the House of Lords in *Rookes v Barnard* should be removed. The Law Commission in England is currently looking into this question as part of its Fifth Programme of Law Reform. I imagine that Australian decisions on exemplary damages may have a significant influence on any forthcoming reform in England and I would not be surprised if the restrictions on the award of exemplary damages imposed by the House of Lords in *Rookes v Barnard* are abandoned.

Perhaps less worthy of influence is the decision of the High Court in *Fontin v Katapodis*.[14] The High Court decided that the provocation of the plaintiff could not be used by the defendant to mitigate or reduce compensatory damages but that provocation "operates only to prevent the award of exemplary damages or to reduce the amount of such damages which, but for the provocation, would have been awarded".[15] This decision has led some judges in Australia to conclude that provocation is no defence to an action for assault and battery[16] for the logical reason that if the provocation of the plaintiff cannot be used by the defendant even to reduce compensatory damages (including aggravated damages) how could it possibly be used to defeat the claim of the plaintiff completely? However, the decision in *Fontin v Katapodis* is not without its critics. A Queensland judge put it rather trenchantly when he said:

> It seems to me absurd that the Common Law should allow a person who is guilty of the most outrageously provoking conduct to recover full compensatory damages for any injuries occasioned by a reasonable response to his conduct. It seems to me even more absurd that if he claims only compensatory damages, the circumstances of his conduct are irrelevant and may not be pleaded or given in evidence.[17]

If this matter comes before the High Court again the better view to take might be that provocation can, if the response to the provocation is reason-

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13. Contra Lord Reid in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1087.
14. (1962) 108 CLR 177.
15. Id, 187.
16. See *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153, 162 and *Plumb v Breen* (unreported) Supreme Court of NSW 13 Dec 1990 Young J, 12. It should be added that none of the judges in *Fontin v Katapodis* supra n 14 specifically indicated that provocation is not a defence to an action in intentional assault or battery. However, it is arguable that that view is implicit in their decision.
17. See *Love v Egan* (1971) 65 QJPR 102 McLoughlin DCJ, 104.

able,[18] be pleaded as a complete defence to an action in assault or battery but that in other circumstances it can be taken into account in mitigation or reduction of exemplary damages and even compensatory damages, whether the latter amount includes an element of aggravated damages or not.[19]

NEGLIGENCE: PROXIMITY AND DUTY OF CARE

So far, I have dealt with some of the decisions of the High Court in the area of intentional torts. I should like now to consider the tort of negligence described by one writer as that "young tort which has grown very rapidly".[20] In the process of that rapid growth, the High Court has played a significant part. This has been particularly so in recent years during which a majority of the High Court have imposed a new and conceptually difficult structure on the law of negligence.

The exigency for this new structure was prompted by successful and expanding claims in two particular areas of the law of torts, namely, claims for nervous shock[21] and claims for pure economic loss caused by negligent statements[22] and negligent acts.[23] The courts in England and Australia have come to the realisation that acceptance of reasonable foreseeability simpliciter as a determinant of liability for nervous shock would bring within the range of compensable plaintiffs an unacceptably wide range of persons. They also realised that foreseeability of pure economic loss could not by itself (in cases involving negligent statements and negligent acts) act as a determinant of liability in negligence without raising the spectre of liability "in an indeterminate amount for an indeterminate time to an indeterminate class",[24] and so turned their attention to restrictive propositions of law outside the test of foreseeability. Lord Wilberforce's attempt in *Anns v Merton London Borough Council*[25] (*"Anns"*) to impose some limits on the test of foreseeability simpliciter by way of a two stage test which required the court to consider

18. As in *White v Connolly* [1927] St R Qd 75 where the defendant on discovering the plaintiff sexually embracing the defendant's wife in bed in an hotel struck the plaintiff in the course of the struggle that ensued.
19. See *Murphy v Culhane* [1977] 1 QB 94, 98.
20. See T Weir *A Casebook on Tort* 4th edn (London: Sweet & Maxwell, 1979) 257.
21. P G Heffey "The Negligent Infliction of Nervous Shock in Road and Industrial Accidents" (1974) 48 ALJ 196, 204 and F A Trindade "The Principles Governing the Recovery of Damages for Negligently caused Nervous Shock (1986) 45 CLJ 476.
22. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
23. (1976) 136 CLR 529.
24. *Ultramares Corporation v Touche* (1931) 174 NE 441 Cardozo J, 444.
25. [1978] AC 728, 752.

whether, in addition to reasonable foreseeability, there were "any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed" only resulted in a further expansion of duty situations, as the two stage test was interpreted by some judges as *requiring* a duty to be created if the requirement of foreseeability was present, unless the defendant could produce good policy reasons why a duty of care should not come into being. In Australia, the High Court judges in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[26] ("*Caltex*") each attempted to formulate general principles which, apart from foreseeability, would limit the persons, or class of persons, to whom a duty of care may be owed in respect of pure economic loss. Although the approaches of the various members of the High Court in *Caltex* have been vigorously criticised by English judges,[27] the High Court in *San Sebastian Pty Ltd v Minister Administering the Environmental Planning & Assessment Act 1979*[28] ("*San Sebastian*") has rightly pointed out that "the critics have themselves been unable to offer a solution to the problem". It should be noted that in *Caltex* Stephen J expressed the view that "in the general realm of negligent conduct it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity between tortious act and compensable detriment".[29] Stephen J was clearly not formulating in *Caltex* a notion of proximity which would act as a unifying rationale of particular limiting propositions of law which might otherwise appear to be disparate in the law of negligence. He was merely attempting to formulate a generalised principle which would govern recovery for pure economic loss. Nevertheless, it may well be the case that his Honour's judgment in that case was influential in sowing the seed[30] for the development by Deane J of his wider or extended notion of proximity and the consequent conceptually difficult structure with which we now have to contend.

The first formulation of that new and conceptually difficult structure is found in the judgment of Deane J in *Jaensch v Coffey*[31] (a case of nervous shock suffered by a wife who though not present at the scene of an accident involving her husband was present at its aftermath) where his Honour for the

26. Supra n 23.
27. See *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, 532–533; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 23–26; *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* (1985) 1 QB 350, 395–396; [1986] AC 785.
28. (1986) 162 CLR 340, 354.
29. Supra n 23, 575.
30. Deane J was counsel in *Caltex* for the respondent dredge.
31. (1984) 155 CLR 549, 578–611.

first time expounded his notion of "proximity" or "relationship of proximity" as a test for determining the existence of a duty of care in negligence, in addition to the test of reasonable foreseeability. Deane J indicated that he was using those terms as "designating a separate and general limitation upon the test of reasonable foreseeability in the form of relationships which must exist between plaintiff and defendant before a relevant duty of care will arise".[32] Although His Honour, either through excessive humility or because of a natural judicial instinct to rely on precedent where it is at all possible to do so, found support for his notion of proximity in what he described as "Lord Atkin's requirement of 'proximity' of relationship",[33] and repeated reference to proximity as a touchstone for determining the existence and content of any common law duty of care to avoid reasonably foreseeable injury of the type sustained",[34] it may with truth be said that his general and wider[35] notion of proximity in the law of negligence, as a unifying rationale of particular limiting propositions of law which might otherwise appear to be disparate, is very much an indigenous creation. Although Deane J expounded this wider notion of proximity for the first time in *Jaensch v Coffey*, it has subsequently been repeated by him, with varying degrees of refinement, in several decisions and has ultimately been accepted by the High Court (with the exception of Brennan J) in *San Sebastian*.[36] What is this requirement of proximity which the High Court (with the exception of Brennan J) appear to require in addition to reasonable foreseeability before they will acknowledge the existence of a duty of care? The requirement is best described by Deane J himself in *Sutherland Shire Council v Heyman*:

> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and

32. Id, 584.
33. Id, 583.
34. Id, 582–583 and the cases there cited by Deane J.
35. As distinct from his narrower notions of physical, circumstantial and causal proximity.
36. Supra n 28.

> the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case. That does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances. The requirement of a relationship of proximity serves as a touchstone and control of the categories of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable' ... or from the considerations of public policy which underlie and enlighten the existence and content of the requirement.[37]

If you do not completely understand what this home-grown concept of proximity means take comfort from the fact that we were warned by Robert Goff LJ (as he then was) in *Leigh and Sillivan v Aliakmon Shipping Co Ltd* that once "proximity is no longer treated as expressing a relationship founded simply on foreseeability of damage, it ceases to have an ascertainable meaning; and it cannot therefore provide a criterion for liability".[38] Deane J in *Heyman*, while acknowledging "an incontestable element of truth in that statement in that the notion of proximity is obviously inadequate to provide an automatic or rigid formula for determining liability", went on to say that he did not think "that either the validity or the utility of common law concepts or principles is properly to be measured by reference to whether they can be accommodated in the straightjacket of some formularised criterion of liability". For his Honour, it has been "the flexibility of fundamental concepts and principles which has enabled the common law to reflect the influence of contemporary standards and demands and which has in no small part underlain its genius to provide a living element of the social compact of civilisation for different peoples through different ages and in different parts of the world." His Honour takes the position that to dismiss the general conception of proximity "on the ground that it does not provide a 'criterion of liability' or on the ground that it lacks 'ascertainable meaning' is ... to ignore its importance as the unifying rationale of particular propositions of law which might otherwise appear to be disparate".

Those who remain unconvinced by Deane J's notion of proximity as a "touchstone and control of the categories of case in which the common law

37. (1984) 157 CLR 424, 497–498.
38. [1985] QB 350, 395.

will adjudge that a duty of care is owed",[39] and who have difficulty in applying this concept of proximity to the facts of a particular case, can take heart from the fact that Brennan J remains similarly unconvinced. As he said in *Hawkins v Clayton*:

> Lacking the specificity of a precise proposition of law, the wider concept (of proximity) remains for me a Delphic criterion, claiming an infallible correspondence between the existence of the 'relationship of proximity' and the existence of a duty of care, but not saying whether both exist in particular circumstances.[40]

For Brennan J, "it is preferable for the law to develop new categories of negligence incrementally and by analogy with established categories, for the established categories provide firm evidence of the kinds of factors which condition the existence of the various categories of duties. It is one thing to speak in general terms about the considerations which affect the development of the law; it is another to define the law as developed. In a novel category of case, when it appears that the proposed duty depends on some factor additional to reasonable foreseeability of loss, the additional factor must be identified."[41]

Despite Brennan J's persistent criticism of Deane J's extended concept of proximity, the concept appears to have the support of a majority of the members of the High Court and so duties of care must be developed using his difficult, wider concept of proximity, which not only includes within its conceptual basket his narrower notions of proximity (physical, circumstantial and causal) but also notions of what is fair and reasonable as well as considerations of public policy.[42] However, there are signs on the horizon that that support might not be as solid as it was before the decision of the High Court in *Gala v Preston*.[43]

In that case, the plaintiff and the defendant consumed the equivalent of 40 Scotches in a Maryborough hotel during the course of an afternoon, stole a car and drove North sharing the driving. About four hours after they began their drunken journey the car veered off the road and struck a tree causing the plaintiff to be injured. Subsequently both the plaintiff and defendant were convicted of the theft and unlawful use of a motor vehicle contrary to section 408A of the Criminal Code 1899 (Qld). The plaintiff sued the defendant in negligence in respect of his personal injuries. At first instance, judgment was

39. Supra n 37, 498.
40. (1988) 164 CLR 539, 555–556.
41. Id, 556.
42. See *Sutherland Shire Council v Heyman* supra n 37, 497–498.
43. (1991) 172 CLR 243.

entered against the plaintiff on the ground that the plaintiff and the defendant were engaged in a joint illegal enterprise in which the standard of care owed by the defendant to the plaintiff could not be determined. On appeal, the Full Court of the Supreme Court of Queensland held that a standard of care could be determined, the ordinary duty of care applied and the only reasonable inference from the facts was that the defendant had breached that duty of care. The High Court, in allowing an appeal from the Full Court's decision, held unanimously that the defendant as driver of the car owed no duty of care to the plaintiff as his passenger.

A majority of the High Court (Mason CJ, Deane, Gaudron and McHugh JJ) held the defendant owed the plaintiff no duty of care using Deane J's wider concept of proximity. As their Honours expressed it: "When attention is given to the circumstances of the present case it is difficult to see how they can sustain a relationship of proximity which would generate a duty of care".[44] Their Honours did not specifically identify the consideration or considerations which negated the duty of care, preferring merely to say that "in determining whether the requirement of proximity is satisfied in a particular category of case in a developing area of the law of negligence, the relevant factors will include policy considerations. Where, as in the present case, the parties are involved in a joint criminal activity, those factors *will include* the appropriateness and feasibility of seeking to define the content of a relevant duty of care".[45]

Brennan J (as was to be expected) rejected that approach. As his Honour pointed out,[46] in this case the parties were driver and passenger in a car and there are few more familiar examples of a proximate relationship.[47] If the relationship is to be held not to give rise to a duty of care:

> [I]t must be on account of some consideration which can, and should, be identified. One may say that that consideration denies to the relationship of driver and passenger the character of proximity and that accordingly no duty of care arises. Or one may say directly that that consideration precludes a duty of care from arising. Whether the

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44. Id, 254.
45. Id, 253 (emphasis added).
46. Id, 261.
47. Note that in *Sutherland Shire Council v Heyman* supra n 37, 441–442 Gibbs CJ said "no trial judge need inquire for himself whether one motorist on the highway owes a duty to another to avoid causing injury to the person or property of the latter, or what is the scope of that duty". Note also that in *March v E & M H Stramare* (1990) 171 CLR 506, 520 Deane J said "it is clear that the second respondent was in a relationship of proximity with other users of the road on which he left the truck". Thus, to leave a truck carelessly on the road clearly brings about a relationship of proximity but driving a car carelessly on the road may not, as Deane J held in *Gala v Preston* supra n 43.

> proposition be put in one way or the other, 'proximity' is surplus to the reasoning.... Better to identify the consideration which negates the duty of care than simply to assert an absence of proximity.[48]

For Brennan J that consideration was that the normative influence of section 408A of the Criminal Code 1899 (Qld) would be destroyed by admitting a duty of care in the circumstances of this case. Toohey and Dawson JJ also identified the considerations which for them negated the existence of a duty of care. Toohey J held a duty of care not to exist, not because of the difficulty of defining a standard of care, but because of the joint participation by the parties in the criminal activity which resulted in the injury.[49] Dawson J held that there was no duty of care because the law refuses to set a standard of care and hence to erect a duty where to do so would be to condone a breach of the criminal law by granting a civil remedy. In a case like *Gala v Preston*, Dawson J thought it was necessary to seek what lay behind the law's reluctance to set a standard of care to be observed by the participants in a joint criminal enterprise. In such an exercise his Honour said that he did not derive "any great help from the notion of proximity as it has been developed in recent decisions of this court".[50] As the relationship of driver and passenger is in other circumstances a textbook example of a proximate relationship Dawson J thought that it was important to identify the underlying principle why the law did not recognise a duty of care in the circumstances in which the plaintiff sustained his injuries in this case; "merely to describe it as a matter of proximity is to mask the problem."[51] Without suggesting that the application of the test of proximity produces capricious or arbitrary results, Dawson J went on to say that he thought "it may be going too far to say, as Deane J does in *Stevens v Brodribb Sawmilling Co Pty Ltd*,[52] that 'the notion of proximity can be discerned as a unifying theme explaining why a duty to take reasonable care to avoid a reasonably foreseeable risk of injury has been recognised as arising in particular categories of case'".[53]

I think it is fair to say from an analysis of this judgment that three of the seven judges in *Gala v Preston* rejected the value of using Deane J's wider notion of proximity preferring to base their decision to refuse to erect a duty of care in that case on clearly articulated principles of policy. This is clearly

48. Supra n 43, 261.
49. Toohey J held that the decision of the High Court in *Smith v Jenkins* was sound law and could not be distinguished on the facts in *Gala v Preston* id, 292.
50. *Gala v Preston* id, 276.
51. Id, 277.
52. (1986) 160 CLR 15.
53. Id, 52.

the correct approach because, to pose a hypothetical problem, if the plaintiff in *Gala v Preston* had chosen to bring his action in the tort of negligent trespass rather than the tort of negligence, the judges who relied on the notion of proximity would not have been able to hide behind the mask of proximity (to use Dawson J's words in *Gala v Preston*)[54] and would have been forced to articulate their policy reasons for denying recovery to the undeserving plaintiff. It is unnecessary to point out that in Australia at the present time,[55] unlike in England,[56] the tort of negligent trespass is still available for injuries which are caused directly and negligently. The High Court in *Williams v Milotin*[57] decided that the plaintiff, who was struck from behind by a motor truck while riding a bicycle along a public road and who relied upon the negligence of the defendant to bring an action, could lay his cause of action either as a negligent trespass to the person or as an action for the tort of negligence. In actions for negligent trespass "duty" questions are irrelevant and the notion of "proximity" for solving questions of liability would consequently also be irrelevant. In those actions for personal injuries which can be brought either as an action in negligent trespass or as an action in the tort of negligence, the notion of proximity in its wider sense is unlikely to provide a working criterion of liability as its use could so easily be prevented by the plaintiff. It might be wise, therefore, not to attempt to shoehorn actions for personal injuries as in *Gala v Preston* into Deane J's extended notion of proximity just for the sake of theoretical consistency (as the majority attempted to do in that case) but to confine that notion only to cases involving recovery of damages for pure economic loss and cases involving damages for nervous shock. This appears to be Dawson J's suggestion in *Gala v Preston*.[58] Whether the judgments of Brennan, Dawson and Toohey JJ in *Gala v Preston* have effectively undermined Deane J's "fundamentally imprecise" notion of proximity, or whether Deane J will continue to "define its imprecision with ever increasing precision",[59] and whether His Honour will be able to carry a

54. Supra n 43, 277.
55. Trindade & Cane supra n 2, 2nd edn, 312–323 and F A Trindade "Some Curiosities of Negligent Trespass to the Person" (1971) 20 ICLQ 706.
56. In *Letang v Cooper* [1965] 1 QB 232, 239 the English Court of Appeal decided that an action in negligent trespass was no longer available at the present time for direct injuries caused by carelessness or negligence.
57. (1957) 97 CLR 465. See also *Venning v Chin* (1974) 10 SASR 299; *McHale v Watson* (1964) 111 CLR 384; *Shaw v Hackshaw* [1983] 2 VR 65 and *Timmins v Oliver* (unreported) NSW Court of Appeal 12 Oct 1972.
58. Supra n 43.
59. See M Davies *Torts* (Sydney: Butterworths, 1992).

majority of the High Court with him, should become apparent in the decisions of the High Court in the next year or two.

Meanwhile it is important to remember that general tests for determining the existence of a duty of care in negligence have had a limited shelf-life. The "neighbour" test based on reasonable foreseeability alone, considered by many to be the test propounded by Lord Atkin in *Donoghue v Stevenson*,[60] was overtaken by the two-stage test of reasonable foreseeability *and* policy considerations (which restrict the scope of the duty which would otherwise be created by the use of foreseeability alone) propounded by Lord Wilberforce in *Anns*.[61] That two-stage test was rejected by the House of Lords in *Murphy v Brentwood District Council*[62] and by the High Court in *Sutherland Shire Council v Heyman*.[63] In England, the two-stage test has been replaced by a test which seems to require that, in addition to foreseeability and proximity, "the situation be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other".[64] The House of Lords acknowledges in *Caparo* that "there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability".[65] The House of Lords has accepted the view of Brennan J of the High Court that the law should develop novel categories of negligence incrementally and by analogy with established categories.[66] In Australia, however, Brennan J's view remains the minority view as long as Deane J's extended concept of proximity holds sway. This is despite the fact that practitioners, academics and possibly even judges find great difficulty in understanding how it should be applied.[67] However, as McHugh J, in an extra-curial observation before he became a member of the High Court, has said,

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60. [1932] AC 562, 580.
61. Supra n 25, 751–752.
62. [1991] 1 AC 398.
63. Supra n 37, 481, 505-508.
64. See *Caparo plc v Dickman* [1990] 2 AC 605, 617–618. This has led one writer to suggest that in England there is now a 3 stage test for the existence of a duty of care. See Tan Keng Feng "The Three-Part Test: Yet another Test of Duty in Negligence" (1989) 31 Malaya Law Review 223.
65. *Caparo plc v Dickman* id, Lord Roskill, 628.
66. Id, Lord Bridge, 618; Lord Roskill, 628.
67. For the view that legal practitioners have difficulty in understanding how to apply the extended notion of proximity, see M H McHugh "Neighbourhood, Proximity and Reliance" in P D Finn (ed) *Essays on Torts* (Sydney: Law Book Co, 1989) 5, 6.

"the history of general formulae in the field of duties of care serves as a warning that the present domination of the proximity notion may not last."[68] Considering that McHugh J was one of the four judges who constituted the majority in *Gala v Preston*, one might reasonably conclude that support on the High Court for Deane J's extended notion of proximity may well be fragile.

NEGLIGENCE: STANDARD OF CARE

Having discussed the scope of the duty of care, I should like now to consider the content of that duty, which is commonly referred to as "the standard of care". The question here is, assuming that the plaintiff is owed a duty of care by the defendant, what is the standard of care which the defendant must achieve if he is to be adjudged not to be in breach of his duty of care. That standard, expressed as a matter of law, is "the standard of the reasonable man", the court concerning itself more with the question of what a reasonable man would foresee, and a reasonably careful man do in the circumstances confronting the defendant, rather than with the question of the actual foresight and capacity of the particular defendant to respond to the reasonably foreseeable and real risks of injury created by his conduct. It is because of this that the standard of care has been described as objective and impersonal.

A good illustration of this is provided by the English decision in *Nettleship v Weston*[69] which was an action by a driving instructor against his pupil. On the third lesson, the pupil drove carelessly and injured the driving instructor. What was the standard of care required of the learner driver to her driving instructor (and to passengers in the car or pedestrians and other motorists on the road)? The Court of Appeal decided that the standard of care which the learner driver must attain in relation to all these categories of persons was exactly the same. As Lord Denning MR said: "He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing and is free from any infirmity."[70] His Lordship added: "The learner driver may be doing his best, but his incompetent best is not good enough."[71] The Court of Appeal was referred to a judgment of Dixon J (as he then was) in *The Insurance Commissioner v Joyce*[72] (*"Joyce"*) in which His Honour

68. Ibid.
69. [1971] 2 QB 691.
70. Id, 699.
71. Ibid.
72. (1948) 77 CLR 99.

had formulated a varying standard of care depending on the plaintiff's knowledge of the defendant's skill and competence; but this notion was rejected by Lord Denning MR on the ground that "it would result in endless confusion and injustice".[73]

The notion of varying standards in relation to the duty of care has, however, recently been resurrected and accepted by the High Court in *Cook v Cook*,[74] thereby creating a further divergence between the English and Australian law of torts. In that case, the plaintiff and defendant were in the defendant's husband's company car which the plaintiff was driving with the defendant's husband's permission. In the course of casual conversation the defendant informed the plaintiff that she intended to apply the next day for a learner's permit. The plaintiff immediately stopped the car and said to the defendant, "If you are going to drive you may as well start now". The defendant said, "I should wait, I think" but the plaintiff told her not to be "stupid". The plaintiff then persuaded the defendant to get into the driver's seat, got herself into the passenger seat, and told the defendant to drive off. The defendant drove the car into a concrete electricity pole and the plaintiff sustained injuries for which she brought the action. The facts disclosed that the defendant, faced with an obstacle, deliberately accelerated instead of stopping, an act described by counsel for the defendant as reflecting stupidity associated with inexperience. The trial judge found that the defendant's fault "lay in inexperience and not in carelessness" and dismissed the plaintiff's claim. On appeal to the Full Court of the Supreme Court of South Australia, King CJ decided that in the "quite exceptional" circumstances of the case the standard of care required of the defendant was that reasonably to be expected not of a qualified and experienced driver but of a driver who was "almost totally devoid of driving skill and experience". The remaining judges (Matheson and Johnstone JJ) decided to apply the standard required by Lord Denning MR in *Nettleship v Weston*, the ordinary standard of care measured objectively by the care to be expected of an experienced, skilled and careful driver. They allowed the plaintiff's appeal but reduced her damages by 70 per cent for contributory negligence. The High Court, assisted no doubt by the burgeoning notion of proximity being developed by a majority of their number, decided that King CJ's approach based on Dixon J's approach in *Joyce* was to be preferred, but nevertheless dismissed the appeal.[75] All the

73. Supra n 69, 700.

74. (1986) 162 CLR 376.

75. On the ground that even though the High Court agreed with King CJ's approach to the law, they thought the majority in the Full Court of the Supreme Court of South Australia had

judges decided that the English Court of Appeal's decision in *Nettleship v Weston* should not be followed and that the variable standards approach of Dixon and Latham JJ in *Joyce* should be adopted. As the High Court said:

> While the personal skill or characteristics of the individual driver are not directly relevant to a determination of the content or standard of the duty of care owed to a passenger, *special and exceptional facts* may so transform the relationship between driver and passenger that it would be unreal to regard the relevant relationship as being simply the ordinary one of driver and passenger and unreasonable to measure the standard of skill and care required of the driver by reference to the skill and care that are reasonably to be expected of an experienced and competent driver of that kind of vehicle.[76]

Might this mean that in the drink-driving cases the standard of skill and care required of the drunk driver might be adjusted if the knowledge of his state of intoxication is known to his passenger (assuming that these are regarded as special and exceptional facts by the court)? This would appear to follow from the following statement in *Cook v Cook*:

> Assuming that the requirement of proximity remains satisfied, the standard of care, while remaining an objective one, must be adjusted to the exigencies of the relevant relationship in that it will be the degree of care and skill reasonably to be expected of the hypothetical reasonable person of the law of negligence projected into that more precisely confined category of case.[77]

Presumably then, a driver who drinks 10 Scotches with a passenger who joins him in every drink in the pub before they embark on their journey,[78] and who drinks only three Scotches with his second passenger who arrives later and who has not fully assessed the driver's drunken state,[79] and who picks up as his third passenger a hitchhiker with whom he does not have a drink at all (and who does not detect the driver's drunken state) may owe a different standard of care to each of his three passengers injured by the very same act of careless driving which has caused the very same accident. It is also possible that if the passenger who consumed 10 Scotches was too drunk to realise that he was accepting a lift from the drunken driver, he might be owed a higher standard of care than the passenger who had only drunk three Scotches and

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> come to the correct conclusion on the facts because, even though the standard of an inexperienced driver applied to the defendant, her act of deliberately accelerating to avoid an object in the path of the vehicle she was driving involved an element of carelessness over and above what could be attributed merely to inexperience.

76. Supra n 74, 383 (emphasis added).
77. Id, 383-384.
78. As in *Gala v Preston* supra n 43.
79. As in *O'Shea v The Permanent Trustee Co of NSW Ltd* [1971] Qd R 1 and *Radford v Ward* (1990) Aust Torts Rep ¶81-064.

the hitchhiker who had consumed no alcohol, if they at some stage fully appreciated the drunken state of the driver and took no reasonable action to remove themselves from the vehicle after that appreciation.[80]

These are not easy questions. Murphy J asked in *Radford v Ward*,[81] "how much alcohol — or how much stagger — would be sufficient to take the case out of the ordinary and make the circumstances special and exceptional? Some would say that anyone who voluntarily becomes or remains a passenger in a vehicle, and is driven by a driver who is known by the passenger to have been drinking, cannot complain if injured in an accident in which the driver is at fault. Could such circumstances be special and exceptional? If not, could they become so? If so, when? No yardstick is given by the High Court by which either judge or jury could measure what are facts which amount to special and exceptional circumstances". Murphy J also draws attention to the fact that from a practical point of view, "the measurement of the degree to which the driver was seen to be affected, and the parameters of the standard of care nonetheless appertaining in the circumstances, as well as the difficulties of an objective judgment whether or not the conduct causing the accident in the circumstances breached that lesser standard, would appear ... to introduce an air of complete unreality that should be avoided in this branch of the law". Murphy J felt that in the circumstances of *Radford v Ward*, where a drunken passenger with a blood alcohol reading of 0.07 per cent was injured by a drunken driver with a blood alcohol reading of 0.25 per cent, the application of the concept of varying standards makes the judge's task in charging the jury "almost impossible". Comments so far would seem to indicate that the concept of varying standards expounded in *Cook v Cook* needs refinement. Some judges, such as Murphy J, obviously believe that there is a danger that unless this is done, this concept might introduce chaos into the law of negligence.[82] These indigenous concepts obviously have problems of their own and one would have to admit that the introduction of the notion of proximity both in relation to the existence of a duty of care and in the elaboration of its content has involved serious difficulties.

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80. This is on the assumption that the courts using the wider proximity test of Deane J do not deny a duty of care to the passenger who has consumed 10 Scotches on an analogy with the plaintiff in *Gala v Preston* supra n 43. But can the court do so if the passenger does not know and appreciate the particular deficiency or incapacity of the driver.
81. (1990) Aust Torts Rep ¶81-064, 68,353.
82. Id, 68,352.

MEDICAL NEGLIGENCE: A SPECIAL CATEGORY

There is another aspect concerning the standard of care in negligence where the High Court has developed a view of its own and refuses to follow the decisions of English courts on the issue of determining medical negligence. As is well known, the standard of reasonable care and skill required of a medical practitioner is that of an ordinary, skilled medical practitioner exercising and professing to have that special skill; and a breach of the duty of care will occur if the medical practitioner falls below that standard. But how is the issue of breach of duty resolved in medical negligence cases? This point arose in *Rogers v Whitaker*[83] (*"Rogers"*) where the plaintiff, who went to the defendant ophthalmic surgeon for a routine procedure for possible improvement to her bad right eye (in which she had little sight due to a childhood accident), ended up by losing the sight in her good left eye as well due to a condition known as sympathetic ophthalmia. There was evidence that there was a one in 14 000 chance that such a result might occur but the patient did not ask (because she did not know of this possible risk) and the defendant did not inform her of this risk (even though he knew of it). The plaintiff's action against the defendant succeeded at first instance, then in the Court of Appeal of New South Wales and ultimately in the High Court. The High Court took the opportunity not only to state the law for Australia in relation to the scope and content of the duty of care which arises out of the doctor-patient relationship (particularly the content of the duty to provide information and advice concerning the risks of proposed medical treatment) but also to answer the difficult question whether a failure to warn of the risks of proposed medical treatment is to be regarded as a breach of duty, to be determined exclusively by reference to the current state of responsible and competent professional medical opinion, or whether the court can in appropriate circumstances demand a standard of care which is at variance with some body of responsible and competent medical opinion. Although what the High Court has to say about the content of the duty to provide information and advice concerning medical treatment is important and said in a very clear manner,[84] it is the Court's declaration that in appropriate circumstances a

83. (1992) 67 ALJR 47.

84. The court took the view that a doctor would breach his duty of care if he failed to warn a patient of a material risk inherent in the proposed treatment. The court said a risk is material if, in the circumstances of the particular case, a reasonable person in the plaintiff's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should be reasonably aware that the particular patient, if warned of the risk, would be likely to attach significance to it. See *Rogers* id, 52. The

court can demand a standard of care which is at variance with some body of responsible medical opinion that takes Australian law further away from English law. It is this view of the High Court that makes the *Bolam* principle inapplicable in Australia at least in cases of non-disclosure of medical risks. Under the *Bolam* principle, "a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the *standard* of care is a matter of medical judgment."[85] The effect of applying the *Bolam* principle is that if a medical practitioner can get a responsible body of medical opinion, however small, to say that the practice adopted by him was in their opinion one which could reasonably be followed, then the court should adjudge the medical practitioner not negligent even though a vast body of medical opinion might take the opinion that the practice should not be followed. The rationale of the *Bolam* principle is that in matters involving medical expertise there is ample scope for genuine difference of opinion and that a practitioner is not negligent merely because his or her conclusion or procedure differs from that of other practitioners. Of course, if the *Bolam* principle had been strictly applied in *Rogers* the plaintiff would in all probability have failed because even though there was evidence from a body of reputable medical practitioners that, in the circumstances of the case, they would have warned the plaintiff of the risk of sympathetic ophthalmia, there was also evidence from similarly reputable medical practitioners that they would not have given such warning. By abandoning the *Bolam* principle, the High Court, at least in relation to information and advice concerning medical treatment, is asserting the plaintiff's right to make a meaningful choice as to whether he or she will undergo a particular treatment or procedure. That choice says the High Court will become "meaningless unless it is made on the basis of relevant information and advice".[86] The High Court thought it was illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession because the choice to be made calls for a decision by the patient on information known to the medical practitioner but not to the

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doctor would not commit a breach of his duty if he could defend his non-disclosure on the ground of therapeutic privilege.

85. This is Lord Scarman's statement of the *Bolam* principle which is derived from the direction to the jury in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118. See *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871, 881.

86. See *Rogers* supra n 83, 52.

patient.[87] It is not without interest that in *Rogers* the trial judge accepted the evidence of the plaintiff that she would not have agreed to undergo the operation if she had been informed that there was a risk (even of one in 14 000) of losing the sight in her good eye and hence becoming totally blind —a result "except for death under the anaesthetic the worst possible outcome for the plaintiff".

The effect of the decision of the High Court in *Rogers* is that in relation to the provision of information and advice concerning the risks of proposed medical treatment, the courts will adopt the principle that, while evidence of acceptable medical practice "is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make his own decisions about his life'".[88] Whether the courts will go further and extend that principle so that, even in the case of diagnosis and treatment (as distinguished from information and advice concerning the risks of proposed medical treatment), evidence of acceptable medical practice will only act as a useful guide, allowing the courts to adjudicate on the appropriate standard of care, is something which is unclear. Certainly there are hints in the judgment in *Rogers*[89] that the High Court does not disapprove of decisions which "even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner" have not applied the *Bolam* principle. It is conceivable that if a case like *Mahon v Osborne*[90] (where a surgeon who put six surgical swabs into the patient's abdomen and only removed five after the operation with the result that the patient died three months later) were to come before the High Court, it is more than likely that the High Court would decide that the standard of care demanded of the surgeon is a question for the court and not to be determined exclusively by the practice of the medical profession. Regardless of whether that is right or not, two points are worth noting. First, that the decision in *Rogers* (and the decisions of the Australian State courts approved in *Rogers*) will be the decisions to turn to if we wish to seek guidance on the question of the standard of care required of medical practitioners in Australia. Secondly, that the abandonment of the *Bolam* principle which occurred first in Australia is almost certain to be followed soon in England.

87. Ibid.
88. Id, 51. See also *F v R* (1983) 33 SASR 189, 193.
89. Supra n 83, 51.
90. [1939] 2 KB 14.

CAUSATION: THE POLICY CONSIDERATIONS

Regrettably I can only deal briefly with the important and difficult decision on causation delivered by the High Court in *March v E & M H Stramare*.[91] In that case the majority of the High Court rejected the "but for"[92] test as the exclusive test for determining the question of whether the defendant's negligence was a "cause" of the plaintiff's loss or injury. Mason CJ, with whom Gaudron J agreed, said:

> The cases demonstrate the lesson of experience, namely, that the test, applied as an exhaustive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations.[93]

For Deane J "the question whether conduct is a 'cause' of injury remains to be determined by a value judgment involving ordinary notions of language and common sense".[94] Toohey J, after indicating that he shared the Chief Justice's view that the "but for" test is not and should not be a definitive test of causation where negligence is alleged, went on to say that: "Where negligence is an issue, causation is essentially a question of fact, in the sense explained by the Chief Justice, into which considerations of policy and value judgments necessarily enter".[95] Only McHugh J expressed the view that "now that legislation allows liability for damage to be apportioned in accordance with what the court thinks is just and equitable ... the preferable course is to use the causa sine qua non (or 'but for') test as the exclusive test of causation".[96]

In the subsequent decision in *Bennett v Minister of Community Welfare*,[97] Mason CJ and Deane and Toohey JJ (with whom Gaudron and McHugh JJ could be said to have agreed) stated:

> In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of common sense. In resolving that question, the 'but for' test, applied as a negative criterion of causation, has an important role to play but it is not a comprehensive and exclusive test of causation; value judgments and policy considerations necessarily intrude.[98]

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91. (1991) 171 CLR 506.
92. Or the "causa sine qua non" test as it is sometimes called.
93. Supra n 91, 516.
94. Id, 524.
95. Ibid.
96. Id, 534–535.
97. (1992) 107 ALR 617, 619.
98. Id, 631.

The notion of proximity has been used to obscure policy considerations when determining the existence and content of the duty of care. It is too early to say whether common sense notions of causation will be used to conceal these consideration in the same way. But it is certainly true that the "utilization of common sense notions of causation has the potential to conceal these considerations and their influence on judicial decision-making".[99]

The problem is further complicated by the fact that there might not be agreement (even between judges) as to what policy demands in the circumstances of a particular case. In *State Rail Authority of New South Wales v Wiegold*,[100] for example, the plaintiff, who was injured by the negligence of the defendant employer, while waiting to be compensated for that injury, was induced by his impecuniosity to cultivate and sell indian hemp. The offence was discovered and on conviction the plaintiff was imprisoned for nine months. He was also dismissed from the defendant's service as a result of his imprisonment and he lost significant accrued superannuation. The trial judge determined the question of causation by application of the "but for" test and concluded that the defendant's negligence "caused" the plaintiff to turn to crime and that as a consequence the fact of the plaintiff's conviction and sentence could be ignored in assessing his economic loss after release from prison. That decision was overturned on appeal by Samuels and Handley JJA who held that the issue of whether the defendant's negligence was a cause of the plaintiff's criminal conduct is to be determined (following *March v E & M H Stramare*) "not simply by reference to factual considerations, but also by reference to considerations of policy".[101] Those considerations of policy demanded that a defendant should not be held responsible for the losses a plaintiff sustains that result from "a rational and voluntary decision to engage in criminal activity".[102] Kirby P, on the other hand, would have dismissed the appeal because he did not think policy considerations prevented the plaintiff from recovering for the losses claimed. He said that "there is no single view in the Australian community concerning the moral disapprobation of the respondent's conduct in cultivating indian hemp ... Although the law speaks with a clear voice about the cultivation and supply of indian hemp, the repeated reports of discoveries throughout Australia of huge crops of the plant rather suggest widespread usage by many otherwise apparently law-

99. See N J Mullany "Common Sense Causation — an Australian View" (1992) 12 Oxford Journal of Legal Studies 431, 436.
100. (1991) 25 NSWLR 500.
101. Id, 511.
102. Id, 517.

abiding citizens."[103] Earlier Kirby P had said: "On the shifting sands of public policy, and without guidance of plain speaking or binding authority, there is much room for difference of judicial opinion."[104] This appears to leave us with the conclusion that just as uncertainty has been created by the High Court in relation to the questions of the existence and content of the duty of care in negligence by the notion of proximity, so also uncertainty on the question of causation has been created by the decision of the High Court in *March v E & M H Stramare.*[105]

OTHER MAJOR DECISIONS

It is an impossible task to consider all the important decisions of the High Court in the law of torts, even if one confines the discussion to the last 30 years. This court is a very strong and active one and even the introduction of the leave to appeal procedure does not seem to have diminished its output by way of judgments on the law of torts.[106]

The important decision of the High Court in *Australian Safeway Stores v Zaluzna*[107] has revolutionised the law concerning the liability of occupiers to entrants on their land. The old categories of entrants and the varying duties owed by the occupier depending on the category of entrant are no longer relevant. "All that is necessary [now] is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff".[108] This simplification of occupier's liability[109] is complicated by the fact that there is much legislation in Australia on the liability of occupiers and so the principle enunciated in *Zaluzna's* case will only have an effective

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103. Id, 505.
104. Ibid.
105. Supra n 91.
106. Appeals in tort cases recently decided by the High Court include: *Burnie Port Authority v General Jones Pty Ltd* (1991) Aust Torts Rep ¶81-128; *Nagle v Rottnest Island Authorities* (1991) Aust Torts Rep ¶81-090; *Pervan v The North Queensland Newspaper Co Ltd* (1991) Aust Torts Rep ¶81-119 and *Stevens v Head* (1991) Aust Torts Rep ¶81-130.
107. (1987) 162 CLR 479.
108. Id, 488. The quote is from Deane J's statement in *Hackshaw v Shaw* (1984) 155 CLR 614, 663.
109. The principle enunciated in *Aust Safeway Stores v Zaluzna* supra n 107 was not intended, it seems, to apply to contractual entrants: see *Calin v Greater Union Organisation* (1991) 173 CLR 33, 38.

operation to the extent that the situation is not covered by legislation.[110] English law has not had anything as revolutionary as the decision in *Zaluzna* even though the decisions of the English courts are probably building up towards a similar approach.

I should have liked to have dealt with the High Court's bold attempt in *Atlas Tiles Ltd v Briers*[111] ("*Atlas Tiles*") not to follow the decision of the House of Lords in *British Transport Commission v Gourley*[112] ("*Gourley*"), which requires a court to take into account the income tax which the plaintiff would have had to pay on the earnings of which his injuries had deprived him, and the extraordinary volte face in *Cullen v Trappell*[113] just a year later where by a majority decision of four to three, the High Court decided that they should apply *Gourley* in preference to their own decision in *Atlas Tiles*. I must confess a certain sympathy with the judgment of Barwick CJ in *Atlas Tiles* who felt that there should be no reduction in damages because of liability to taxation on taxable income and that it should be left to the legislature "to determine whether, and if so, to what extent damages awarded for personal injuries should be included in assessable income.[114] Gibbs J (as he then was) thought it was fallacious to say that the defendant receives a windfall at the expense of the Commissioner of Taxation because "the question is what damages will compensate the plaintiff for his loss".[115] But is an injured plaintiff who never gets the chance of reducing his taxable income perhaps by charitable donations which might have the effect of increasing his standing in the community (which is the effect of *Gourley's* case) being fully compensated for his loss?

Equally disappointing in my view is the decision of the High Court in the *State Government Insurance Commission v Trigwell*,[116] where a majority held that the rule in *Searle v Wallbank* (that an owner or occupier of land adjoining a highway owes no duty to users of the highway to fence or in other ways prevent his animals from straying onto the highway) was part of the law of South Australia and, by implication, of general application in Australia, except to the extent that the rule had been varied or abolished by subsequent State legislation. I should have thought that the High Court would have

110. For possible future problems see Trindade & Cane 2nd edn, supra n 2, 386–399.
111. (1978) 144 CLR 202.
112. [1956] AC 185.
113. (1980) 146 CLR 1.
114. Supra n 111, 212.
115. Id, 222–223.
116. (1979) 142 CLR 617.

accepted the argument of counsel for the appellant (and in 1993 it probably would have done so) that the Court should declare that the rule does not represent the law in Australia on the general ground that it is unsuited to modern conditions and that the position therefore should be governed by the ordinary principles of negligence. A formidable argument for the abandonment of the rule would have been that the common law development of the rule had been statutorily sterilised in England by the enactment of the Animals Act 1971 (UK) and that it was therefore impossible to say what the common law rule would have been if the House of Lords had had a recent opportunity to reappraise it. The rule has now been abolished in almost every State and Territory of Australia, but the decision in *Trigwell* remains, perhaps as a reminder that the High Court has on occasions made what Murphy J, in his vigorous dissenting judgment in *Trigwell*, has described as "overly mechanical applications of English precedents".[117]

That can certainly not be said in relation to one aspect of the burden of proof in negligence where the High Court has explicitly departed from its English origins and developed an approach of its own. In cases where the doctrine of res ipsa loquitur applies,[118] the Australian courts[119] have taken the view, contrary to the courts in England,[120] that the legal burden of proof on the issue of negligence does not shift from the plaintiff, who normally bears it, to the defendant.[121] The only effect of raising res ipsa loquitur in Australia is that, if the defendant does not explain the accident in a way which is consistent with the absence of negligence on his part, the jury *may* regard the defendant as negligent without any further evidence. However, if a jury decides in favour of the defendant (even without any explanation or further evidence from the defendant) such a verdict will not be regarded as perverse in Australia. In England, however, such a verdict will be regarded as perverse as the effect of raising res ipsa loquitur in English courts is to shift the legal burden of proof on the issue of negligence from the plaintiff to the defendant.

117. Id, 650.

118. See *Lambos v The Commonwealth* (1967) 41 ALJR 180, Barwick CJ, 182, "An accident will itself provide evidence of negligence where in the ordinary affairs of mankind such an incident is unlikely to occur without want of care on the part of the person sued".

119. See *Nominal Defendant v Haslbauer* (1967) 111 CLR 448. See also the earlier cases of *Anchor Products Ltd v Hedges* (1966) 115 CLR 493; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 and *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200.

120. See *Swan v Salisbury Construction Co Ltd* [1966] 2 All ER 138 and the earlier decision in *Barker v South Wales Transport Co Ltd* [1949] 1 KB 54.

121. The position in trespass cases is different. See Trindade & Cane 2nd edn supra n 2, 24–25, 316–320 and F A Trindade "Some Curiosities of Negligent Trespass to the Person" (1971) 20 ICLQ 706.

An evaluation of these differing approaches has been made by a distinguished English critic then resident in Australia.[122]

LINKS AND DIVERGENCES

The purpose of this article has been to indicate the extent to which the law of torts in Australia, though having its origin and roots in English law, has diverged from its source so that it can truly be said that we have an Australian law of torts. The emphasis has been on the role of the High Court in that process, particularly in the last 20 to 30 years, as that has been the period during which almost all the significant decisions which emphasise that divergence have been delivered. It is arguable, however, that the direction of Australian thinking encapsulated in several of those decisions was set at a much earlier date. That in itself may well provide a further topic for fruitful research. Although I have indulged in the luxury of picking and choosing from the numerous decisions of the High Court on the law of torts delivered during those two to three decades I hope that I have not overlooked any decisions of great significance. My concentration on the decisions of the High Court is not only due to the focus of this Symposium but also because of the forceful reminder by Brennan J in *Mabo*[123] that the ultimate responsibility for declaring the common law of Australia (including the law of torts) rests with the High Court. This is not to say that the decisions of the State courts are without significance. On the contrary, the learning to be found, particularly in the law of torts, in the decisions of the Supreme Courts of the States is, in my opinion, a fertile source of inspiration for many of the judgments of the High Court. The recent decision of the High Court in *Rogers*,[124] for example, owes much to the approach of King CJ in his dissenting judgment in *F v R*[125] and the various decisions of State courts which followed that decision.[126] Nor do I believe that decisions (both recent and less recent) of the English courts in the area of torts are without significance in Australia today. There is no doubt that decisions of the English courts will continue to play an important role in the development of an Australian law of torts, particularly on issues where there are no relevant decisions of Australian courts to guide us.

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122. See P S Atiyah "Res Ipsa Loquitur in England and Australia" (1972) 35 Mod LR 337.
123. *Mabo v State of Queensland [No 2]* supra n 3, 18–19.
124. Supra n 83.
125. Supra n 88, 192–194.
126. See *Rogers* supra n 83, 51 fn 32.

As the High Court indicated in *Cook v Cook*,[127] "the history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of English courts just as Australian courts benefit from the learning and reasoning of other great common law courts."[128] This should ensure, even if the temptation is there, that "judicial nationalism"[129] will not flourish in Australia and that the Australian law of torts will never be preserved in an aspic of xenophobia.

127. Supra n 74, 390.

128. Even though I have ignored the influence of the decisions of New Zealand courts on the law of torts in Australia in this paper it is only because the general thrust of this paper makes that a side issue. I am sure that Australian lawyers generally acknowledge the valuable contribution made to the Australian law of torts by the courts of New Zealand.

129. See Sir Anthony Mason "The Tort Law Review" (1993) 1 Tort L Rev 5, where he concludes his survey with the words 'it is to be hoped that contributors to the Tort L Rev will be willing to take note of developments in other countries with a similar legal heritage to our own and to consider how these developments may be turned to account in Australia.'