

Legal Reasoning in Tort Law

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Summary

The positivist perspective on law as a system of rules, together with a conventional view of legal decisions as possessed of binding force, does not well characterise the reasoning process in tort law. Rather the history of the case-law displays often the importance of the influence of principle and policy on the process of decision-making, and the direction of the law. Very rarely can tort law be seen to represent the consistent application of rules together with a stipulated outcome.

The key starting-point for a line of common-law development in tort, which must be a product of policy, is the creation of a category of liability. Thereafter, influences on the further development of the law are variable. But it is a complex process in which subsequent decisions realistically have to be seen as creatively adding to the story as law in action, rather than as themselves determined by the precedent.

Statement of Authorship

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person's work has been used without due acknowledgment in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

Signed KA Warner

Dated 19 April 2013

Chapter One

Theoretical Perspectives

There is a story concerning a horse which was in the habit of obscuring itself in bushes and whimsically chasing somebody who happened to be passing through the field where it was pastured. On one occasion it suddenly emerged and knocked down a passing cyclist, injuring him. The question is whether the keeper of the horse would be legally responsible. For the keeper, the argument goes, that his horse properly belongs in the domesticated class of beast. This means that liability can follow only provided the defendant had some reason to appreciate that his horse was possessed of this peculiar and dangerous propensity, or was in some other way in the circumstances said to be negligent.¹ For the cyclist the argument is that it is appropriate to take into consideration the behaviour of the horse. By launching itself and making contact with the cyclist the horse is, in effect, a missile, and if the defendant assumes control of a dangerous missile, the defendant ought to be held strictly liable for the damage it does.² From here, the expectation is that once we have decided which is the proper category to proceed with, the reasoning process takes a relatively objective course, for in a common-law system the outcome can be justified by reference to the practice of precedent.³

¹ Cf *McLean Pty Ltd v Meech* [2005] VSCA 305.

² On torpedoes, *obiter*, see *Cadillac v Johnson* 221 Fed 801, 803 (1915).

³ In defence of the story, in the context of 'inherently dangerous things' in *MacPherson v Buick* 217 N.Y. 382 (1916) the court had been invited to consider that, since it was propelled by explosive gases, an automobile was more like a locomotive engine than a wagon. Occasionally we can see that a party is prepared to make an argument that appears to be borne more of hope than conviction, and sometimes this is productive of little more than some degree of confusion. In the much more modern case of *Tutton v A D Walter* [1975] 3 All ER 757 the defendant farmer was found to be negligent in spraying his wheat crop with a chemical insecticide, in the clear knowledge that this would be harmful to his neighbour's bees, when they landed on the crop to pollinate it. He could have sprayed at another time of year when they would not be present doing that. The defendant contended that the bees fell into the class of trespasser. This didn't really matter. The learned judge observed that on the older authorities they properly would have fallen into the class of invitee. But that doesn't matter anyway because the bees weren't suing. The bee-keeper was suing and his action was one for property damage. The real question was whether he was foreseeable as affected by the risk posed by the defendant's conduct. He was.

Again, consider *Hynes v New York Central Railroad Co.*⁴ Sixteen year-old Harvey Hynes, in the company of two young friends, swam across from Manhattan to the Bronx side of the Harlem River, a navigable stream and a public highway. The defendant railroad company operated its trains at the Bronx side of the river, along which it enjoyed a right of way, and had placed poles and cross-arms bearing the high tension wires which provided power to the trains. Boys in the neighbourhood habitually swam in this part of the river in summer and used a plank fixed at the water's edge on the Bronx side as a makeshift springboard. This springboard had been in existence for at least five years. It was held down on the bank by a rock and by nails driven through one end of it into the railroad company's bulkhead at the river bank. It projected a further seven and a half feet beyond the bulkhead over the river, to a height of five feet above the river at its outermost point, from which the swimmers would dive or jump into the river. On the fatal occasion giving rise to the case, one of Harvey's companions had just taken the standard plunge from the end of the springboard into the water below, and Harvey made his way in turn to the end of the springboard. At that moment one overhead cross-arm collapsed, bringing down electric cables which struck Harvey and hurled him, together with the smashed springboard, to his death in the Harlem River. For want of maintenance the cross-arm had decayed. Harvey's mother, as administratrix of his estate, commenced an action for damages against the railroad company.

Denying liability, the railroad contended that the springboard on which Harvey had been present at the time of his death, had acceded to their land,⁵ therefore Harvey was at that time a trespasser, since he had no warrant to be there. The occupier's duty towards a trespasser was minimal. It did not encompass taking positive steps for his safety. For Harvey, it was argued, he had been killed by the defendant's dangerous equipment whilst in the airspace but five feet above the public place. He was a member of the public using a public right of way.

⁴ 131 N.E. 898 (1921).

⁵ Quicquid plantatur solo, solo cedit; whatever is affixed to the soil belongs to the soil.

The defendants owed a duty to that class of person to keep their abutting premises from posing a danger.

The lower courts found for the railroad. On appeal a majority of the New York Court of Appeals reversed that verdict and judgment in the matter was finally entered in favour of the plaintiff. Delivering the leading judgment, Cardozo J clearly acknowledged that the decision itself was not the product of an application of precedent.⁶ He said:

There are times when there is little trouble in marking off the field of exemption and immunity from that of liability and duty. Here structures and ways are so united and commingled, superimposed upon each other that the fields are brought together. In such circumstances there is little help in pursuing general maxims to ultimate conclusions...Rule appropriate to spheres which are conceived of as separate and distinct cannot be enforced when the spheres become concentric. There must be readjustment or collision.⁷

Legal reasoning in the common law of tort is predominantly inductive.⁸ But inductive reasoning requires a starting point, and that starting point is often the creation of a legal category. Indeed the origins of modern tort law are to be found in a relatively small number of categories emerging from the early case law: common callings,⁹ escaping fire¹⁰ and beasts,¹¹ invitees and licensees,¹² inherently dangerous things.¹³ And with the movement subsequently to draw these categories together in terms of some unifying principle,¹⁴ with its attraction of conceptual coherence, paradoxically, tort, in modern law has found its way to a point of rather more, and much broader, legal categories. Subsequent legal history sometimes

⁶ His lecture "Adherence to Precedent" appears in B N Cardozo, *The Nature of the Judicial Process* (1921) 142.

⁷ 131 N.E. 898, 899 (1921). A discussion of Cardozo's conception of judging appears in R White, *Tort Law in America: An Intellectual History* (1980) 119-124. A general discussion of the American and English perspectives appears in H L A Hart, *Essays in Jurisprudence and Philosophy* (1983) 123.

⁸ R Cross, *Precedent in English Law* (1977) 176-188.

⁹ P Winfield, 'The History of Negligence in the Law of Torts' 42 *Law Quarterly Review* (1926) 184.

¹⁰ A I Ogus, 'Vagaries in Liability for the Escape of Fire' 27 *Cambridge Law Journal* (1969) 104.

¹¹ G Williams, *Liability for Animals* (1939) ch 15.

¹² *Devlin v Smith* 89 N.Y. 470, 359 (1870); *Heaven v Pender* 11 L.R.Q.B. 503 (1883).

¹³ E H Levi, *An Introduction to Legal Reasoning* (1949) 8-27.

¹⁴ In *Heaven v Pender* 11 L.R.Q.B. 503, (1883) 510 Brett MR spoke of a unifying principle.

shows the impact of a new category to be limited.¹⁵ In Australia the new category of ‘wrongful life’¹⁶ is likely to remain limited in terms of further development for the foreseeable future, because of the peremptory way in which the High Court has dismissed that claim. We can see that this is much less the case in those American jurisdictions which have, at least in part, allowed it.¹⁷

In other instances the impact of a new category is much more profound as the case-law develops over a longer period. The rule in *Ryland v Fletcher*¹⁸ has had a long and venerable history. During that history its extents and its features have been discussed. There have been some twists and turns. Some of this has been concerned with what ‘things’ should properly go into the category, a conceptually simple matter but difficult as a matter of practical definition. There have been periods of acceleration and restriction. In most jurisdictions we are now seeing the latter. In Australia alone, the category has been, by judicial pronouncement, formally closed.¹⁹

Rule, Principle and Policy

Professor Hart’s acclaimed thesis presents law as fundamentally a model of rules. In the abstract, a modern system of law can be characterised by two tiers of rules of different types. The second tier, comprising what he describes as secondary rules, are procedural, in that they facilitate recognition, change and adjudication with respect to existing substantive law. The first tier, called primary rules, comprises mandatory and power-conferring rules. Together,

¹⁵ *Hynes* was followed by the High Court of Australia in *Thompson v Bankstown Corp* (1952-3) 87 CLR 919.

¹⁶ *Infra* p.14.

¹⁷ *Infra* pp.18-20.

¹⁸ *Infra* p.62.

¹⁹ *Burnie Port Authority v General Jones Ltd* (1994) 179 CLR 520.

the primary rules would include the existing laws of a legal system at any point in time.²⁰

This would mean that the substantive common law of tort should be fairly recognisable as a collection of primary rules. This is fundamentally the positivist position I refer to when I consider the developments in the common law of tort which I shall subsequently pursue.

A different theoretical position, however, would have it that the concept of rules alone will not be impressive as a juristic representation of tort law. According to the second position, it is at least a requirement of a persuasive theory, that it includes recognition of the concepts of principle and policy. To begin with, of course, this assumes that there are important distinctions between the concepts of rule, principle, and policy.

One thinks of a rule, it is submitted, not necessarily quite as Professor Dworkin would have it, as operating in an ‘all or nothing’ manner,²¹ but as giving a high degree of consistency in terms of outcome. I would venture that a rule-structure, that is the articulation of a rule with premises, can include exceptions, and the proposition will survive as a rule. That is to say it will have at least strong guiding force, if not binding force. This is a matter not of mathematics, but degree. However, there must come a point where the exceptions will put paid to the rule.²² To say that the train will arrive at 9am each day except Sunday, it is suggested, retains the rule. To say that the train will arrive at 9am except from Tuesday through Sunday means that the former rule has gone, since it can no longer have force in guiding behaviour as it did previously.

²⁰ H L A Hart, *The Concept of Law* (1961) 77-96. Hart presents his concept as a theory of modern law. For a consideration of a pertinent distinction between law and legal system, see G MacCormack, “ ‘Law’ and ‘Legal System’ ” 42 *Modern Law Review* (1979) 285.

²¹ R Dworkin, *Taking Rights Seriously* (1977) 24.

²² An example of this in law is to be found in the history of the *res gesta* doctrine; see J Stone, *Legal System and Lawyers’ Reasonings* (1968) 246- 48.

Prima facie a principle is a different concept. Legal rules occupy distinct, if very expansive, categories of law. ‘A contract requires consideration’ is a rule of law. No consideration is required in order to found an obligation, or a legal duty, in the tort of negligence. But in its operation a principle, in contrast, is capable of cutting across the broad categories of the law, and, in addition, when in conflict with a rule, is capable of victory in terms of inclining the outcome of a case.²³

Policy represents some community goal or aspiration,²⁴ or perhaps some strong social expectation in terms of society’s mores, as perceived by the courts as part of their deliberations. Policy therefore, confining ourselves here to common law, must *prima facie* have an integral relationship with morality in the broadest sense. Policy may operate alone to incline a decision. Policy may distil into principle, or even rule, which subsequently is applied to incline a decision. But still conceptually the positivist position may hold, that it is possible to separate the moral aspect from the legal rule.²⁵ Whilst there may be initially reasons for a rule which do not constitute legal reasons, once the rule becomes promulgated in a statute or is embodied in a judgment of a higher court then the application of the rule in future cases is justified by that very promulgation or embodiment. No further appeal to the social reasons originally behind the rule- what might be referred to as the ‘primary reason’ for a rule- is necessary. According to the theory any subsequent dispute to which the rule is addressed will be resolved one way or the other because there exists a distinctly legal reason

²³ See, for example, in tort, *ex turpi causa non oritur actio*; infra p.24. Dworkin’s examples are *Riggs v Palmer* 115 N.Y. 506 (1889) and *Henningsen v Bloomfield Motors* 32 N.J. 358 (1960); R Dworkin, *Taking Rights Seriously*, (1977) 23.

²⁴ See, for example, R Dworkin, *Taking Rights Seriously* (1977) 22.

²⁵ See, for example, H L A Hart, *The Concept of Law* (1961) 163-176.

for reaching that decision which is independent of the content of a law and independent of social or moral considerations.²⁶

The positivist theory of law, described by Professor Dworkin as ‘so popular and influential that I shall call it the ruling theory of law’,²⁷ has an important corollary in a theory of adjudication. The link lies in the separation of law and morality. The law which is, can have many moral connections, and a law may have a moral character, but it is not these qualities which provide the defining character of *law*, but ultimately some other, distinctly, legal, qualities.²⁸

How far can tort law be seen to be a matter of resolving disputes with the application of legal rules?²⁹ In that sense, to what extent can it realistically be seen as ‘objective’ in terms of adjudication, if, by rule, we mean a statement of a legal norm which should lead to a consistent outcome most of the time?³⁰ In terms of a model of rules, the propositions of tort law would have to be seen as the exposition of a type of primary rule; a rule of obligation.³¹ It is possible to articulate a tort statement in that way, as for example, ‘one should take reasonable care to avoid injuring one’s neighbour, and, to add to it a contingent conclusion in terms of a legal outcome: ‘otherwise liability in damages will follow’. However an early sense of unease about this arises from an impression of the history of negligence law. Does it simply obscure too much that is involved in the legal enquiry, for so many cases are

²⁶ The principle reference is H L A Hart, *The Concept of Law* (1961). For elaboration of this position see H L A Hart, *Essays on Bentham* (1982) chs V, VI, X.

²⁷ R Dworkin, *Taking Rights Seriously* (1981) vii.

²⁸ What Dworkin describes as a pedigree; R Dworkin, *Taking Rights Seriously* (1977) 17.

²⁹ It should be said that the proposition is not confined to positivist thought. In the U.S.A; for example, Professor Fuller has described law in terms of ‘the enterprise of subjecting human conduct to the governance of rules; L L Fuller, *The Morality of Law* (1963) 96.

³⁰ An example I can provide is, a solicitor owes a duty of care to a beneficiary in the execution of a will: *Ross v Caunters* [1980] 1 Ch. 297; *Hill v Van Erp* (1997) 188 CLR 159.

³¹ H L A Hart, *The Concept of Law* (1961) 89-96.

concerned with just who is my neighbour, and the circumstances in which liability will, or will not, follow, even when it has been concluded as to who my neighbour is?

Moreover, there are times when the social issue has presented itself, as in most jurisdictions with the ‘wrongful life’ cases today, but the legal category in tort has yet to be created. Is the most satisfactory juristic explanation of the position, say, in Australia, prior to the High Court’s decision in *Harriton v Stephens*,³² that there is as yet no legal rule on the matter, or as yet no law exists? To take a strict positivist position then, would be to provide the simplest explanation, that there is, as it were, a ‘gap’ in the law.³³ There appear two immediate difficulties with this. First, the matter has been adjudicated upon elsewhere. True it is that those adjudications are within the traditional versions of *stare decisis* denied the status of the *binding*, but the modern practice and the reality is that they represent real influences on the outcome, none the less.³⁴ A second, arguably more telling objection, is that the decision in *Harriton*, like all others, has a retroactive effect. This is not simply a matter of technical proposition. Legal norms, in tort law, are very frequently moving.³⁵ If one is, in positivist terms, to appreciate what the law *is*, in such circumstances, it is necessary to engage in a degree of prediction, and to do this requires the taking into account of factors external to any rules that may be currently available.³⁶

³² (2006) 226 CLR 52. *Infra* p.14.

³³ In the alternative, with Hart, a discretion to decide; H L A Hart, *The Concept of Law* (1961) 127-29.

³⁴ In *Harriton v Stephens* (2006) 226 CLR 52, authorities cited included cases from the U.S.A, India, Israel, Singapore and elsewhere.

³⁵ Particularly negligence, a bird in flight, as Millner puts it; M A Millner, *Negligence in Modern Law* (1967) v.

³⁶ Extra-judicially Cardozo J observed ‘A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is, then, for the purposes of our study, a principle or rule of law. In speaking of principles and rules of conduct, I include those norms or standards of behaviour which, if not strictly rules or principles, since they have not been formally declared in statute or decision, are none the less the types or patterns to which to which statute or decision may be expected to conform.’ B N Cardozo, *The Growth of the Law* (1924) 52.

A dramatic example of this second objection is to be seen in the history of remoteness in tort. The origin of the proposition that a defendant should not be held responsible for consequences of his actions which are quite unpredictable can probably be found in *Palsgraf v Long Island Railroad Co.*³⁷ Mrs Palsgraf, with her children, had been waiting at the defendants' subway for her train to Rockaway beach. She was seated at a bench on the platform close to a set of heavy iron scales. On an adjoining platform a considerable distance away, a train was slowly departing. A passenger in pursuit managed to catch it and jump onto the steps at the rear. The guard at the top of the steps reached forward to steady the man's balance, and in doing so, a package which the passenger had been carrying was dislodged and fell onto the track. The package happened to contain fireworks. It happened to land on a live rail, and it happened to explode. In her evidence Mrs Palsgraf spoke of a loud roar, intense smoke, and a ball of fire entering her own platform, before she suffered a heavy blow to her neck and shoulder, the result of the collapse of the scales.³⁸ By majority her action was rejected. The railroad must have owed her some kind of duty with respect to her personal safety, but Cardozo J related this duty to 'a risk reasonably to be perceived', or 'a risk within the range of apprehension'.³⁹

Remoteness begins to enter the law of tort as a discrete concept, extrapolated from maritime cases, in *Re Polemis*.⁴⁰ Stevedores employed by the defendants were unloading a vessel when somehow a heavy timber plank was dropped into the hold. An explosion and a fire ensued. As the ship had been carrying petrol, it is thought that the plank ignited a spark when striking

³⁷ (1928) 248 N.Y. 339.

³⁸ Helen Palsgraf's story bears considerable resemblance to that of May McAllister (or Donoghue). Although we cannot see how their actions were originally framed, we know that both won their point of law at first instance. Both persons were of modest means, and in the case of Helen Palsgraf the world was entering the years of the Great Depression, and in the case of May McAllister, well into them. Both Helen's award of damages, and May's settlement, to them personally must have appeared golden. Whereas May kept hers, sadly, Helen was deprived of hers, but narrowly, on appeal. See J T Noonan, 'The Passengers of Palsgraf' in *Persons and Masks of the Law* (1976) 111.

³⁹ (1928) 248 N.Y. 339, 344.

⁴⁰ [1921] 3 KB 560.

the foot of the hold, igniting petrol vapour. Were the defendants to be found responsible for such an unpredictable consequence? The English Court of Appeal answered the question in the affirmative. As long as there was a direct link between the defendant's negligent conduct and the consequent damage, the defendant was liable. Bankes LJ said⁴¹:

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated.

Late in 1951, the tanker *Wagon Mound*⁴² was at anchor off Sydney harbour. Somehow a quantity of crude oil was discharged from the vessel and spread to the defendants' wharf. The defendants' workers were engaged in ship repairs, and as a precaution, since this involved welding, they gave instructions for operations to cease, while they sought advice. The best scientific opinion, however, was that sparks from the welders' torches would not be capable of setting fire to crude oil floating on water. The men were therefore set back to work. Some time later the oil ignited, developing into a huge conflagration, which continued for days, and destroyed the plaintiffs' wharf. The advice was apparently correct in itself, but allowance had not been made for the presence in the harbour of floating cotton waste. An enquiry found that probably the sparks had set fire to this, which then acted as a slow burning wick, which would be sufficient to ignite the oil. Again then, were the defendants to be held responsible for this loss, or did it constitute damage which was uncompensable at law because too remote? On the law in *Polemis* the question is whether the fire is properly to be viewed as a

⁴¹ [1921] 3 KB 560, 571.

⁴² *Wagon Mound: Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co.Ltd.* [1961] AC 388.

direct consequence of the spillage of oil. It could be, and so it was argued. In *Wagon Mound*, however, the Privy Council changed the law. Viscount Simon said⁴³

...it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be “direct”.

The defendant was to be held responsible for the plaintiff’s loss only provided that damage fell within a class of consequence which ought to be reasonably foreseeable. This is a different question. The finding of the court was that it was not, and therefore it was too remote.⁴⁴ Between the decision in *Polemis* and *Wagon Mound*, all would have believed that the remoteness issue rested on a view as to directness. The decision in *Wagon Mound*, however, caught the events of 1951.

In his essay *How Law is Like Literature*⁴⁵ Professor Dworkin elucidates a theoretical position of a complex nature which accords a much more limited influence to the rule in the development of the common law than does the positivist theory. Dworkin takes an analogy between the development of case law and the writing of a chain novel. In the second circumstance, we imagine that a team of authors are randomly allocated a chapter to write in a series which will continue and develop the overall story from the previous chapter and set the scene for the next. The literary interpretation aims at the most valuable enterprise of art.

⁴³ [1961] AC 388, 423.

⁴⁴ The ‘directness’ test, was replaced by one of ‘reasonable foresight’. On the basis of the advice, Morts Dock could hardly be heard to argue that the fire was foreseeable, although others not privy to the advice could; see *Overseas Tankship (UK) Ltd v Miller Steamship Co.* [1967] 1 AC 617. Had Morts Dock, with remarkable prescience, contended that the fire was foreseeable, they would have been met with the riposte that, if the defendants should have foreseen the fire, then so should they, and they set their welders back to work. At the time in N.S.W. contributory negligence was a complete defence at common law. The law was brought into line with the other Australian states and the U.K. by the *Law Reform (Miscellaneous Provisions) Act 1965 (NSW)*.

⁴⁵ R Dworkin, *A Matter of Principle* (1986).

In pursuit of that, the writer must attend to matters of identity, coherence and integrity.⁴⁶ In determining what is the right principle to apply in a case, the judge should work in a similar way.⁴⁷ Whilst not an artistic enterprise but, for Dworkin, a political one, law aims at the best outcome⁴⁸ in terms of representing the best principle or policy that decision demonstrates.⁴⁹ This conceptualisation of common law development as interpretation, I would suggest, invites a reconsideration of precedent as a binding matter in the process. It is not so much the precedent itself which counts, when it comes to the outcome of the next case, but what the judge in the next case makes of the precedent. The external, subjective, influences that can, it appears, play probably an equally important part in the legal decision, are sometimes, but not always articulated.

Professor Dworkin's principal objection to the model of rules⁵⁰ is that it fails to include and account for the concept of a legal principle. It is possible to reply that the rule model might simply be augmented by the addition and inclusion of principle,⁵¹ but the objection is more profound. Dworkin argues that, since the application of a principle requires a moral reason, the positivist insistence on a separation of law and morality is denied.⁵² The *is*, of the law, depends first, upon the *ought* contained in a prior proposition. Lord Atkin in *Donoghue v Stevenson* related the tort of negligence to a 'species of culpa....no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay'.⁵³ Once that case has been decided we cannot, of course, anticipate anything other than that a trial court

⁴⁶ The idea is further developed in R Dworkin, *Law's Empire* (1986) 228-258.

⁴⁷ Dworkin's general position is that law cannot be seen as a system of rules. The acknowledged presence within law of the principle establishes that; R Dworkin, 'Is Law a System of Rules?' in R S Summers (ed) *Essays in Legal Philosophy* (1976) and R Dworkin, *Taking Rights Seriously* (1977) esp chs 2, 3. It can, *prima facie*, be argued that the model of rules can be elaborated so as to take in principles, but Dworkin's stronger objection is that the principle has a moral basis, which militates against the positivist basis for the rule model, with its relationship to the dichotomy of the *is* and the *ought*. Cf. N MacCormick, *Legal Reasoning and Legal Theory* (1978) esp ch II.

⁴⁸ And Dworkin maintains that, in this broader sense, there is a right answer to a novel case; R Dworkin, *A Matter of Principle* (1986) 119.

⁴⁹ For a discussion see D Lyons, 'Principles, Positivism and Legal Theory' 87 *Yale Law Journal*, (1977) 415.

⁵⁰ R Dworkin, 'Is Law a System of Rules?' in R S Summers, ed *Essays in Legal Philosophy* (1968).

⁵¹ Dworkin sets out distinctions between a 'rule' and a 'principle' in *Taking Rights Seriously* (1977) 22-29.

⁵² *Ibid*, 60.

⁵³ [1932] AC 562, 580.

will reach the same conclusion on those, or very similar facts. In this narrowest sense the case can be seen as establishing a rule together with a given outcome. The court will feel bound by the decision. But we know that the effects of *Donoghue v Stevenson* have been profoundly more pervasive of tort law. *Donoghue v Stevenson* itself had nothing to say, for example, about the liability for careless statements,⁵⁴ or the careless infliction of psychological harm.⁵⁵ To characterise tort law as more in the nature of the development of principle, initially appears more comfortably reconciled with a view of case-law as presenting variables which will incline a decision one way or another, in the terms of inductive reasoning. There may or may not be agreement, at any point of time, as to what those important variables are.⁵⁶ Moreover those variables are subject to be added to or subtracted from, as we see, for example, in the now extensive history of the case-law concerning psychiatric harm.⁵⁷

What follows is a study of common law in action, in the field of tort law. I want to consider to what extent tort law as it actually is, is fairly characterised by the positivist position on the dominance of rules, or in contrast, better characterised by a different jurisprudence. My thesis is that the best starting point for this analysis is the creation of a legal category, at which point the impact of social morality upon the process of decision making appears undeniable, but in the subsequent, much more legally complex, process of the development of the common law, the concept of a rule system, is insufficiently complex to characterise the law of torts.

⁵⁴ Liability in negligence for these awaited *Hedley Byrne v Heller & Partners* [1964] 1 AC 465.

⁵⁵ *Infra* p.36.

⁵⁶ See also W Twining and D Myers, *How To Do Things With Rules* 3rd ed (1991) 304-311.

⁵⁷ *Supra* pp.36-61.

Chapter Two

Wrongful Life⁵⁸

In the tort of negligence a ‘wrongful life’ action is one in which a child plaintiff is maintaining an action for damages, usually against a medical practitioner who was responsible for the pre-natal care of, and advice concerning the pregnancy to, the mother. The basic contention is that the defendant failed to exercise reasonable care in diagnosing an injury to the foetus or identifying a risk of such injury and advising the mother so that she could decide whether to exercise her lawful choice to terminate the pregnancy.⁵⁹ It follows that there must be evidence that she would have done so. As a result of this failure the child is born with permanent disabilities of a serious nature which constitute the injury from which he or she is now suffering. On the basis of the case-law to date, that damage often takes the form of ‘Downs Syndrome’, but may consist of other kinds of physical and psychological affliction for which the child seeks to recover damages from the defendant.⁶⁰ It is the child’s own action, distinct from any action that the mother herself may have against the defendant in negligence, which latter is referred to in terms of ‘wrongful birth’.⁶¹

⁵⁸ A version of this chapter appears as K A Warner, ‘Wrongful life Goes Down Down-Under’ 123 *Law Quarterly Review* (2007) 209.

⁵⁹ It is, therefore, an essential premise in the plaintiff’s argument, that lawful abortion be available in the jurisdiction. Absence of such was another ‘policy’ ground for denial of liability in American cases prior to 1973. As to whether the mother *would* have opted for a termination, this is an evidentiary matter relating to the issue of causation, therefore highly relevant to the outcome of the controversy. It may at first sight appear paradoxical that in the ‘wrongful birth’ action, the defendant’s argument that given the availability of abortion and the plaintiff’s desire to avoid birth, the plaintiff ought to have mitigated her loss by electing for an abortion, when raised has been rejected. However yet another ‘policy’ factor endorses the consensual view in *Harriton v Stevens* (2006) 226 CLR 52 that it is solely the mother’s choice.

⁶⁰ A somewhat wider variety of grievances have been pursued as putative damage in the U.S.A. than in other jurisdictions, for example an unsuccessful action brought by a child against his father for causing him to be born illegitimate; *Zepeda v Zepeda* 190 N.E. 2nd 849 (1963). See also M Linde, ‘Liability to Bastard for Negligence Resulting in his Conception’ 18 *Stanford Law Review* (1966) 530.

⁶¹ The mother’s action for wrongful birth has been recognised by the common law, for example in Australia by the High Court in *Cattanach v Melchior* (2003) 215 CLR 1. In England and Wales the action has had a brief and chequered history. In *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522 the plaintiff was awarded damages for pain and suffering and loss of income but denied damages for maintenance of the child. In *Emeh v Kensington Area Health Authority* [1985] QB 1012 damages included a sum for the child’s maintenance, as was

In the majority of jurisdictions the wrongful life claim has met with a resounding judicial rebuff. The High Court of Australia has added Australia to that list with the decision of *Harriton v Stephens*.⁶² Mrs Harriton, believing herself to be pregnant, became acutely unwell with fever and a rash. She consulted a general practitioner over this, explaining that she was worried that she might have contracted rubella, and was aware that this could produce congenital abnormalities in an unborn child. She was advised that when she was well enough she should have a blood sample taken to determine whether she was in fact pregnant and whether she had contracted rubella. In due course the report of the blood analysis advised that Mrs Harriton was indeed pregnant and that if there had been no recent contact with rubella any further contact with the virus would be unlikely to result in congenital abnormalities in the foetus. At her next consultation she was informed that she was pregnant but that she had not been suffering from rubella. A daughter, the plaintiff, Alexia, was born in March 1981. She suffered from the most profound disabilities as a consequence of contact with the rubella virus *in utero*, including blindness, deafness, mental retardation and spasticity, such that she would require total care for the rest of her life.

It was agreed that the defendant was negligent in advising Mrs Harriton that she did not have rubella and in failing to arrange further, more detailed, testing. It was also agreed that in 1980

the case in *Thake v Maurice* [1986] 1 QB. 644. In *McFarlane v Tayside Health Board* [1999] 4 All ER 961 the House of Lords held that general damages representing the cost of maintenance of a healthy child were not recoverable under English law. Following this decision the Court of Appeal has awarded damages related to the disabled child's special needs and care but not for the ordinary costs of living; *Parkinson v St. James and Leecroft University Hospital N.H.S. Trust* [2001] 3 All ER 97. This in effect would leave special needs unattended to by the common law once the child attains the age of majority. In *Cattanach v Melchior* the award of damages included the costs of rearing the child to the age of majority. The decision has been repudiated by legislation in New South Wales (s.71 *Civil Liability Act 2002*), Queensland (s.49A *Civil Liability Act 2003*) and South Australia (s.67 *Civil Liability Act 1936*). See also, generally, D Stretten, 'Damages for Wrongful Birth and Wrongful life' (2005) 10 *Deakin Law Review* (2005) 319; P Cane, 'Injuries to Unborn Children' 51 *Australian Law Journal* (1977) 704; S Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life' 27 *Sydney Law Review* (2005) 525.

⁶² (2006) 226 CLR 52.

a reasonable general practitioner would have done so, and would have advised Mrs Harriton that there was a high risk that a foetus which had been exposed to rubella would be born with very serious disabilities.⁶³ It was further agreed that had this been explained to her Mrs Harriton would have terminated the pregnancy. The contentious issue was whether, in relation to any duty of care which the defendant doctor might owe to the plaintiff as a foetus, the disabilities which Alexia suffered from at birth were legally capable of constituting actionable damage, sounding in tort.

At first instance the Supreme Court of New South Wales⁶⁴ held that any duty owed to the foetus by the defendant could not include an obligation to provide advice which could deprive the unborn child of an opportunity for life, and that the defendant had done nothing to contribute to the mother's contracting of rubella.⁶⁵ The Court of Appeal, (Mason P. dissenting) dismissed the plaintiff's appeal.⁶⁶ The plaintiff appealed to the High Court.

The Law in other Jurisdictions

For the U.K., legislation now specifically denies recovery of damages for the child in the wrongful life action.⁶⁷ This endorses the common law position in England and Wales. In *McKay v Essex Area Health Authority*⁶⁸ the plaintiff was a six year-old girl whose mother had contracted rubella early in the pregnancy. A blood sample had been sent to the defendant's laboratory but the virus had not been detected, and she was therefore misadvised

⁶³ In cases involving medical negligence evidentiary difficulties over the breach issue often arise due to the time lapse between the date of events and the date of trial. An excellent example of this is *BT v Oei* [1999] NSWSC 1082.

⁶⁴ (2002) NSWSC 461.

⁶⁵ Mrs Harriton's own action for wrongful birth was statute barred, the limitation period having expired.

⁶⁶ (2004) 59 NSWSC 694.

⁶⁷ *Congenital Disabilities (Civil Liability) Act 1976 (UK)* ss 1, 4(3). This applies to children born after 22 July 1976.

⁶⁸ [1982] 2 All ER 780.

and continued the pregnancy. The child was born partly blind and deaf. At first instance the judge reversed a decision of the Master to strike out the plaintiff's claim as disclosing no reasonable cause of action, ruling that the claim was not one for damage resulting from wrongful entry into life, but rather for damage resulting from birth with disabilities, and that this constituted a reasonable and arguable cause of action. The case was complicated by the plaintiff's argument that had the rubella virus been detected at this early stage, an injection of globulins could have reduced the likelihood of further damage to the foetus, although it could not reverse or ameliorate any damage which had already eventuated.⁶⁹ On appeal, however, the Court of Appeal unanimously rejected the plaintiff's claim in negligence, holding that the damage had not been caused by the defendant's negligence but rather by an act of nature for which the defendant was in no way responsible.⁷⁰ More broadly the court was influenced by policy factors concerning the 'sanctity of human life'⁷¹ and the repugnance of a conclusion which by inference would regard the life of a handicapped person as not worthwhile.⁷² To assess damages according to normal principles in such a case, it was reasoned, would involve a comparison of a life with disabilities, and no life at all.⁷³ Whilst there would arise on the defendant's part a duty of care in negligence towards the mother, as well as a duty to avoid

⁶⁹ This would, one would think, involve a different difficulty for the plaintiff in the form of the 'lost chance'. This has been rejected by the House of Lords in *Gregg v Scott* [2005] 2 WLR 268. See also, for example, *Phipson Nominees Pty Ltd v French* (1988) Aust Torts Reports 80-196. If the action can be framed in contract the position appears to be different; *Chaplin v Hicks* [1911] 2 KB 786.

⁷⁰ [1982] 2 All ER 771,780.

⁷¹ A variation of this appears in some of the cases; the 'damage' caused by the burden of pregnancy and childbirth is totally offset by the happiness delivered by the child. In *C.E.S. v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 87 Meagher JA. opined '...there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child.' In *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522, 527 Jupp J was 'inevitably reminded of the Gospel (John 16:21). A woman when she is in travail hath sorrow, because her hour hath come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world.' The author has been unable to find any empirical evidence either to support or refute this proposition.

⁷² [1982] 2 All ER 771, 781. 'Six reasons of public policy' are canvassed briefly by counsel for the plaintiff in *Thake v Maurice* [1986] 1 QB 644, 650-657. In fact the policy factors have met with a considerable variation of judicial opinion; see C R Symmons, 'Policy Factors in Actions for Wrongful Birth' 50 *Modern Law Review* (1987) 269. The policy factors variously raised in relation to the child's claim for wrongful birth are mostly the same.

⁷³ [1982] 2 All ER 771,780-781.

acts or omissions which would cause harm to the foetus *in utero*,⁷⁴ no duty could arise to counsel action which would result in its destruction.⁷⁵

The wrongful life action has, however, found some limited success in the U.S.A. In *Gleitman v Cosgrove*⁷⁶ the New Jersey Supreme Court rejected the child's claim on the grounds that an assessment of damages would be impossible and that to award damages for loss of an opportunity to abort would be contrary to public policy.⁷⁷ This remained the general position in the U.S.A. until the decision of the New York Supreme Court in *Park v Chessin*.⁷⁸ Mrs Park had previously given birth to a child suffering from a kidney disease who lived only for a few hours. She subsequently consulted the defendant medical practitioners as to whether any future pregnancy was likely to be afflicted with the same prospect and was advised in the negative. Relying on this, she again became pregnant, and gave birth to another child with the same disease who died in early infancy. An action for damages on behalf of the child was allowed. The decision itself was short-lived. In *Becker v Schwartz*⁷⁹ the New York Court of Appeals rejected the child's claim on grounds of policy. The court should not be seen to endorse a view that a child's life was not worthwhile.

The wrongful life action was received into California state law, however, in *Curlender v Bio-Science Laboratories*.⁸⁰ The defendant medical laboratories had carried out tests to determine

⁷⁴ Such a duty was first recognised in Australia in *Watt v Rama* (1972) VR 353.

⁷⁵ As with the duty towards the unborn child with respect to the defendant's acts or omissions, it is uncontroversial that, for the purposes of the action in negligence, to qualify as a plaintiff the child must be born alive; see, for example, *Park v Chessin* 400 N. Y. S. 2nd 110 (1977). An action brought by the mother for an unwanted pregnancy is a different matter, since it has been held that the pregnancy itself sounds in damages as 'pain and suffering'; see, for example, *Melchior v Cattanaach* [2001] QCA 246.

⁷⁶ 49 N.J. 22, 227 A. 2nd 689 (1967). See also H Teff, 'The Action for 'Wrongful Life' in England and the United States' 34 *International and Comparative Law Quarterly* (1985) 423.

⁷⁷ The position on abortion has been affected by U.S. Supreme Court's interpretation of the Bill of Rights in *Roe v Wade* 410 U.S. 113 (1973).

⁷⁸ 400 N.Y.S. 2nd 110 (1977).

⁷⁹ 46 N.Y. 2nd 401 (1978).

⁸⁰ 165 Cal Rptr 477 (1980).

whether the plaintiff's parents were carriers of Tay-Sachs disease. Relying on the erroneous negative result the wife conceived and her plaintiff daughter was born with the disease. The California Court of Appeal upheld her claim for damages for pain and suffering caused for the duration of her life-span, plus damages for the costs of her care to the extent that these had not been recovered by the parents themselves.

The crucial distinction in *Curlender* is that the approach of the court to the issue of damage differed from what had become the norm. It was not axiomatic that the law should involve itself in a comparison of an existence with disabilities and non-existence to address the matter of damage. The damages awarded could properly be related to the pain and suffering endured by the plaintiff in her lifetime as a result of contracting Tay-Sachs disease and the additional financial burdens imposed upon her because of it.

Curlender v Bio-Science Laboratories was followed in part by the California Supreme Court in *Turpin v Sortini*.⁸¹ Owing to the negligence of the defendant doctors the plaintiff child's parents were unaware of a hereditary condition which caused the child to be born with total deafness. Whilst the court declined to award general damages on the familiar policy grounds, the court awarded damages related to the extraordinary financial costs borne by the plaintiff because of her deafness.

The Washington Supreme Court followed suit in *Harbeson v Parke-Davis Inc.*⁸² Mrs Harbeson had been prescribed a drug to control her epilepsy. She enquired of the defendants whether the drug might result in birth defects and was advised that use of the drug during pregnancy might cause cleft palate. However the defendants had conducted no literature

⁸¹ 182 Cal Rptr 337 (1982).

⁸² 98 Wash. 2nd 460 (1983).

search to ascertain whether there was any risk of serious impairment to the foetus, and Mrs Harbeson subsequently gave birth to two daughters both of whom suffered growth deficiencies and retardation due to the effects of the drug. Following *Turpin v Sortini* the court awarded damages for the plaintiffs' medical expenses, insofar as these had not been awarded to the parents, as special damages, whilst declining to award general damages on the ground that it would require comparison of the childrens' existence with non-existence.⁸³

The High Court's Decision

The most detailed judgment delivered in the High Court in *Harriton v Stevens*,⁸⁴ with which Gleeson CJ, Gummow, Hayne and Heydon JJ agreed, was delivered by Crennan J in which she expanded on the *rationes* provided by the lower courts.

Duty of Care

Her Honour reasoned that recognising a duty of care in a wrongful life action requires an identification of a right or interest capable of legal protection in the foetus itself, rather than via the mother. It poses the uncomfortable question of whether the common law does, or ought to, vindicate a right of the foetus to be aborted, or an interest in its own termination,

⁸³ In France a decision of the Cour de Cassation of 17 November 2000; *arret: Perruche*, Bull; Ass. Plen no. 9, to award damages under Article 1382 of the Code Civile to a teenage boy who had been born with severe mental and physical disabilities has been addressed by special statute after fierce political lobbying on the part of the medical insurers. The statute states: "nobody can claim to have been harmed simply by being born"; *Proposition du loi 10 January 2002*. The equivalent of the wrongful birth action remains. A more recent decision of a court of the Netherlands to award damages for wrongful life to a severely disabled nine year-old girl may yet share the same fate as the French judging by some statements in the legislative assembly and by some jurists in the Universities; *Molenaar*, 26 March 2003, Het Gerechtshof, Haag. However if I am correct in my view as to the identification of damage, the French statute may yet not be the end of the matter, since the plaintiff is not claiming to have been harmed simply by virtue of being born. The Cour de Cassation does not issue reasons but the outcome of a further *arret* could be consistent with that of *Perruche*. The *Civil Liability Act 2002 (NSW)*, whilst abrogating the High Court's decision in *Cattanach v Melchior*, does not preclude 'any claim for damages by a child for personal injury...sustained by the child pre-natally or during birth':s.70(2).

⁸⁴ (2006) 226 CLR 52.

since on the agreed facts that was the only way in which the plaintiff's present disabilities could have been avoided. This is inescapably different to an existing duty of care to avoid acts or omissions which may cause injury to the child *en ventre sa mere*.

It was Mrs Harriton's decision alone as to whether or not to undergo an abortion,⁸⁵ and elsewhere the law recognises that where this is a lawful possibility, this is a decision she may make in her own best interests, and not necessarily those of the foetus. Then a recognised legal right of the mother may conflict with any posited 'right' of the unborn child, with the further complication that, should the mother decide to continue the pregnancy to term in the light of her full knowledge as to its condition, she then, it must follow, has caused the posited 'damage'. If a doctor lies under a duty of care in this way it is difficult in principle to appreciate why a mother would not.⁸⁶

Damage⁸⁷

The very gist of the action in negligence is damage suffered by the plaintiff, since the action is compensatory. This inevitably involves a proposition that the plaintiff has in some way been left worse off by the action of the defendant, and requires a comparison of the plaintiff's condition following the defendant's tort, with that pertaining absent the tort, which again brings one back to the imponderable comparison of the virtues of existence and non-existence. It cannot be determined, then, in what sense Alexia Harriton's present life with her disabilities represents a 'loss'. For the same reasons it would in any event not be possible to

⁸⁵ See, for example, *Planned Parenthood of Missouri v Danforth* (1976) U.S. 52; *Paton v Trustees of BPAS* [1978] 2 All ER 987; *Emeh v Kensington Area Health Authority* [1985] QB 1012, 1024-1025, per Slade LJ.

⁸⁶ Statutory immunity for the mother is provided in the U.K. by s.1 *Congenital Disabilities (Civil Liability) Act 1976*.

⁸⁷ (2006) 226 CLR 52.

assess the damages in the normal way according to the compensatory principle.⁸⁸ On the plaintiff's averment, had the defendant doctor exercised reasonable care towards her she would simply not be here.

The Value of Life

Whilst her Honour noted that it is not the case that the common law invariably regards the preservation of human life as paramount,⁸⁹ she opined that

...it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities. In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection. A seriously disabled person can find life rewarding.⁹⁰

The *Harriton* decision, then, as a practical matter resolves what was an existing social question in Australia. There were no doubt other children in the same position in Australia. The decision is retroactive in terms of the ultimate outcome. In terms of effect, this always was the law. Moreover there are reasons to propose that this outcome was predictable. From this, relatively modern history of case-law, we can see that courts in the majority of common-law jurisdictions have denied the claim. We can appreciate the influence of that weight of authority together with the rationales in support of it, as articulated in *Harriton* itself.

⁸⁸ *restitutio in integrum*.

⁸⁹ A judicial examination appears in *Airedale N.H.S. Trust v Bland* [1993] 2 WLR 317. See in particular the speech of Hoffman LJ (at 349). See also the judgment of Kirby J in *Harriton v Stephens* (2006) 226 CLR 52.

⁹⁰ (2006) 226 CLR 52. Kirby J thought that the description of the action as 'wrongful life' implicitly denigrates the value of human life but that the problem lies with the description itself; (2006) 226 CLR 52. He observes that the term has been somewhat carelessly extrapolated from a different social context. Mason P opined that 'The labels themselves have contributed to instinctive opposition to certain claims': [2004] NSWCA 93,108.

The courts were offered a new category of liability in tort, and for the most part, declined to enter into the legal creation of one. In these jurisdictions, then, there is nothing present to develop. In the minority of jurisdictions where the new category has been accepted, we can see that further questions have been posed as (the little) further case-law subsequently presents itself, for example, what is the nature of the child's loss? How is the damage to be defined? We can note that these questions have not been answered consistently in those jurisdictions. Further, it seems reasonable to expect that the courts will be invited to add other sets of circumstances to the category, with the arrival of cases argued as 'analogous'. The development, in legal terms, is yet young, and the variables are yet to be established.

What has been said does not, I think, prove impressive of a conclusion that the law in relation to this matter is best explained in terms of a rule or rules, even in the case of *Harriton*, where we have but one case directly in point. It is fair to say, that we can distil, or infer, a rule from *Harriton*: a person owes no duty of care in negligence to act in the prevention of birth of a child with mental or physical impairment towards the child personally. This is premised on the outcome of the case (probably more confidently so, because of a 6-1 majority verdict).

If one turns to the reasoning, however, the preponderance is openly a justification of the decision in terms of policy, together with, at times, an articulation of the connections in what is perceived as social morality.

This still leaves open a possible reply from the positivist position. We would expect this, simply because the category is a new one. The picture we would take from an examination of the history of a long established category of the common law would be different.⁹¹

⁹¹ See, for example, H L A Hart, *The Concept of Law* (1961) 199-120.

Chapter Three

Illegality

A relationship between policy and principle can be found clearly in one category of case; that in which the claim arises from events which implicate the plaintiff in some serious form of legal wrongdoing. The principle ‘*ex turpi causa non oritur actio*’ (from a bad cause no action arises) may be raised as a defence to an action in tort in a situation where the plaintiff’s harm arises out of the course of his own criminal actions. The principle may find its origin in the remarkable Highwayman’s case, *Everet v Williams*,⁹² in which a highwayman apparently filed a Bill in Equity for an account against his partner in crime, and again in modern times, probably because of the historical connection with immoral conduct which the court cannot be seen to condone, it is clear on the case-law that the defence is restricted to the context of serious criminal wrongdoing. In a case of a relatively minor offence, for example the plaintiff’s failure, as legally required, to wear a safety belt or protective helmet, *ex turpi causa*, finds no proper place. The principle is often articulated as asserting a strong sentiment of public policy, and whilst in a negligence action such failures as those described above may bring about a reduction of damages for contributory negligence, they are not viewed as justifying defeat of the plaintiff’s action entirely, where the normal features of the tort are clearly made out.

In *Ashton v Turner*⁹³ the plaintiff was with two other young men who, after an evening’s drinking, engaged in a joint enterprise of burglary using a car belonging to one of them. They broke into premises and, having stolen some radios and activated the burglar alarm, panicked

⁹² (1725) 9 L.Q.R. 197. There is debate as to whether the case is genuine, see R E Megarry, *Miscellany at Law* (1955) 76-77.

⁹³ [1981] QB 137.

and fled. The defendant negligently crashed the getaway car and the plaintiff was injured. His action against the driver, his fellow miscreant in crime, was defeated by the circumstances. Normally this would, in terms of negligence principle, have been a straightforward case of liability. But we can see that two principles are brought into collision, and in determining the outcome, policy provides the trump card.

A more recent decision of the House of Lords has confirmed this. In *Gray v Thames Trains Ltd.*⁹⁴ The plaintiff had been a passenger on a Turbo train operated by the defendants when, due to the negligence of their employees, it was involved in a collision in which 31 people were killed and more than 500 injured. The plaintiff himself suffered only minor injuries, but as a consequence of the experience he subsequently developed post-traumatic stress disorder and depression. Almost two years later, while he was under medication and receiving treatment for that condition, the plaintiff was involved in an altercation with an inebriated pedestrian who had stepped into the path of his car. Immediately afterwards the plaintiff drove to his girlfriend's house and armed himself with a knife. He then drove in search of the pedestrian, managed to find him, and stabbed him to death.

The plaintiff was brought to trial for murder. The Crown accepted a plea of guilty to manslaughter on the ground of diminished responsibility, and he was sentenced to indefinite detention in a hospital pursuant to sections 37 and 41 of the Mental Health Act 1983. Whilst in detention he commenced an action in negligence against the defendants. He claimed in damages his loss of earnings up until the date of this detention less any money which he had managed to earn from time to time over that period. In addition he claimed loss of future earnings, on the assumption that when he is eventually released it is unlikely that he will be

⁹⁴ [2009] 3 WLR 167.

employable. He also claimed general damages for his detention itself, his feelings of guilt and remorse over his killing, and for damage to his reputation.

The first of these claims was not really in dispute. The causal link between the defendant's negligence and the plaintiff's loss of earnings up until the point of his arrest for murder appears clear. The other heads of damage in the claim, however, are thrown into doubt by two factors. Firstly, under the House of Lords decision in *Jobling v Associated Dairies Ltd*,⁹⁵ in assessing damages, the court must take into account any events which have occurred between the date of the cause of action and the trial which would have the effect of reducing the plaintiff's earning capacity regardless of the tort. Secondly, the principle *ex turpi causa non oritur actio* presents itself, because Gray's detention and subsequent loss of earnings was a result of his own action of killing, and the consequent conviction for manslaughter. It was held that the principle of illegality cut short the plaintiff's claim. In effect, the responsibility for his detention beyond the point of his criminal act was attributed to himself. Hence he himself was to bear the loss of those future earnings.

The closest analogy to the facts of *Gray*, is the Court of Appeal decision in *Clunis v Camden & Islington Health Authority*.⁹⁶ Clunis had been a psychiatric patient with the authority for a lengthy period and had once been admitted to hospital under their statutory powers, then discharged. There was a statutory duty on the defendants' part to provide aftercare for Clunis, but there was a series of problems involving missed appointments, and then Clunis left his only known address. One morning he was seen on Finsbury Park station waving screwdrivers, and later that day he stabbed another person, killing him. Clunis sued the authority in negligence. His claim was that his detention for manslaughter was the result of

⁹⁵ [1982] AC 794.

⁹⁶ [1998] QB 978.

the Authority's failure to exercise their power to admit him, which given their knowledge of him and his situation, they ought to have done. Assuming that there was negligence on the Authority's part, (which is far from clear on the facts), it was held a plea of manslaughter did not obviate entirely the plaintiff's responsibility for his behaviour, and the principle *ex turpi causa* applied so as to defeat the action.

An excursus through the Australian case-law, however, shows that the position is not always so clear cut, and there is room both for diversion in terms of interpretation of precedent, and confusion in terms of principle and policy. In *Miller v Miller*⁹⁷ the plaintiff, who was a girl aged 16 years, was travelling in the early hours of the morning as a passenger in a motor vehicle driven by the defendant. Earlier still that day the vehicle had been broken into and stolen from a car-park by the plaintiff, the plaintiff's sister, aged 20, and her cousin, aged 13. They had taken the car for the purpose of travelling to their home in Maddington. The defendant was uncle to the plaintiff. The previous evening the plaintiff with her companions had been drinking alcohol in the streets. Her attempts to accompany them into a nightclub were unsuccessful due to her age, and she left to return home. However the train service had ceased for the night, and she was without enough money for a taxi fare, so she returned and found her companions. The plaintiff, her sister and cousin, found the vehicle in the car-park, broke into it, and started the engine. They were observed by the defendant who had been standing at a taxi rank nearby. He then walked to the vehicle and offered to drive. A number of other persons then entered the vehicle, so that although the car had capacity to carry five, there were, in total, nine occupants. The defendant did not have a driver's licence and he was intoxicated. He also knew the vehicle to have been stolen. During the journey the defendant was driving at excessive speed. He applied the brakes, which caused the car to skid, sliding

⁹⁷ [2009] WASCA 199.

50 metres before mounting a median strip and crashing into a metal pole. He was subsequently convicted of a number of serious driving offences and sentenced to five years imprisonment. In the collision one passenger was killed and the others suffered serious injury, including the plaintiff. She sued the defendant driver claiming damages in negligence.

In the District Court the defendant contended that at the time of the collision he was under no duty of care to the plaintiff, since she was engaged in an illegal enterprise, together with himself. In the alternative he contended that by her conduct in accompanying him as a passenger when she knew him to be intoxicated, she had voluntarily consented to the risk of injury caused by his negligent driving. The defendant also pleaded contributory negligence on the plaintiff's part since she had not been wearing a seat belt. The trial judge found on the evidence that although the plaintiff thought it probable that the defendant did not possess a driver's licence, it could not reasonably be inferred that she was accepting that he would drive in a reckless manner. Whilst she knew he had been drinking, the evidence was not that she realised his level of intoxication to be such that he was incapable of maintaining safe control of the vehicle. He had at first driven sensibly. When he started to speed and ran through red traffic lights, the plaintiff had asked him to stop and let her and her sister out of the vehicle, and he slowed down. Later when he began to speed again she asked that they be let out, but the defendant ignored her and drove on. The court found that a reasonable person in the plaintiff's position would not have reason to appreciate at the time she embarked upon the homeward journey, that she would be exposing herself to an unusual and serious risk of injury. Once that risk had become apparent, the conduct of the plaintiff was such as to indicate that she was not willing to accept it. The court then went on to consider the relevance of illegality in relation to the defendant's plea that on the occasion of the journey he was under no duty of care to the plaintiff. The 'illegality', in question, lay with permitting the

defendant to drive her home in a vehicle which she knew to be stolen. However on these facts, since the purpose of the lift was simply the conveyance of the plaintiff to her home, rather than any criminal venture, the fact that the vehicle was stolen appeared to Her Honour to have no significant connection with the plaintiff's ordinary duty of care to the plaintiff as driver to passenger; the activity of driving a stolen car is not, of its nature, fraught with serious risks. Her Honour concluded that at the time of the events the defendant owed to the plaintiff the ordinary duty of care that a driver owes to a passenger. The defendant appealed to the Supreme Court of Western Australia.

The Supreme Court considered several earlier decisions of the High Court of Australia. The first of these, *Henwood v Municipal Tramways Trust (SA)*,⁹⁸ concerned a passenger on board the defendants' tram who, becoming unwell, left his seat, leaned over the side of the vehicle and vomited. His head was struck by two steel standards located in the middle of the street and he died shortly afterwards of those injuries. An action was brought by the personal representative of his estate against the defendants who in defence relied upon the deceased's breach of a bye-law, supported by a penalty of a fine, which prohibited passengers from allowing any part of their body to protrude from the moving vehicle. The court held that the breach of the bye-law was not sufficient reason to disentitle the plaintiff from maintaining an action in negligence. The court was firmly of the view that the simple fact of the plaintiff's unlawful conduct at the time of the events did not mean that it must follow that the action fails.

Latham CJ concluded

⁹⁸ (1938) 60 CLR 438.

it cannot be held that there is any principle which makes it impossible for a defendant to be liable for injury brought about by his negligence simply because the plaintiff at the relevant time was breaking some provision of the law.⁹⁹

In *Smith v Jenkins*,¹⁰⁰ the plaintiff, in concert with the defendant, had assaulted the owner of a vehicle and stolen it. Later, when the two were travelling in the vehicle, the defendant drove negligently and the plaintiff was injured. The High Court held that the plaintiff was not entitled to recover damages in tort in these circumstances. Barwick CJ emphasised the fact that at the time of the events giving rise to the injury complained of, the plaintiff was engaged in a criminal activity which carried a penalty of imprisonment. The serious nature of this illegal conduct was such as to invoke a public policy consideration and the court ought not to entertain an action for damages arising from it.

In *Progress & Properties Ltd v Craft*,¹⁰¹ the plaintiff was a workman on a construction site who was injured when a goods hoist in which he was being carried collapsed to the ground. The hoist was not designed or constructed for carrying persons, and under statutory regulations it was offence for a person to travel in it or permit another to do so. The majority of the High Court nonetheless held that defendant's plea of illegality must fail. For the majority, on these facts, it was not reasonable to relate the illegal conduct on the plaintiff's part to any duty of care owed to him in tort by the defendant. The standard of care owed on the occasion by the operator of the hoist would be in no way diminished by that illegality.

⁹⁹ (1938) 60 CLR 438, 446.

¹⁰⁰ (1970) 119 CLR 397.

¹⁰¹ (1976) 135 CLR 651.

In *Jackson v Harrison*¹⁰² the plaintiff was travelling as a passenger in a vehicle when he was injured as a result of the defendant's negligent driving. The plaintiff knew at the time that the defendant was disqualified from holding a driver's licence and therefore committing a criminal offence by driving. Again the majority of the court held that these factors provided no basis for a denial of the plaintiff's claim in negligence. Jacobs J (Aickin J agreeing) distinguished *Smith v Jenkins* on its facts. In that case the car had been had stolen for the purpose of a 'joy-ride', and the plaintiff had been injured in the course of that very criminal enterprise itself. It was not appropriate for the court to attempt an assessment of the standard of care to be expected of the defendant in that context. But it was doubted that the decision in *Smith* would be the same where the collision had occurred 'days, weeks or even months later when the circumstances of the taking of the vehicle had ceased to have any significant relationship to the manner in which the vehicle was being used'.¹⁰³ Murphy J was of the opinion that in a case where the illegality was related to a statutory provision, as was the case in *Jackson*, the question was essentially one of statutory policy. In the instant case the relevant legislation did not require that that recovery be denied and that the defendant be exempted from liability.¹⁰⁴ In other cases the relevance of illegality to the consideration of the plaintiff's claim for damages was properly a matter for judicial policy.¹⁰⁵

The issue was visited again most recently by the High Court in *Gala v Preston*.¹⁰⁶ The defendant and two others had earlier in the day stolen a vehicle after consuming large quantities of alcohol. The plaintiff was a passenger in the vehicle when the defendant negligently drove off the road into a tree. At the time of the collision the car was being used

¹⁰² (1978) 138 CLR 438.

¹⁰³ (1970) 119 CLR 397, 460.

¹⁰⁴ (1970) 119 CLR 397, 466.

¹⁰⁵ (1970) 119 CLR 397, 464.

¹⁰⁶ (1991) 172 CLR 243.

illegally under the Criminal Code (Qld). The High Court held that in the circumstances the action must fail.

According to Mason CJ; Deane, Gaudron and McHugh JJ:

The joint criminal activity involving the theft of the motor vehicle and its illegal use in the course of a spontaneously planned 'joy-ride' or adventure gave rise to the only relevant relationship between the parties and constituted the whole context of the accident. That criminal activity was, of its nature, fraught with serious risks...each of the parties to the enterprise must be taken to have appreciated that he would be encountering serious risks in travelling in the stolen vehicle when it was being driven by persons who had been drinking heavily...In the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care.¹⁰⁷

The dicta of Their Honours cited above was applied by the Supreme Court of Western Australia in *Miller v Miller* in allowing the appeal and holding that on the facts the plaintiff's claim in negligence must fail. The plaintiff and the defendant at the time of the collision were engaged in a joint criminal activity since both were using a stolen motor vehicle. In the opinion of Buss JA, at the commencement of the journey there were significant and foreseeable risks involved, which included that the defendant might not exercise the care ordinarily to be expected of a competent driver, and might refuse to comply with any request to stop the vehicle. Also relevant were the facts that that the plaintiff could have left the vehicle before the journey had commenced, the plaintiff knew that the defendant had consumed some alcohol, the plaintiff had assumed correctly that the defendant had no licence, and she could see that the vehicle was seriously overloaded.

¹⁰⁷ (1991) 172 CLR 243, 254-5.

On further appeal to the High Court of Australia, the trial court's verdict was restored, and the plaintiff's claim was ultimately allowed.¹⁰⁸ This was principally based upon a construction of the statute. The illegality in which the claimant was involved was the conduct of taking and using the stolen vehicle. It was open to her to withdraw from the joint illegal enterprise, and by twice asking the driver to stop so that she could leave, which was the most she could reasonably do, she had effectively withdrawn. Therefore at the time of the collision in which she was injured, she was not a participant in a criminal venture, and was owed a duty of care by the driver.

The path to the decision in *Miller v Miller* can be described as a tortuous one, and it remains questionable as to what significance the issues pertaining to the standard of care in negligence are properly seen to have in relation to a defence of illegality. This issue is possibly complicated by the earlier High Court decision in *Cook v Cook*.¹⁰⁹ In that case, in the course of a family gathering, the plaintiff, who was related to the defendant, had coaxed the defendant into driving the motor car with herself as passenger, when to the plaintiff's knowledge the defendant had no driver's licence and had never driven a vehicle before. On these facts the High Court found that the plaintiff had placed herself in a position where she could reasonably expect only the standard of care of such an inexperienced driver, rather than the ordinary standard of reasonable care. *Cook v Cook*, however, has since been overruled by the subsequent High Court decision in *Imbree v McNeilly*,¹¹⁰ which restores an objective standard of care in the context of the driver/passenger duty, rather than entertaining the possibility of individuated standards.

¹⁰⁸ [2011] HCA 9.

¹⁰⁹ (1986) 162 CLR 376.

¹¹⁰ (2008) 82 ALJR 1374.

In *Miller v Miller*, the evidence as to what the plaintiff could be taken to know in relation to the defendant being unlicensed and having consumed alcohol could be relevant to an issue of consent and an alternative defence of *volenti non fit injuria*, always assuming this had some relationship factually to the negligent driving, so as to provide a causal link, or give rise to a finding of contributory negligence on the plaintiff's part. The knowledge which the plaintiff had relating to the earlier theft of the vehicle, if important at all, must surely go to the issue of the joint illegal enterprise. However, in relation to alternative verdicts, the explanation lies in a different interpretation or findings on the facts rather than in a difference as to applicability and effect of the principle itself.¹¹¹

We can see then, that *ex turpi causa non oritur actio*, despite the fact there is relatively little in the way of case-law, has a place of some significance within a relatively narrow area of tort law, since it is at least capable of determining an outcome. *Gray's* case both endorses that view, and represents a variation of the principle in this context, since its effect may be to disqualify part of a plaintiff's claim, rather than the claim in its entirety. This possibly shows again that the category, although ostensibly a narrow one, is yet capable of expansion or contraction, sometime according to changing perceptions of moral standards.¹¹²

How well does the concept reconcile with the positivist model of law as a system of rules? To begin with, the concept clearly has a moral basis, since it is grounded in a view as to what would be perceived by most to be a part of public morality. This alone does not found any

¹¹¹ It may be that the road traffic context is an unarticulated influence. With the presence of insurance there is a strong policy in favour of compensation. See, for example, J Fleming, *An Introduction to the Law of Torts* (1967) 176. In order to rebut the driver's duty of care the defendant's illegal conduct would have to be doubtless.

¹¹² In *Kirkham v Chief Constable of Manchester* [1990] 2 QB 283 the plaintiff's suicide did not invoke the principle so as to defeat his claim against the police who had assumed a duty of care for his safety. In the context of wills, the equitable maxim 'no man shall profit from his wrongdoing' has been subtly extended, again apparently according to perceptions of morality. In *Re Orton* [1968] (unrep) Times 14 April the playwright Joe Orton by his will left his estate to his domestic partner, who murdered him, then killed himself. The will was held to have no legal effect and the estate passed to Orton's sister as his next of kin. The partner himself didn't stand to profit, since his intention was to kill himself afterwards, and he did. His own beneficiaries would have profited. Again the maxim has been considered, and sometimes applied, in other categories of law.

crucial objection to the rule model, since, as we have seen previously, this is true of many legal rules, which nonetheless can be viewed as legal by virtue of other, distinct and separate legal factors. But *ex turpi causa* does not appear to operate like a rule.

We may notice, first, that it is not confined to the law of tort.¹¹³ Legal rules normally are confined within a discrete category of law. A stronger objection, however, is that the concept, in its application, indicates a high degree of inconsistency, and appears to require a moral judgment at the stage of adjudication. The distinction between the sort of behaviour sufficiently repugnant to society to warrant the invocation of the plea, and that which is not, itself is a matter of moral judgment. Again this means that we can predict, on a set of facts, whether the plea is likely to defeat the plaintiff's action, but we cannot postulate a rule that it will or will not do so. Moreover the disagreement over the proper application of the concept in *Miller v Miller* illustrates this sort of inconsistency, and the outcome ultimately resides with a judgment about the moral culpability of the plaintiff's conduct. Is it significantly less morally stigmatised that that in say, *Gala v Preston*¹¹⁴ to warrant a different outcome? All these features seem to vindicate Professor Dworkin's view that some important legal concepts are better described in terms of principle, and where this is the case, it is not possible to distinguish them in their operation, from their basis in social morality.

We can say about *ex turpi causa* that it is derived from a discernible policy position within the law, and that that policy gives rise to first the invention, and later the operation of the principle. We cannot, it is submitted, regard the concept as a rule.

¹¹³ Unsurprisingly its origins are in equity; *Everet v Williams* (unrep) (1725), supra p.24.

Chapter Four

Psychological Injury ¹¹⁵

The tort category of liability for the infliction of psychological harm provides both a relatively modern and rapidly developing context in which to view the influence of precedents, and despite the often articulated concerns about indeterminate liability, as well as some other policy reasons for a denial of suit by the courts, most of the history of the case-law to date presents an overall picture of steady judicial expansionism. Certainly there was a typical reluctance on the part of the judiciary to create the category in the first place. Once created, however, the pattern of development exhibits little reticence in extending the principles within it inductively. In fact only recently, and only in England and Wales, have we seen policy considerations operating so as to stem that expansion.

Since the Scottish case of *Bourhill v Young*¹¹⁶ in 1943 it has become common to examine a defendant's degree of legal responsibility for psychological harm¹¹⁷ caused to the plaintiff in a negligence allegation primarily in terms of the defendant's duty of care. In that case it is true that the House of Lords established the importance of the duty criterion for controlling the extent of so-called 'nervous shock' liability. Yet it is also true that *Bourhill v Young* was until 1982 the only case on the issue decided at the ultimate level of the English jurisdiction, and that the majority of the major decisions between 1888 when the Privy Council decided

¹¹⁵ This chapter draws on some material which first appears in K A Warner, 'Judicial Reasoning and Precedent' 10 *Legal Studies* (1990) 63.

¹¹⁶ [1943] AC 92.

¹¹⁷ Reference to 'nervous shock' has become ingrained but it would be better now to abandon the term. There is no compensation for 'shock', only for medically diagnosed psychological illness. The psychological illness will invariably have physical symptoms. It is perhaps not clear whether the compensation goes to the psychological condition or the symptoms. If the latter then the only distinctive feature of the claim is that the injuries appear to arise less obviously directly and more slowly than in the standard claim for physical injuries. As early as *Dulieu v White & Sons* Kennedy J spoke of 'the undoubted rule that merely mental pain unaccompanied by any injury to the person cannot sustain an action of this kind' ([1901] 2 KB 669, 673). See also *Bourhill v Young* [1943] AC 92.

*Coultas v Victorian Railway Commissioners*¹¹⁸ and 1982 when the House once more had the issue before it in *McLoughlin v O'Brian*¹¹⁹ were not, in formal terms at least, decided in terms of duty. If *Bourhill v Young* established a rule at the highest level, the case did not control the factual outcome of those subsequent major cases.¹²⁰ The same generalisation is true of the Australian jurisdiction where the majority of the High Court in *Chester v Waverley Municipal Council* in 1939¹²¹ determined the claim for psychological injury in terms of duty and the same question was squarely raised again only in 1984 in *Jaensch v Coffey*.¹²²

The modern chain of 'shock' cases commences with *Coultas v Victorian Railway Commissioners*, where a level-crossing gatekeeper had allowed the driver of a horse-drawn carriage to proceed over the crossing although a train was approaching. The train narrowly missed the rear of the carriage but the plaintiff, who was a passenger in the carriage, suffered shock which led to subsequent illness. The Supreme Court of Victoria found that the gatekeeper had been negligent and that damages for physical and mental injuries caused by the fright could be recovered. The defendants appealed successfully to the Privy Council. The only point expressly taken by the Privy Council however, was that the nervous shock was not a consequence to be attributed to the gatekeeper, otherwise

... in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged

¹¹⁸ (1888) 13 App Cas 222.

¹¹⁹ [1982] 2 WLR 982.

¹²⁰ As the highest authority, *Bourhill v Young* could have been preferred to *Hambrook v Stokes Bros*, or the cases could have been distinguished, since in the more modern parlance, the plaintiff in the first case was a primary victim, and in the second case a secondary victim, thus opening up two divergent lines of cases within the same category. This is what appears to have occurred subsequently.

¹²¹ (1939) 62 CLR 1.

¹²² (1983) 155 CLR 549.

physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened up for imaginary claims.¹²³

In fact, the *Coultas* case offered virtually no legal reason for ruling against Mrs Coultas' claim, only a statement of concern for the practical difficulties attending litigation of 'pure shock' cases. No question of duty on the gatekeeper's part towards Mrs Coultas was raised, and insofar as the question of impact might subsequently be said to relate to the existence of a duty, then strictly the decision of the Supreme Court was not disturbed; impact was not necessary.

In any event, the Privy Council decision in *Coultas*' case never found approval in later decisions. In *Pugh v London, Brighton and South Coast Railway*,¹²⁴ a signalman had managed to prevent a collision between a stationary train and an oncoming one by leaning out of his signal box and desperately waving a red flag at the driver of the moving train. The alarm and excitement gave him a shock which incapacitated him from working for the next year or so. *Coultas* was invoked by the defence but the Court of Appeal chose to decide in favour of the plaintiff on the basis of an insurance contract which he had earlier taken out with the defendants, according to which, the court ruled, he was entitled to be compensated for this incapacity. As to whether the nervous injury was a consequence for which the defendant was in law answerable the court held that the 'connection between the cause and the effect' was 'sufficiently close and complete'.¹²⁵

¹²³ The position in *Coultas* was mirrored in the U.S.A. in *Lehman v Brooklyn City Railroad Co.* 47 Hun NY 355 (1888).

¹²⁴ [1896] 2 QB 248.

¹²⁵ [1897] 2 QB 57, 59.

Again *Coultas* was argued and rejected in *Wilkinson v Downton*,¹²⁶ where the defendant had given the plaintiff a shock by falsely telling her that her husband had been injured in a road accident and that she must go to fetch him at once. The plaintiff succeeded. As to *Coultas*, it was a different matter, since ‘... there was not, in that case, any element of wilful wrong.’

Moreover decisions in the Court of Appeal in Ireland,¹²⁷ and in the New York Court of Appeals¹²⁸ had also avoided the outcome in *Coultas* case.

The first of the enduring statements in this branch of modern law arrived with *Dulieu v White & Sons*.¹²⁹ There the defendants’ servant driver had contrived to run their pair-horse van into a public-house where the plaintiff was working behind the bar, causing her shock and illness. At the time of the accident the plaintiff was pregnant, and two months later she gave birth prematurely to a brain-damaged child, a result which she alleged followed from the shock.¹³⁰ The Court of Appeal upheld her claim for her illness consequent upon the shock; where fright had directly produced physical injury there was no requirement that there need be any accompanying physical impact. As to the extent of liability for psychological injuries, however, Kennedy J made a statement that was to command the attention one way or the other of subsequent courts deciding cases of this kind:

It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation.

¹²⁶ [1897] 2 QB 57.

¹²⁷ *Bell v Great Northern Ry Co of Ireland* [1890] 26 LR Ir 428.

¹²⁸ *Mitchell v Rochester Ry Co* 151 NY 107 (1896).

¹²⁹ [1901] 2 KB 669.

¹³⁰ The statement of claim included ‘5. In consequence of the shock sustained by the plaintiff the said child was born an idiot.’; which claim counsel subsequently abandoned.

The shock, where it operates through the mind, must be shock which arises from a reasonable fear of immediate personal injury to oneself.¹³¹

As to the existence of a legal duty the court felt that there could be ‘no question’.

Still, the statement of the rule in *Dulieu v White* itself was to prove of limited duration. In *Hambrook v Stokes Brothers*¹³² the duty question was not argued, but the requirement of ‘fear for oneself’ proffered by Kennedy J in *Dulieu v White* was not accepted by the majority of the Court of Appeal. In *Hambrook’s* case the defendants’ servant lorry driver had left his vehicle unattended with the engine running at the top of a steep, narrow and winding road. The lorry took off on its own down the incline, eventually running against the side of a house some 300 yards further down the road. Mrs Hambrook had been accompanying her children to school, and shortly after she had left them to walk the rest of the way on their own, after they were out of sight, the lorry came down the hill rapidly towards her, but stopping short of her. A crowd of bystanders gathered and the plaintiff was told that the lorry had run down a young girl who answered the description of her daughter. In a state of distress Mrs Hambrook went to the school and failed to find her daughter. She then went to hospital to discover that her daughter had been taken there badly injured after being hit by the runaway lorry. The shock resulting from these events affected Mrs Hambrook’s physical health and she died following surgery some two-and-a-half months later.

A claim by Mrs Hambrook’s husband for loss of his wife’s services failed at first instance, where the judge put to the jury the question. ‘Was the death of the wife the result of shock produced by fear and loathing to herself?’ On appeal the Court of Appeal ordered a new trial.

¹³¹ [1902] 2 KB 669, 675.

¹³² [1925] 1 KB 141.

For Atkin LJ, the question was whether the consequences complained of were the ‘direct result’ of the wrongful act or omission. Bankes LJ felt that the defendant ‘ought reasonably to have anticipated’ the consequence of shock in the circumstances. Both rejected Kennedy J’s limitation in *Dulieu v White*, but Bankes LJ concluded that to succeed this plaintiff would need to show

... that the shock resulted from what the plaintiff’s wife either saw or realised by her own unaided senses, and not from something which someone had told her and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children.¹³³

The path of the common law apparently diverged with the American decision of *Waube v Warrington*. An action brought by the estate of a woman who had died from shock injuries suffered when she saw her child run down and killed by a negligent driver failed. According to Wichen, J,

It is one thing to say that as to those who are put in peril of physical impact, impact is immaterial if physical injury is caused by shock arising from the peril... It is quite another thing to say that those who were out of the field of physical danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others, when that distress results in physical impairment. The answer to this question cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved in order to ascertain how far the defendant’s duty and the plaintiff’s right may be justly and expediently extended. It is our conclusion that they can neither justly nor expediently be

¹³³ [1925] 1 KB 141, 152, Sargant J dissenting, favouring Kennedy J’s limitation in *Dulieu v White & Sons* [1902] 2 KB 669.

extended to any recovery for physical injuries sustained by one out of the range of ordinary physical perils as a result of the shock of witnessing another's danger.¹³⁴

In Australia, the High Court in *Chester v Waverley Municipal Council*¹³⁵ rejected the claim of a woman who suffered shock when she witnessed the body of her young son dragged out of the flooded trench in which he had fallen and drowned, while the Court of Appeal in England in *Owens v Liverpool Corporation*¹³⁶ upheld a claim for shock brought about through the imminent peril of a corpse. A tramcar driver had negligently run into a hearse, and the coffin overturned, threatening to deposit its contents on the road. Several of the relatives of the deceased, travelling in the vehicle behind, suffered shock. The court overturned the view of the trial judge that there 'must be apprehension of injury to a human being' before the law permitted recovery.

But in 1943, before the House of Lords, the impact – duty relationship was finally taken on board. Reasoning along lines similar to *Waube v Warrington* the House in *Bourhill v Young*¹³⁷ rejected the shock claim of an Edinburgh fish-wife who had wrenched her back and become ill when she heard the noise of a traffic collision further along the road from where she was positioned, and had to pass the blood left on the road a while afterwards. She was approximately 50 feet away from the point of impact between the motor-cycle and the car which were involved in the accident.

Mrs Bourhill relied upon *Hambrook v Stokes Brothers*, contending that a legal duty existed to drive so as to avoid causing injury to other road users. That the injury turned out to be shock

¹³⁴ 258 NW 497; 216 Wis 603 (1935).

¹³⁵ [1939] 62 CLR 1, Evatt J dissenting.

¹³⁶ [1939] 1 KB 394.

¹³⁷ [1943] AC 92.

rather than immediate physical injury was of no consequence. For the defendant it was argued that Mrs Bourhill had been in no danger and there was no liability for shock brought about by hearing a loud noise.

The House of Lords held that no legal duty extended to Mrs Bourhill. The reasoning can be summarised in the words of Lord Thankerton: ‘... the shock resulting to the appellant, situated as she was, was not within the area of potential danger which the cyclist should reasonably have had in view.’¹³⁸

Although some of the judgments proceeded in terms of what the motor-cyclist (who was driving too fast) ought to have anticipated as a likely consequence of his driving, the clearest practical implication of *Bourhill v Young* (endorsing such judgments as *Waube v Warrington* and the minority view in *Hambrook v Stokes Brothers*) is that, at least in traffic accident situations the bystander who is beyond the range of possible impact is outside the ambit of the legal duty of care.¹³⁹ It is possible, it appears at this point, to articulate the law in terms of a legal rule.

Bourhill v Young is the clearest statement of the impact-duty rule, but it also proves to be its brief high-water mark in a fast moving area of law. For although *Bourhill* was followed by the Court of Appeal in *King v Phillips*,¹⁴⁰ the influence of *Hambrook v Stokes Brothers* was clearly not finished. In *King v Phillips*, all three judges ruled against a shock claim brought by a woman who had been in her upstairs bedroom when she heard her young son cry out from the street below. She looked out of the window, witnessed a taxi-cab backing

¹³⁸ [1943] AC 92, 99.

¹³⁹ We may note, however, more recent dicta that this cannot be excluded as a possibility; per Lord Keith in *Alcock v Chief Constable of South Yorkshire* [1994] 4 All ER 907, 914.

¹⁴⁰ [1953] 1 QB 429.

over the child's tricycle, and thought that he had been run over. Only one judge, however, specially decided against the mother in terms of duty.¹⁴¹ Denning LJ offered a different approach, and a different rule, if one is to appreciate the decision in terms of rule:

We have to try to reconcile *Bourhill v Young* with *Hambrook v Stokes Brothers*, particularly in regard to the duty of the driver ... Take the case of the fish-wife. Although the House of Lords held that the motor-cyclist was under no duty to her, that must mean that he owed her no duty in regard to emotional shock.¹⁴² It cannot mean that he did not owe her a duty in regard to physical injuries if it had so happened that she had suffered any...I think we should follow *Hambrook v Stokes Brothers* so far as to hold that there was a duty of care owed by the taxi-driver not only to the boy, but also to his mother...Nevertheless, I think that the shock in this case is too remote to be a head of damage.¹⁴³

Later, again there was no duty question in *Schneider v Eisovitch*,¹⁴⁴ but rather as to what consequences of a breach of duty were acceptable as heads of damage. The plaintiff had been travelling with her husband in a vehicle which the defendant was driving. There occurred a collision in which the plaintiff was injured and rendered unconscious and her husband was killed. The plaintiff regained consciousness later in hospital and suffered further shock when she was told of her husband's death. A claim on this account was allowed by the trial judge. The defendant's foresight began to make the currently important extension to the aftermath of the breach of duty.¹⁴⁵

¹⁴¹ Singleton LJ; [1953] 1 QB 429, 433.

¹⁴² As well as 'mere shock', 'mere grief' at the loss of a loved one does not sound in damages in most common law jurisdictions, see, for example, *Hinz v Berry* [1970] 2 QB 40, 42 (per Lord Denning), *Mount Isa Mines v Pusey* (1970) 125 CLR 383, 394 (per Windeyer J). What constitutes a recognised psychiatric injury, or evidence of it, is not in itself unproblematic. See, for example, *J v Chief Constable of South Yorkshire* [1991] 4 All ER 907. More recently in *Hunter v British Coal Corporation* the plaintiff's 'survivors guilt', (*obiter*) did not count as an actionable damage; [1998] 3 WLR 685. Neither did the wife's 'extended grief reaction' in *Gifford v Strang Patrick Stevedores Ltd* (2002) 214 CLR 269.

¹⁴³ [1953] 1 QB 429, 438-9; 441-442.

¹⁴⁴ [1960] 2 WLR 169.

¹⁴⁵ On this aspect see *Boardman v Sanderson* [1964] 1 WLR 1317, *Chadwick v British Railways Board* [1967] 1 WLR 912, *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383, *Benson v Lee* [1972] VR 879, and *McLoughlin v O'Brian* [1981] 1 All ER 809. For the earlier rejection see *Chester v Waverley Municipal Council* (1939) 62 CLR 1.

In *Boardman v Sanderson*¹⁴⁶ the plaintiff recovered damages over shock resulting from his hearing the cries of his young son and rushing upon the scene to find the boy's foot trapped under a reversing car. The only judgment delivered in the Court of Appeal spoke in terms of duty, the foreseeability test, after *King v Phillips*¹⁴⁷ now capable of appearing in either the guise of duty or remoteness.

It was said to be:

clear that a duty was owed by the defendant not only to the infant but also to the near relatives of the infant who were, as he knew, on the premises, within earshot, and likely to come upon the scene if any injury or ill befell the infant.¹⁴⁸

The rapid demise of the impact-duty statement is probably sealed with *Chadwick v British Railways Board* in 1967.¹⁴⁹ In that case the plaintiff had taken part in rescue operations after a horrific railway accident had occurred some 200 yards from his house. The stress and horror of the events had a progressively deleterious effect on his health. His claim for damages was upheld. Following this in *Hinz v Berry*¹⁵⁰ where a woman had witnessed a car run into and kill her husband and injure several of her children while she was in a field across the road from the spot, the only appeal point was the award of damages.

In *Mount Isa Mines Ltd v Pusey*¹⁵¹ before the High Court of Australia, the appeal question concerned the defendant company's liability over the type of mental injury sustained by the plaintiff who suffered shock while assisting a badly injured fellow workman. The defendants

¹⁴⁶ [1964] 1 WLR 1317.

¹⁴⁷ [1953] 1 QB 429.

¹⁴⁸ [1964] 1 WLR 1317, 1322.

¹⁴⁹ [1967] 2 All ER 945.

¹⁵⁰ [1970] 1 All ER 1074.

¹⁵¹ (1971) 125 CLR 383.

were held liable to compensate for a form of schizophrenia which would only rarely result from such shock.

In Australia, *Benson v Lee*,¹⁵² later however, did raise the duty question again, and the Victorian Supreme Court confirmed the trend to regard the aftermath of an accident as within the range of foresight. The plaintiff's child had been run over by a car at a time when the plaintiff herself was at home, 100 yards away. She learned of the accident from the injured child's older sibling soon after the events had taken place. The shock resulted from a combination of hearing of the event, coming to the scene and finding the child injured, and attending the child through to hospital where he died. The defendants were held liable for the plaintiff's harm.

Yet the impact-duty proposition attempted a belated revival in the English jurisdiction in 1982. In *McLoughlin v O'Brian* the plaintiff's husband and children had been severely injured in a car crash, one child dying almost immediately, the other two being taken to hospital. Two hours later the plaintiff was told of the accident and arrived at the hospital where she learned of the death of the one child and then attended her husband and the other children. Her subsequent injuries resulting from the general shock included organic depression and personality change. At first instance her claim was rejected. For the trial judge the vital question was whether

The hypothetical reasonable bystander (would have) foreseen the risk of injury by shock to this plaintiff if the defendants failed to exercise reasonable care in the driving of their motor vehicles on the highway at the material place and time.

¹⁵² [1972] VR 879.

He concluded:

I feel bound by principle and what I conceive to be good sense, if not constrained by authority, to conclude that in such circumstances injury to the mother is too remote a possibility to come within the ambit of the foresight of the reasonable bystander.¹⁵³

On appeal the Court of Appeal unanimously upheld the trial judge's ruling. According to Stephenson LJ 'considerations of policy ought to take this sort of injury to this class of person out of the scope of duty by limiting that scope to those on or near the highway at or near the time of the accident.'¹⁵⁴

Griffiths LJ agreed: 'Did the lorry drivers owe a duty to the plaintiff in her home two miles away from the scene of their bad driving? In my judgment they did not.'¹⁵⁵

The plaintiff again appealed and the House of Lords unanimously reversed the Court of Appeal.¹⁵⁶

The important judgments in the House were those of Lords Wilberforce and Bridge. On the view of Lord Wilberforce the plaintiff's proximity to the accident is one factor to take into account in determining liability for shock. Proximity must mean 'close in time and space' but 'to insist upon direct and immediate sight or hearing would be impractical and unjust.'¹⁵⁷

Similarly, for Lord Bridge:

¹⁵³ [1981] 1 All ER 809, 812-813.

¹⁵⁴ [1981] 1 All ER 809, 820.

¹⁵⁵ [1981] 1 All ER 809, 824. Griffith LJ added 'the common thread running through all the judgments is the concept of physical proximity to the accident, as a necessary ingredient to create the duty of care owed by the driver' (at 824). However both Griffith and Stephenson LJJ disagreed with the trial judge's finding that the plaintiff's shock was 'unforeseeable' in the circumstances of the case; (at 823, 820).

¹⁵⁶ [1982] 2 WLR 982.

¹⁵⁷ [1982] 2 WLR 982, 991.

In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the court will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it...¹⁵⁸

The reasoning of Lords Wilberforce and Bridge was substantially applied by the High Court of Australia in the subsequent case of *Jaensch v Coffey*,¹⁵⁹ a case which raised similar facts. Here again the plaintiff's shock was 'reasonably foreseeable' and she was therefore within the ambit of the defendant's duty although safe from impact at the time of the accident.

Had the Court of Appeal decision in *McLoughlin v O'Brian* been left to stand then we would have seen in effect the re-emergence of *Bourhill v Young* as a controlling case. The matter is no doubt complicated by the obvious similarity of the ideas of foresight that the plaintiff would be affected (duty) and foresight that the consequences of the negligence would include psychological injuries (remoteness).¹⁶⁰ However, in practical terms, after *Bourhill v Young* no major reported decision has gone against the plaintiff, up to this point, with the exception of *King v Phillips*, which would now, no doubt, (unlike *Bourhill's* case itself) have to be decided differently.¹⁶¹ This is despite, at several points in the history of the cases, some clear

¹⁵⁸ [1982] 2 WLR 982, 1007; other factors to be considered included whether shock resulted from sensory and contemporaneous observance of the accident; whether plaintiff and victim were closely related. On the latter a 'workmate' relationship qualified in both *Dooley v Camell Laird & Co Ltd* [1951] 1 LI Rep 271 and *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383. There was disagreement as to the status of 'policy considerations', (see particularly the speeches of Lords Edmund-Davies and Bridge), but overall the decision, as Lord Wilberforce observed, raised no new legal principle.

¹⁵⁹ (1983) 155 CLR 549.

¹⁶⁰ In both *Schneider v Eisovitch* [1960] 2 WLR 169 and *Jaensch v Coffey* (1983) 155 CLR 549, it was argued that the plaintiff's personality was such as to predispose her unusually to psychological injury. In neither case did this affect the result. Nor did the rare form of schizophrenia in *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383.

¹⁶¹ In America the change of direction from 'impact-duty', most clearly articulated in *Waube v Warrington* 216 Wis 603 (1935), appeared more dramatically in the Supreme Court of California decision in *Dillon v Legg* (1968) 69 Cal Rptr 72 – successful claim by mother for psychological injury suffered witnessing young daughter run down and killed by car. We may note that codifying legislation in Australian states endorses the

propositions apparently capable of deducing a legal rule which would deny the viability of an expanded range of claims.

In England and Wales, however, a halt to the march is called in the dramatic *Alcock v Chief Constable of South Yorkshire*.¹⁶² At the event of the English F.A. Challenge Cup semi-final match held at the Hillsborough stadium in Sheffield, the region's police were responsible for crowd control. Hillsborough was a standard, but large, terraced stadium, with steps descending to the playing arena. The arena itself was enclosed by a fence, and the stadium was further divided by other fences, into 'pens', separating groups of spectators. At the rear of each pen was the gate facilitating entry and exit. The gate at the rear of Leppings Lane pen was not, as it should have been, secured by the police. The all-ticket match was a sell-out, but it was well appreciated that many hopeful fans without tickets would be present, seeking any means to gain entry to the event. Some discovered the easy access to the rear of Leppings Lane. Others followed, pushing their way in. In the domino effect, people were pushed forward and down, and soon bodies began to pile up close to the perimeter fence below. In the ensuing crush many spectators were killed and injured.

The immediate grim aftermath was described in his interim report on the Hillsborough Stadium Disaster by Taylor LJ:

view of the status of *King v Phillips* taken here. It is provided that, where the plaintiff is a close family member to the primary victim, a duty may arise; *Civil Liability Act 2002 (NSW)* s.30; *Wrongs Act 1958 (Vic)* s.72(2); *Civil Liability Act 2002 (Tas)* s.32. The *Civil Liability Act 1936 (SA)* s. 53(1) requires the secondary victim to be a parent, spouse or child. The *Civil Law (Wrongs) Act 2002 (ACT)* stipulates parent or domestic partner.

¹⁶² [1991] 4 All ER 907.

It was truly gruesome. The victims were blue, cyanotic, incontinent: their mouths open, vomiting: their eyes staring. A pile of dead bodies lay and grew outside gate three. Extending further and further onto the pitch the injured were laid down and attempts made to revive them...The scene was emotive and chaotic as well as gruesome.¹⁶³

News of the Hillsborough events permeated the country in diffuse ways. The game, abandoned after two minutes, was none the less broadcast live to air by national television and radio, so that the aftermath had the largest imaginable range of perception by others. There followed many claims in negligence against the defendants by others, ‘secondary victims’, not physically injured in the crush, but alleging psychological injury caused by the events in terms of their involvement with the aftermath. In his judgment, Lord Keith described some of these claims:¹⁶⁴

Mr and Mrs Copoc lost their son. They saw the scenes on live television. Mrs Copoc was up all night. She was informed by police officers at 6 a.m. that he was dead. Mr Copoc went to Sheffield at 4 a.m. with his nephew. He was informed at 6.10 a.m. of his son’s death and later identified the body.

Denise Hough lost her brother. She was 11 years older than her brother and had fostered him for several years although he no longer lived with her. She knew he had a ticket at the Leppings Lane end and would be behind the goal. She was told by a friend that there was trouble at the game. She watched television. At 4.40 a.m. she was informed by her mother that her brother was dead. Two days later, on 17 April, she went with her mother to Sheffield and confirmed an earlier identification of the body. His face was bruised and swollen.

Alexandra Penk lost her fiancé, Carl Rimmer. They had known each other for four years and recently became engaged. They planned to marry in late 1989 or at the latest early in 1990. She knew he was at the match at

¹⁶³ Cited in *Frost v Chief Constable of South Yorkshire* [1998] 3 WLR 1509. The events also gave rise to a novel issue of another, more morally controversial kind. Teenage Anthony Bland, present at the match, had been crushed, but his brain stem was left intact. He was therefore rendered in a ‘persistent vegetative state’. Some three years later the House of Lords determined that it was lawful for the applicants to cease providing nutrition to the patient to allow him physically to expire; *Airedale N.H.S. Trust v Bland* [1993] AC 789. [1991] 4 All ER 907, 911.

would be on the Leppings Lane terraces. She saw television in her sister's house and knew instinctively that her fiancé was in trouble. She continued to watch in the hope of seeing him but did not do so. She was told at about 11 p.m. that he was dead.

The House was unanimous in rejecting all these claims by secondary victims. The articulation of the decision is that no duty of care arose on the facts on the part of the defendants towards these plaintiffs in respect of their psychological harm. Two important factors present themselves, which may conveniently be referred to as 'proximity' factors. First, a reasonable foresight of the secondary victim as affected by the defendant's negligence, as requisite to the duty of care, is raised by the formal relationship between secondary victim and primary accident victim, i.e. the person directly injured in the events.¹⁶⁵ The second is a consideration of proximity of the secondary victim in a temporal sense; distance in terms of time and space from the tragic events.¹⁶⁶ How close was the plaintiff to the shocking scene? And the closer, the more likely that the plaintiff is brought within the ambit of the duty.¹⁶⁷

Lord Ackner, for example, spoke of 'sudden appreciation by sight or sound of horrifying event',¹⁶⁸ and opined that being informed, reading of, hearing of, is not enough,¹⁶⁹ and that simultaneous TV broadcast cannot be equated with being present and witnessing.¹⁷⁰

Following *Alcock*, in *White v Chief Constable of South Yorkshire*¹⁷¹ a large number of claims for post-traumatic stress disorder were brought by members of the police force who had

¹⁶⁵ On the dicta, this is a presumptive conclusion; it is the actual relationship which counts, but surely as a practical consideration this hardly matters.

¹⁶⁶ An unusual case in which both considerations were satisfied and no liability in the defendant followed, is *Greathorex v Greathorex* [2000] 1 WLR 1970. The defendant was driving while intoxicated and badly injured in a collision. The plaintiff was his father who in his role as rescue worker was called to the scene. Policy reasoning prevailed.

¹⁶⁷ But in Australia, now see *Gifford v Strang Patrick Stevedoring Ltd* (2003) 214 CLR 269; per Gummow and Kirby JJ.

¹⁶⁸ [1991] 4 All ER 907, 918.

¹⁶⁹ [1991] 4 All ER 907, 917.

¹⁷⁰ [1991] 4 All ER 907, 921.

played various roles in different places at the Hillsborough events, such as Janet Smith, who in the early hours on the following day was detailed to identify bodies and deal with relatives at a Sheffield hospital. The duty was denied.¹⁷²

In Australia,¹⁷³ by contrast, the onward trend of liability continues. The High Court of Australia has made two important, more recent, decisions.¹⁷⁴ In *Annetts v Australian Stations Ltd*¹⁷⁵ the plaintiffs' young son was taken on by the defendants to work in a remote outback location. The parents clearly would not have agreed to this had they not been given specific assurances that proper arrangements for his safety would be made and that he would be working under constant supervision. A few weeks later he was sent off alone as caretaker of another remote station, and some time after that he went missing. There was a prolonged search in which the plaintiffs took some part, which failed to locate him. Later his bloodstained hat was found in the desert, and some months after that, his body. He had died of dehydration, exhaustion and hypothermia. The plaintiffs were informed of this by telephone and subsequently the father viewed a photograph of skeletal remains for purposes of identification. Both parents developed psychological injury as consequence of this protracted ordeal. The High Court found the defendants liable in negligence. On the facts the defendants must have had the plaintiffs in contemplation as closely and directed affected by

¹⁷¹ [1983] 3 WLR 1509.

¹⁷² Two 'aftermath' claims which have since failed are *Taylor v Somerset Health Authority* [1993] P.I.Q.R. 262 where the plaintiff suffered through viewing her husband's body at the mortuary, and *Taylorson v Shieldness Produce Ltd* [1994] P.I.Q.R. 329 where parents briefly saw their fatally injured child at hospital.

¹⁷³ Most state jurisdictions in Australia have largely codified the common law: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

¹⁷⁴ *Tame v NSW* (2002) 211 CLR 317, is to be distinguished. The plaintiff was not subjected to injury or danger, and there was no secondary victim. She had been previously involved in a road collision with a third party, and a police officer had erroneously recorded her alcohol reading as .14 instead of 0. When she discovered this the plaintiff developed a psychotic depression as a result. Her claim failed on the basis that such a result did not come within that which ought to be foreseeable.

¹⁷⁵ 211 CLR (2002) 317.

their actions, and it was clearly foreseeable that their exposure to mental anguish over the very sort of risk that they had sought from the first to avoid could result in this kind of injury.

In *Gifford v Strang Patrick Stevedoring Ltd*¹⁷⁶ Mr Gifford had been employed by the defendants at their Sydney wharf, and was killed when their fork-lift driver ran over him. Whilst he was still married to Mrs Gifford, they had been estranged for some years, and, at the time of his death, she was in another relationship. On the evidence, Mr Gifford had maintained a close relationship with his three children, aged mid to late teens, and visited them at the former matrimonial home almost daily. Mrs Gifford maintained that she and Mr Gifford, despite their separation, had continued to experience a close relationship. She was informed of Mr Gifford's death soon after it occurred, and the children were told by family friends later on the same day. None viewed the body. Mrs Gifford and all three children sued the defendants alleging that their employee's negligence had caused them psychiatric injury. The first plaintiff's claim failed in the courts below on the ground that she had suffered no actionable damage.¹⁷⁷ The question for the High Court was whether in these circumstances the three children were owed a duty of care. The court was unanimous in holding in the affirmative.

Viewed simply in terms of trends the line of decisions is not a particularly difficult one. Despite a number of judicial statements indicative of some unease about the potential for extravagant liability the earlier cases show that claims for psychological injury were successful, with the exception of the original, *Coultas* case.¹⁷⁸

¹⁷⁶ (2003) 214 CLR 269.

¹⁷⁷ It was described as an 'extended grief reaction'; 51 NSWLR (2001) 606, 611.

¹⁷⁸ In Roman- based systems, an Aquilian action lies, and the development of the law has been similar. See, for example, *Bester v Commercial Union Verzekeringmaatskappy van SA Bpk* 1973 (1) SA 769 (A).

During the period from the mid 1930s to the early 1950s (*Waube v Warrington*, *Bourhill v Young* and *King v Phillips* can be taken as indicative decisions) the claims for psychological injury were rejected. In two of those decisions, *Bourhill v Young* and *King v Phillips*, the injury had been produced through the claimant's perception of what had happened to somebody else, and this situation had occasionally, but not consistently, been viewed as a poor candidate for success at an earlier stage (*Dulieu v White & Sons*). Yet in between we have *Hambrook v Stokes Brothers* which is to the contrary.

Possibly at this point the development is more subtly influenced by the radiating effects of *Donoghue v Stevenson* after 1932 as the negligence action more generally sought to envelope many of the other actionable tort situations in which fault might be an element, and the ways in which the higher courts afterwards interpreted that decision in subsequent cases more generally.¹⁷⁹ Psychological injury claims may have got caught in with a braking period in the general duty of care exposition, the original *Atkin* statement in *Donoghue v Stevenson* clearly having been regarded by some amongst the senior judiciary as perniciously wide.¹⁸⁰ Two of the Law Lords who decided *Donoghue v Stevenson* in 1932 presided also in *Bourhill v Young* in 1943. Lords MacMillan and Thankerton, both of whom had concurred in the majority verdict for the pursuer (claimant) in 1932, concurred in a unanimous verdict against the pursuer in 1943. In relation to the specific line of decisions we are here primarily concerned with, part of Lord MacMillan's speech in *Bourhill v Young* is worth mention:

I am of opinion that the late John Young was under no duty to the appellant to foresee that his negligence in driving at excessive speed and consequently colliding with a motor-car might result in injury to her, for such a result could not reasonably and probably be anticipated.

¹⁷⁹ See M A Millner, *Negligence in Modern Law* (1967)169-216.

¹⁸⁰ See, for example, the judgment of Lord Buckmaster in *Donoghue v Stevenson* (1932) AC 560, 566.

That is sufficient for the disposal of the case and absolves me from considering the question whether injury through mental shock is actionable only when, in the words of Kennedy J, the shock arises from a reasonable fear of immediate personal injury to oneself (*Dulieu v White & Sons* [1901] 2 KB 669, 682), which was admittedly not the case in the present instance. It also absolves me from considering whether, if the late John Young neglected any duty which he owed to the appellant – which, in my opinion, he did not – the injury of which she complains was too remote to entitle her to damages. I shall observe only that the view expressed by Kennedy J has in Scotland the support of a substantial body of authority, although it was not accepted by the Court of Appeal in England in *Hambrook v Stokes Brothers* ([1925] 1 KB 141), notwithstanding a powerful dissent by Sargant LJ. This House has not yet been called upon to pronounce on the question either as a matter of Scots Law or as a matter of English law, and I reserve my opinion on it. The decision in *Owens v Liverpool Corporation* ([1939] 1 KB 394), if it is the logical consequence of *Hambrook's* case, shows how far-reaching is the principle involved...¹⁸¹

That there are anomalous decisions however, is shown by *Owens v Liverpool Corporation*.¹⁸² After *King v Phillips* however (1953) the trend is clearly towards success for the claimant.

Although no reasons for the decision were provided, it is however clear that attention was given to *Coultas'* case, at least by counsel, in the cases decided immediately subsequently in the range presented here. They are ostensibly precedent controlled decisions, but both *Pugh v London, Brighton and South Coast Railway* and *Wilkinson v Downton* fall into that situation identified by jurisprudential research as *potentially* controlled by a number of sources.¹⁸³ In other words there is a choice of legal categories with which to commence the process of reasoning out the decision in the instant case. In *Pugh's* case the favoured category was one of contract; in *Wilkinson's* that of 'intentional wrongdoing.' It is perhaps worth noting that the categories available may be equally insistent.

¹⁸¹ [1943] AC 92, 105.

¹⁸² [1939] 1 KB 394.

¹⁸³ See J Stone, *Legal System and Lawyers' Reasonings* (1968) ch 7, and his *Precedent in English Law* (1984).

The clearest candidate for the binding precedent is of course *Bourhill v Young*. The five judges were unanimous and the decision comes from the top level: the House of Lords.

Bourhill v Young was followed in *King v Phillips*, but there is the difficulty that Denning LJ (as he then was) actually did not apply the reasoning of the House in the precedent case but sought instead to follow partially *Hambrook v Stokes Brothers* which was decided prior to *Bourhill's* case.¹⁸⁴

But what, we may ask, of the force of *Bourhill v Young* upon the decisions after *King v Phillips*. In no less than five cases which theoretically one would expect to be controlled by *Bourhill v Young*, the decisions went the other way in fact and, in those in which the ratio of *Bourhill v Young* was considered, the reasoning upon which the subsequent judges ostensibly based the decision was quite different. (*Boardman v Sanderson*, *Chadwick v BTC*, *Hinz v Berry*, *Mt Isa Mines v Pusey*, *Benson v Lee*.) Ultimately in *McLoughlin v O'Brian*, at the same level, both the decision and majority reasoning were different.

If the best rule candidate in this category clearly appears to lie in some relatively brief statement of the *ratio* of *Bourhill v Young*; perhaps: 'where there is a foreseeable possibility of impact the duty extends to the claimant', most of the results of the subsequent cases are not justified. The rule would square with, for example, *Schneider v Eisovitch*, but not with *Chadwick*, nor with *Benson*, and others.

What of the view that, at the earliest stages of a new range of common law development, what one looks for is a clear statement of a rule emerging but this has nonetheless properly to

¹⁸⁴ Lord Denning is not generally regarded as one who believed strongly in the value of *stare decisis*. See A Paterson, *The Law Lords* (1982) 138-39. There is a brief account of his own concerning the decision in Lord Denning, *The Discipline of Law* (1979) 287-314.

be regarded as a limited statement of the rule? According to this view, as new fact situations are subsequently presented to the courts the statement of the rule lengthens, but in the formative stages the statement of rule has to be seen as incomplete.

Certainly it might be said of judgments in the earlier cases that they contain consideration about the circumstances in which a claim may or may not be successful which have not, as yet, firmed up into a rule. But if we were to take, for example, the considerations put forward by Kennedy J, in *Dulieu v White & Sons*, they were certainly subsequently referred to but then afterwards abandoned. I have already commented upon the fate of the statement of rule from *Bourhill v Young*. Whilst it appears reasonable to think in terms of addition to a rule, and of exceptions to a rule, it is surely very dubious to view a denial of the rule in terms of an addition to it. And what we find subsequent both to *Dulieu v White & Sons* and *Bourhill v Young*, looks much more like a denial than anything else, whereas it may be possible to interpret *Chadwick v BRB*, for example, as representing an exception to the rule.¹⁸⁵

Benson v Lee is striking in that it suggests that the decisions have usually been most heavily influenced by factors *other than* precedent, for it is much closer in its reasoning and its result to the *subsequent* appeal cases. Practically speaking what many observers will read into the whole development of the cases is that near relatives of an injured person have a potential claim also. The general feeling is that strangers, no matter how badly affected by trauma,¹⁸⁶ with some exceptions, will not.¹⁸⁷ But this reading of the situation cannot rely on anything

¹⁸⁵ i.e. because of the rescuer policy.

¹⁸⁶ See, for example, *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1.

¹⁸⁷ In some jurisdictions there exists legislation which clearly places close family members in a favourable position. See, for example, the *Civil Law (Wrongs) Act 2002 (ACT)* s. 36 which provides: Liability in relation to an injury caused by a wrongful act or omission by which someone else (A) is killed, injured or put in danger includes liability for injury arising completely or partly from mental or nervous shock received by-

(a) a parent of A; or

(b) a domestic partner of A; or

sufficiently definite to qualify as a rule. Relationship, certainly is a matter specifically mentioned by Lord Wilberforce in *McLoughlin v O'Brian*, but we have already seen that factors put forward by judges as considerations have met with variable treatment in subsequent cases.

For England and Wales, the decision in *Alcock* appears best explained by appeal to overarching policy, principally the quite familiar concern over indeterminacy, and the multiplicity of possible claims arising from the same event.¹⁸⁸ Although the decision can be justified in terms of previously iterated reasons of principle,¹⁸⁹ there are other indications that it represents a halt to the period of expansionism,¹⁹⁰ and the House has even indulged in a little rewriting of legal history.¹⁹¹

Standing alone it would be possible to view the High Court of Australia decision in *Annetts* as 'confined on its facts', or representing a distinct factual context, since the physical proximity factors do not equate with the precedent decisions. Gleeson CJ said:

another family member of A, if A was killed, injured or put in danger within the sight or hearing of the other family member.

¹⁸⁸ In the familiar words of Cardozo J, liability in an indeterminate amount, for an indeterminate time, to an indeterminate class; *Ultramares Corporation v Touche* 174 N.E. (1931) 441, 444.

¹⁸⁹ The Court of Appeal has subsequently followed the lead. In *Hunter v British Coal Corporation* [1998] 3 WLR 685. The plaintiff and his workmate had been desperately trying to halt the flood of water from a damaged hydrant at their workplace. He walked off to find a hose, and, 20 to 30 yards away heard a terrific bang and sound of water screaming through the pipes and saw a cloud of dust. 10 minutes later he heard a message over the air that a man had been injured. Then another workmate told him 'it looks like Tommy is dead'. The plaintiff was found to be not physically proximate to the tragic events.

¹⁹⁰ On appeal to the House all 14 test claims failed. At first instance 10 had succeeded; [1991] 1 All ER 353, before Hidden J. The trial judge had taken the view that if what is important is the nature of the relationship itself, between primary and secondary victim, then *prima facie* the sibling relationship ought to satisfy in terms of 'proximity'. The House of Lords agreed with the proposition but reached a different conclusion on the facts.

¹⁹¹ In *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, a distinction was made between the rescuer who is exposed to physical danger by the negligence of the defendant, and who, as result suffers psychological injury, and the rescuer who is inflicted with the same harm, but does not satisfy the former criterion. *Obiter* a duty would be owed by the defendant to the first, but not the second; see, however, *Chadwick v British Railways Board* [1967] 2 All ER 945.

Save for those who fall within the ‘direct perception rule’ as extended by *Jaensch v Coffey* a person will be able to recover for psychiatric injury only if there is some special feature of the relationship between that person and the person whose acts or omissions are in question such that it can be said that the latter should have had the former in contemplation as a person closely and directly affected by his or her acts.¹⁹²

However there are already indications to the contrary, because now it is said that factors of sudden shock, direct perception and involvement in aftermath are relevant to, but not determinative of, the duty relationship.¹⁹³

The judgments in the *Gifford* case present us with a remarkable array of views on the duty question, not saved by Callinan J’s reiteration of previous policy and principle:

In my opinion the reasons for judicial caution in cases of nervous shock remain valid... There must have occurred a shocking event. The claimant must actually have witnessed it, or have observed its immediate aftermath, or have the fact of it communicated to him... as soon as reasonably practicable, and before he has... reached a settled state of mind about it. The communicator will not be liable unless he had the intention to cause psychiatric injury... A person making the communication in performance of a legal or moral duty will not be liable for making the communication. The event must be such as to cause psychiatric injury to a person of normal fortitude. The likelihood of psychiatric injury to a person of normal fortitude must be foreseeable. There need to exist special or close relationships between the tortfeasor, the claimant and the primary victim. Those relationships may exist between employer and employee and co-employees...¹⁹⁴

However, ...other members of the court have stated a...very different view as to the various criteria...¹⁹⁵

McHugh J opined

¹⁹²(2002) 211 CLR 317, 340-341.

¹⁹³ Per Gleeson CJ, *Annetts v Australian Stations Ltd* (2002) 211 CLR 317, 333-334, Gummow and Kirby JJ agreeing.

¹⁹⁴ *Gifford v Strang Patrick Stevedoring Ltd* (2003) 214 CLR 269, 303, citing himself from *Tame v NSW* (2002) 211 CLR 317, 439.

¹⁹⁵ (2003) 214 CLR 269, 304.

...the relationship between the children and their father made them a neighbour of Strang for duty purposes, and Strang owed the father a duty of care to provide a safe place of employment...A reasonable employer in the position of Strang was bound to have in mind that any harm caused to its employee carried the risk that it would cause psychiatric harm to any children that he might have when they learned of his death. Because that is so, Strang owed a duty to the children to take reasonable care in its relationship with their father to protect them from psychiatric harm.¹⁹⁶

For Hayne J:

...An employer owes a duty to take reasonable care to avoid psychological injury to an employee's children. (It may be that the duty is wider than that but it is not necessary in this case to decide that it is.)¹⁹⁷

Gummow and Kirby JJ stated that a duty of care could not depend upon reasonable foresight alone,¹⁹⁸ and went on to base their judgments upon reasonable foresight alone¹⁹⁹.

The view expressed by Hayne J, that the duty is restricted to the relationships between employer, employee, and employee's children, was not shared by the other members of the court, and no reasons were put forward to explain why this should be a unique category of liability. All previous 'proximity' factors have gone, saving the relationship between primary and secondary victim. However, it is said to be the closeness and affection of the relationship, rather than the formal status of that relationship, that is relevant to the issue of the duty of

¹⁹⁶ (2003) 214 CLR 269, 291. However, the negligence was that of the fork-lift driver, and the liability of the defendants was a vicarious one. In terms of pre-existing principle the notional and requisite 'foresight' is that of the tortfeasor.

¹⁹⁷ This, with respect, courts further confusion. In the instant case, the defendants were not in breach of a direct duty of care.

¹⁹⁸ (2003) 214 CLR 269, 298.

¹⁹⁹ (2003) 214 CLR 269, 300.

care.²⁰⁰ Further than this, there are clear dicta to the effect that a duty may arise, at least in situations such that an event or its aftermath is sufficiently shocking, where no pre-existing relationship between primary and secondary victim exists at all. It appears that the duty is simply founded upon a direct application of *Donoghue v Stevenson*²⁰¹. The duty arises where the notional reasonable person in the defendant's position ought to have in contemplation the plaintiff, assuming that the plaintiff is a person of normal fortitude,²⁰² as placed at risk of psychological injury, as a result of the acts or omissions of the defendant.²⁰³

It is as if the High Court has recreated the category of harm, and we can but predict what subsequent courts will make of it, in order to state the current law.

²⁰⁰ (2003) 214 CLR 269 (per McHugh J); *Alcock v Chief Constable of South Yorkshire* [1991] 4 All ER 907, 914 (per Lord Keith).

²⁰¹ [1932] AC 562.

²⁰² The 'normal fortitude' requirement is retained in state and territory legislation in Australia. Other general expositions of liability for this type of claim are K Murphy, 'Negligently Inflicted Psychiatric Harm: a Reappraisal' 15 *Legal Studies* (1995) 415; M Bogie, 'A Shocking Future: Liability for Negligently Inflicted Psychiatric Illness in Scotland' 42 *Juridical Review*, (1997) 39.

²⁰³ As to statements, there is little case law directly in point. *Wilkinson v Downton* [1897] 2 QB 57 is authority for the proposition that liability attaches for deliberately caused harm, possibly, however, as a form of trespass. There are dicta in *Gifford v Strang Patrick Stevedoring* (2003) 214 CLR 269, 309, (per Callinan J) to the effect that the passing on of the tragic news does not entail liability in the messenger.

Chapter Five

Rylands v Fletcher²⁰⁴

In 1860, John Rylands decided that he would need a new reservoir constructed to supply water to Ainsworth mill. The subcontractors he engaged to carry out the work discovered that the site was located above some disused mine shafts, but failed to seal them, so when the reservoir ultimately was filled, water flooded Thomas Fletcher's working mines on adjoining land.²⁰⁵ The Court of Exchequer, by a majority, found in favour of the defendant.²⁰⁶ To hold the defendant liable, although free of blame in the matter, would be contrary to legal principle. Baron Bramwell dissented, opining that the defendant should be held liable for the damage on the basis of a strict liability.²⁰⁷ On appeal to the Court of Exchequer Chamber, the defendant was indeed found so liable. The judgment of the court was delivered by Blackburn J who said:

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable care... We think that the true rule of law is, that a person who for his own purposes brings on his land and collects and keeps there anything likely

²⁰⁴ This chapter draws on some material which first appears in K A Warner, 'Legal Reasoning, Drift, Drive and the Rule in Rylands v Fletcher' 43 *Juridical Review* (1998) 201.

²⁰⁵ For more general background see A W B Simpson, 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*' 12 *Journal of Legal Studies* (1984) 209.

²⁰⁶ (1865) 159 ER 737.

²⁰⁷ (1865) 159 ER 737, 744.

to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape...²⁰⁸

A broad survey of the history of *Rylands v Fletcher* in England and Wales can be viewed as two contradictory stages: first a steady expansion, then a steady retreat. As it has transpired *Rylands v Fletcher*²⁰⁹ contained the germ of its own demise not so much in the ‘classic’ Blackburn formulation but in the ‘gloss’ added by Lord Cairns in the subsequent appeal to the House of Lords: the defendant’s user of land must be construed as ‘non natural’.

Natural User

One might guess that Lord Cairns’ emphasis upon a requirement that liability under *Rylands v Fletcher* arises only where the defendant’s use of land is non-natural²¹⁰ was intended simply to exclude situations where a substance, e.g. water, was already there present prior to the defendant’s succession to title and possibly causing damage through no fault of the defendant’s,²¹¹ quite possibly through natural causes.²¹² This would correlate with the subsequent exclusions of strict liability for ‘vis major’ and ‘act of God’,²¹³ eventually recognised as defences to the action.²¹⁴ In practice this distinction has not been consistently

²⁰⁸ (1866) 1 Ex 265, 279-280. The judgment was upheld on the defendant’s unsuccessful appeal to the House of Lords, subject to the, more recently troublesome ‘gloss’, added by Lord Cairns; the defendant’s user of the land must be ‘non-natural’.

²⁰⁹ For all the interesting details of the action see A W B Simpson, ‘Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*’ 12 *Journal of Legal Studies* (1984) 209.

²¹⁰ (1868) LR3 HL 330, 339.

²¹¹ Hence Blackburn J’s reference, (1868) LR 3 HL 330, 338-339 to *Smith v Kenrick* (1849) 7 CB 515, where flooding to neighbouring land was caused by gravitation, as a ‘natural user’, yet the defendant’s land was used for mining.

²¹² For example *Nichols v Marsland* [1876] 2 Ex.D.1.

²¹³ Even in *Fletcher v Rylands* (1865) 3 H & C 774 the majority in the Court of Exchequer repudiated this idea of strict liability.

²¹⁴ Ibid; also *Carstairs v Taylor* [1871] 6 Ex.D. 217 and *Rickards v Lothian* [1913] AC 263; Cf. *Box v Jubb* [1879] 4 Ex.D. 76; *Perry v Kendrick’s Transport Ltd.* [1956] 1 All ER 154. A defence, say ‘vis major’, must be proved by the defendant (although one surmises that this should not be difficult on the civil standard of proof)

maintained and there is some disagreement as to whether ‘natural’ or ‘non-natural’ is a question of fact or law.²¹⁵

Whether anything like a clear policy lay behind common-law strict liability early on, it has certainly been absent in recent times.²¹⁶ Once firmly accepted that a ‘natural’ use could encompass accumulations introduced by the defendant, it was inevitable that the courts would face the task of defining in and out of the concept ‘non-natural’ different types, and later degrees, of accumulations. The plethora of considerations was well articulated by the majority of the Australian High Court in *Hazelwood v Webber*.²¹⁷ In that case the defendant, a farmer, had lit a fire upon his land in New South Wales during the Australian summer for the purpose of burning off around one hundred acres of stubble. In the process some tree stumps caught fire and smouldered for some days and subsequently a high wind blew some sparks from these onto the plaintiff’s neighbouring property where they set fire to his grass, fences and buildings. Despite a jury finding of no negligence at trial, the High Court found the defendant strictly liable for the damage. ‘In Australia and New Zealand, burning vegetation in the open in midsummer has never been held a natural use of land’.²¹⁸

The confusion between two broad interpretations of ‘non-natural’ user was compounded by the statement of Lord MacMillan in *Read v J Lyons & Co. Ltd.* ‘I should hesitate to hold that

but whether or not the defendant’s user is ‘non-natural’ is for the plaintiff to establish; i.e. it is an element of the rule statement itself. Cf. J Stone, *Legal System and Lawyers’ Reasonings* (1964) ch 8.

²¹⁵ For long the description ‘some special use bringing with it increased danger to others’, was the guiding reference; (per Lord Moulton in *Rickards v Lothian* [1913] AC 263, 280).

²¹⁶ There had occurred a series of calamities with newly constructed reservoirs around this period of history, some entailing considerable loss of life as well as the material damage to surrounding land; see A W B Simpson, *Leading Cases in the Common Law* (1995) 195-226. A view that we may perceive a collision between the interests of the established landed gentry and the newly emerging industrial bourgeoisie finds some support in litigation for private nuisance during the same period; *ibid* 163-194.

²¹⁷ (1934) 52 CLR 268, 277.

²¹⁸ (1934) 52 CLR 268, 278.

in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives’,²¹⁹

A significant shift in approach, however, can be discerned by comparing *Mason v Levy Auto Parts of England Ltd.*²²⁰ decided in 1967, with *British Celanese Ltd. v AH Hunt (Capacitors) Ltd.*²²¹ only two years later. In the former case the ‘dangerous thing’ could comprise the thing itself together with the immediate and predictable circumstances of its use which were under the defendant’s control. The plaintiff was owner and occupier of ‘Mill Cottage’, a house standing in some one-quarter of an acre of gardens. The defendants owned and operated a business from a large yard and premises adjoining the plaintiff’s land with a common boundary between. Large quantities of motor parts, engines and combustible material were stored on the defendant’s premises. When a fire broke out on the defendant’s land it spread to the plaintiff’s and destroyed the boundary hedge and many trees and flowers. MacKenna J considered that the materials plus the situation in which they were kept satisfied the requirement.

By contrast, In *British Celanese v Hunt Ltd.* strips of metal foil drifted from the defendants’ factory and caused a power failure. The plaintiffs’ machinery came to a halt and the material inside solidified and had to be removed and discarded. The machinery required cleaning and the plaintiffs then suffered further loss of profits while their machinery was restored to

²¹⁹ [1946] 2 All ER 471, 477. Lord MacMillan manages at least two modifications in his judgment; first, to do with the meaning of ‘non-natural user’; second as to whether personal injuries can be the subject of a claim under *Rylands v Fletcher*, and this is followed by a classical piece of confusion between negligence liability and *Rylands v Fletcher* strict liability (at 477). If with remarkable foresight Lord MacMillan was at this early stage laying the ground for the demise of *Rylands v Fletcher*, there is no relationship to policy. Although the case has been held responsible for the subsequent winding back of *Rylands v Fletcher* liability, only on its *ratio* has it had much direct influence, i.e. no ‘escape’, see, for example, *Hale v Jennings Bros.*[1938] 1 All ER 579; *Shiffman v Order of St. John* [1936] 1 All ER 557; *Benning v Wong* [1969] 122 CLR 249.

²²⁰ [1967] 2 WLR 1384.

²²¹ [1969] 1 WLR 959.

working order but remained idle pending restoration of the power supply from the sub-station. Lawton J ruled that the defendant's user of land was 'natural'.

Of these two competing interpretations of 'non-natural' user the *British Celanese* version, reflective of Lord MacMillan's dicta in *Read v AJ Lyons & Co.* deals a body blow to *Rylands v Fletcher* strict liability as far as manufacturing industry is concerned. It would, after all, take some imagination to produce a practical modern example of industrial manufacturing which did not take place upon manufacturing premises. Perhaps domestic industry might qualify as 'non-natural' user but few such industries today exist and paradoxically these would pose far less risk to the community than their factory-based counterparts. Of course in *Mason v Levy Auto Parts* it was said that negligence could not be proved. In *British Celanese v Hunt* once the facts were accepted negligence was a foregone conclusion since to the defendants' knowledge the selfsame event had occurred before.²²² In short, the requirement of non-natural user, never intended to be axiomatic in Blackburn J's original statement of liability, unless interpreted in the *Mason v Levy Auto Parts* fashion in terms of the level of risk posed by quantity, quality plus juxtaposition of materials, is alone and unaided sufficient to put paid to common-law strict liability for the greater part in a modern industrialised society.²²³

Anything Likely to do Mischief

Common-law liability at civil suit for those who put into circulation the 'inherently dangerous thing' was a reticent development of the earlier part of the nineteenth century and

²²² Lawton J's reference to 'common benefit':[1969] 1 WLR 959, 963 is unnecessary, but had this been judicially endorsed no doubt *Rylands v Fletcher* would soon have faced demise in English law. There is some earlier authority on the point, for example the opinion of Bramwell B in *Carstairs v Taylor* [1861] 6 Ex.D. 217 but that is (a) obiter and (b) confined to an action between co- occupiers of a building.

²²³ See also, D W Williams, 'Non Natural Use of Land' 32 *Cambridge Law Journal* (1973) 310.

it may well be that Blackburn J felt that his own statement provided an obvious corollary.²²⁴ During the early part of the twentieth century, however, the thing ‘likely to do mischief if it escapes’²²⁵ is translated into that very ‘dangerous thing’²²⁶ and the concept again stands available for either restrictive or relatively generous interpretation. Liability was found in *Musgrove v Pandelis*²²⁷ where the plaintiff was lessee of a house and buildings at the rear including a garage with rooms above. He sub-let a part of the garage to the defendant who kept a car there. The defendant’s employee, who possessed only an elementary knowledge of motor cars, on one occasion made to move the car so as to access it for cleaning. Petrol in the carburettor ignited and by the time the employee thought to turn off the petrol tap the fire had got out of hand, eventually engulfing and destroying all the cars in the garage together with the plaintiff’s premises and furniture.

The necessarily variable but relatively generous interpretation of mischievous quality has, however, been overtaken by the judicial adoption of the restrictive approach to non-natural user, and together with that, overwhelmed by the more recent emphasis upon potentially restrictive elements in the original *Rylands v Fletcher* statement.

²²⁴ The rule was often considered also along with liability of the keeper of wild beasts; see, for example, the most confused judgment of Farwell LJ in *West v Bristol Tramways Co* [1908] 2 KB 14 and the judgment of Lord Alverstone in the same case.

²²⁵ Blackburn J drew an analogy with the action for cattle trespass:

‘there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth or stench, or any other thing which will, if it escapes, naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant v. Goldwin (or Golding)* ((1704) 1 Salk. 21, 360) is an express authority that the duty is the same, and is, to keep them in at his peril’; (1866) L.R. 1 Exch. 265, 287.

²²⁶ See also W T S Stallybrass, ‘Dangerous Things and the Non-Natural User of Land’ 3 *Cambridge Law Journal* (1929) 376; A L Goodhart, ‘Liability for Things Naturally on the Land’ 4 *Cambridge Law Journal* (1932) 13.

²²⁷ [1919] 2 KB 43.

The Escape

The seminal decision of the House of Lords in *Read v J Lyons & Co.*²²⁸ has come to be regarded as establishing that in order to invoke the rule in *Rylands v Fletcher* it is necessary for the plaintiff to prove that there occurred an escape of the mischievous substance²²⁹ (or surely its effect or the effect of itself combined with other substances) although equally the requirement of a non-natural user of the defendant's land was spoken of in their judgments both by Lord MacMillan and Viscount Simon LC. The plaintiff was employed by the Ministry of Supply and was required to be present during shell-filling operations at the munitions factory operated by the defendants under an agreement with the government. While the shell cases were being filled with high explosives an explosion occurred which killed one man and injured others, including the plaintiff. Holding that there was no liability on the part of the defendant Viscount Simon LC said:

Now the strict liability recognised by this House to exist in *Rylands v Fletcher* is conditioned by two elements which I may call the condition of 'escape'...and the condition of 'non-natural user' of the land. 'Escape' for the purpose of applying the proposition in *Rylands v Fletcher* means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control.²³⁰

The emphasis upon 'escape' is just about sustainable if there is some policy concern which factors in the restriction of the action,²³¹ but again the unsophisticated treatment of this

²²⁸ [1946] 2 All ER 471.

²²⁹ In *Transco plc v Stockport Metropolitan Borough Council* [2003] 3 WLR 1467 the House of Lords again was of the opinion that the rule requires an escape of the mischievous substance from the defendant's land. Also the provision of water supply to residential flats by means of a pipe connected to a water main could not be seen as an extraordinary use of the defendant's land such as to pose the sort of exceptional hazard to the neighbouring plaintiff which would warrant the invoking of the rule.

²³⁰ [1946] 2 All ER 471, 474.

²³¹ In Lord MacMillan's speech we can certainly find strong indications that the learned judge believed that it was appropriate for the plaintiff to be required to establish negligence on the defendants' part. What is unclear is why. As a whole *Read v Lyons* is an unusually restrictive decision, since the House adverts to so many grounds

element of the rule does not reflect the general pattern of earlier reasonings. In *Musgrove v Pandelis*²³² the escape of the fire, not the petrol, (and according to some authority not the original fire in the motor car's carburettor)²³³ consisted in the spread from one part of the garage to another. Indeed there is early authority to indicate that the element of escape critical in *Read v J Lyons & Co.* was a very muted variable in the action early on. In *Crowhurst v Amersham Burial Board*,²³⁴ for example, the defendants were owners and occupiers of a cemetery and at the time it was set out some seventeen years before had planted two yew trees some four feet within their boundary wall which had since grown beyond and through iron railings which formed part of the boundary fence with the plaintiff's adjoining meadow. The plaintiff's horse, which had been turned loose in the meadow, died from poisoning after browsing on twigs and leaves of the yew, although it was unclear whether it had eaten from those branches which projected into the plaintiff's meadow or that part within the defendant's cemetery which the horse could reach, or both. The plaintiff successfully claimed as damages the value of the horse.

The judgment of Kelly CB. traversed 'trespass' and 'action on the case for nuisance' but concluded: 'The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher v Rylands*'.²³⁵

for absolving a defendant from liability, studiously ignoring previous authority, stopping just short of denying *Rylands v Fletcher* responsibility for the infliction of personal injuries.

²³² [1919] 2 KB 43.

²³³ Per Warrington J. The learned judge was addressing the question as to whether liability arose under the *ignis suus* rule and/or *Rylands v Fletcher* and the effect of the *Fires Prevention Act 1775* which ostensibly provided a defence to 'any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin' (s.86). The High Court of Australia has now decided that this statute has no application in that country; *Burnie Port Authority v General Jones* (1994) 179 CLR 520, which hardly matters because the English courts have long held that a fire negligently ignited does not 'accidentally begin'. See, for example, *Filliter v Phippard* [1847] 11 QB 347.

²³⁴ [1878] 4 Ex D 5.

²³⁵ [1878] 4 Ex D 5,10.

The top section of a flagpole in *Shiffman v Order of St. John*²³⁶ ‘escaped’ from the small site upon Hyde Park occupied for a single occasion by the defendants, as did a ‘chair-o-plane’ in *Hale v Jennings Bros.*²³⁷ Moreover, reinforcing this earlier ‘soft’ focus upon ‘escape’,²³⁸ despite the fact that in *Rylands v Fletcher* the escape of flood water was to the plaintiff’s land, subsequent decisions clearly established that it was not necessary in order to found liability under the principle that the plaintiff should have any interest in land.

In *Perry v Kendricks Transport Ltd.* the plaintiff was a member of the public using a right of way. Similarly in the case of the collapsing flagpole, *Shiffman v Order of St. John*, the plaintiff was exercising a public right and this was sufficient.²³⁹

This liberal treatment of the escape element was paralleled again by the conception of whether the defendant ‘brings onto his land’. In *Charing Cross Electricity Supply Co. v Hydraulic Power Co.* the defendants under statutory authority had laid water mains and pipes under public streets.

Bray J opined:

It seems to me that it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy this land for a certain purpose, namely for these pipes, it is equally his for the purpose of testing this

²³⁶ [1936] 1 All ER 557.

²³⁷ [1938] 1 All ER 579.

²³⁸ But now see *Gore v Stannard* [2013] 1 All ER 694: the ‘mischievous thing’, did not escape, felective of the reasoning in *Read v J Lyons & Co Ltd* [1946] 2 All ER 471.

²³⁹ An additional possible limitation on the scope of the rule is that it is not available in an action for personal injuries, but it is submitted that this remains unresolved. However in *Transco v Stockport Metropolitan Borough Council* [2004] 2 AC 1 Lords Bingham (at 9), Hoffman (at 35), and Hobhouse (at 52), *obiter*, expressed the view that claims for personal injury and death fell outside its proper ambit. As to damage to chattels; Blackburn J in *Cattle v Stockton Water Works Co.* (1875) L.R. 10 Q.B. 453, 457 treats the rule as applicable, but no doubt we shall see. In *Halsey v Esso Petroleum Co. Ltd.* [1961] 2 All ER 145 the defendant’s noxious acid smuts which escaped and did damage to the plaintiff’s house and his clothing were legally stigmatised as a *Rylands v Fletcher* menace.

principle. Therefore I think that *Rylands v Fletcher* applies, and, if it applies, then the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is in itself dangerous and probably mischievous if not kept under control.²⁴⁰

Again in *Eastern and South African Telegraph Co. Ltd. v Cape Town Tramways Co. Ltd.* the defendants' interest in the relevant land was limited to the installation and control of an undersea cable and there are no indications that this was insufficient to found a *Rylands v Fletcher* claim.²⁴¹ Much more recently in *Halsey v Esso Petroleum Co. Ltd.* Veale J accepted that:

If it be the fact that sulphuric acid or harmful sulphate escaped from the defendants' premises and damaged the motor-car in the public highway, I am bound by the decision of the Court of Appeal in *Charing Cross Electricity Supply Co. v Hydraulic Power Co.*²⁴²

If it was then well established that the defendant's 'land' could include in fact something negligible,²⁴³ yet the increasingly regressive interpretation of non-natural user discussed earlier, in tandem with the effective exclusion of statutory authorities from *Rylands v Fletcher* liability, has in practice dramatically reversed the earlier case-law in effect.²⁴⁴

²⁴⁰ [1914] 3 KB 772, 785.

²⁴¹ [1902] AC 381, although the action failed on other grounds, i.e. no damage.

²⁴² [1961] 1 WLR 683, 692.

²⁴³ In *Read v J. Lyons* the plaintiff was on the defendants' land; otherwise on the authorities just about anywhere else would suffice.

²⁴⁴ And apparently without the overruling of a single major case.

Liability of Statutory Bodies

The English Court of Appeal had no difficulty in finding a body exercising statutory functions liable under *Rylands v Fletcher* in the early case of *West v Bristol Tramways Co.*²⁴⁵ The defendants, under the provisions of the Bristol Tramways Act 1894, were obliged to 'pave with wood, or...other suitable material' parts of the road upon which their tram lines were laid. Of the two common types of timber used for such paving, a hard wood, 'Jarrah', or a softer timber coated with creosote, the defendants chose the latter. Fumes were given off by the creosote which damaged the plants and shrubs of the plaintiff, a market gardener, which were situated near the road. By the 1960s however the position was dramatically changed, for defendants who cause the damage whilst acting pursuant to their statutory powers have not collected the mischievous substance 'for their own purpose'. In *Dunne & Anor. v North Western Gas Board*²⁴⁶ some forty-six explosions of coal gas had occurred at different manhole points over a small area of the streets of Liverpool. Many caused craters in the road; others blew the manhole covers into the air. The coal gas had escaped from a gas main into the sewers where, once mixed with air, it became highly flammable and explosive, although it was never established as to how the gas came to be ignited. No liability in respect of personal injury and property damage arose under the rule. The Australian High Court in *Benning v Wong* by majority accepted the same view, although with a marked division of opinion in other important respects.²⁴⁷

²⁴⁵ [1908] 2 KB 14.

²⁴⁶ [1964] 2 QB 806.

²⁴⁷ (1969) 122 CLR 249. Barwick CJ and Windeyer J dissented from the decision. Owen J felt that the appropriate pleading would be either negligence or nuisance.

It appears clearly then that in cases of damage inflicted in the exercise of statutory functions the plaintiff is relegated to proof of negligence, although in this there arise practical difficulties.²⁴⁸

Rylands v Fletcher, Nuisance and Negligence²⁴⁹

It is unsurprising that in its early days *Rylands v Fletcher* liability was raised together with and in relation to other forms of civil action.²⁵⁰ In *Carstairs and Anor. v Taylor*, for example, where the plaintiff's premises had been affected by rainwater leaking from premises above, Martin B. had opined that:

...the true rule is laid down in *Paradine v Jane* ... "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused."...The decision in *Rylands v Fletcher* has really no bearing on the case; it referred only to the acts of adjoining owners of land.²⁵¹

As recently as *Read v J Lyons & Co.*, Viscount Simon was of the opinion that the case could be decided on the basis of the occupier's responsibility towards an invitee. In the modern era the tendency has been to plead *Rylands v Fletcher* in the alternative with nuisance and

²⁴⁸ For example, proof. In *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749, where an explosion had taken place in the plaintiff's shed in which the defendants' gas meter was situated, the plaintiff's plea of *res ipsa loquitur* was defeated. Note also the Australian authority of *Thompson v Bankstown Corporation* (1953) 87 CLR 619 (High Court). Whilst the majority rejected the application of *Rylands v Fletcher* where a young boy, climbing a telegraph pole in order to reach a bird's nest, had been badly burned by a live wire, the defendants were nonetheless found to owe him a duty of care as an ordinary member of the public using a public thoroughfare, founding, in the absence of direct authority, on the New York Court of Appeals decision in *Hynes v New York Railroad Co.* 131 N.E. 898 (1921).

²⁴⁹ See also, H Street, 'The Twentieth Century Development and Function of the Law of Tort in England' 14 *International and Comparative Law Quarterly* (1965) 862.

²⁵⁰ See also, P H Winfield, 'Nuisance as a Tort' 4 *Cambridge Law Journal* (1930-2) 189.

²⁵¹ [1871] 6 Ex. D. 217, 221.

negligence²⁵². In addition *Rylands v Fletcher* liability was also complicated, since the agent of harm was often fire, by ignis suus liability. Not unexpectedly, if from the outset *Rylands v Fletcher* was compared to civil responsibility for dangerous things, wild beasts escaping²⁵³ and more²⁵⁴, the action was also discussed in connection with liability for damage caused by spreading fire. Some early nineteenth century decisions regard the two as amounting to the same.²⁵⁵ Frequently however the discussion arose in relation to whether the Fires Prevention Act 1775 provided a defence in the case where escaping fire formed the subject of a *Rylands v Fletcher* claim, and it was eventually established that it does not.²⁵⁶ The weight of authority in the judgments, to the effect that for the purposes of the statute, the fire must ‘accidentally’, not *negligently* begin,²⁵⁷ has, for reasons to do with the rising standard in relation to negligence and the contemporary intrusion of fault aspects into *Rylands v Fletcher* liability, with respect to the mischievous object, brought the two again close together. The High Court of Australia has held that the ignis suus rule has merged into the *Rylands v Fletcher* action.²⁵⁸ Where, however, a fire has commenced upon the defendant’s land in a clearly non-negligent way, as, for example, by lightning strike, an interesting situation arises in which *prima facie* there exists a defence to *Rylands v Fletcher* liability as well as to liability in negligence, but there is authority to the effect that liability may well arise in an action for private nuisance.

In *Job Edwards Ltd. v Birmingham Navigations*²⁵⁹ the plaintiffs owned some waste land near the banks of the defendant’s canal and for years, unbeknown to the plaintiffs, refuse had

²⁵² See also, F H Newark, ‘The Boundaries of Nuisance’ 65 *Law Quarterly Review* (1949) 480.

²⁵³ See also, G Williams, *op cit*.

²⁵⁴ See also, J H Wigmore, ‘Responsibility for Tortious Acts: Its History’ 7 *Harvard Law Review* (1894) 441.

²⁵⁵ For example, *Jones v Festiniog Railway* [1868] LR 3 QB 733. See also A I Ogus, ‘Vagaries in Liability for the Escape of Fire’ 27 *Cambridge Law Journal* (1969) 104.

²⁵⁶ See, for example, *Musgrove v Pandelis* [1919] 2 KB 43.

²⁵⁷ For example *Filliter v Phippard* [1874] 11 QB 347.

²⁵⁸ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; whilst also holding in the majority that the 1774 statute did not form part of Australian law and that *Rylands v Fletcher* as a distinct action remains only in a tenuous form.

²⁵⁹ [1924] 1 KB 341.

been systematically dumped upon this land by a third party who purported himself to own it. The defendants were well aware that rubbish was deposited upon the land; the refuse came down the canal in barges and they charged a wayleave rent of those who so brought it. When the refuse caught fire, posing a threat to the canal bank, the defendants informed the plaintiffs and it was agreed between them that without prejudice to their legal rights the plaintiffs would contribute to the cost of controlling the fire. In the subsequent legal action the majority of the Court of Appeal held that the plaintiffs were entitled to recovery of their money.

Again the pertinent aspects of the forms of action were brought to scrutiny in *Goldman v Hargrave*.²⁶⁰ In the height of summer in Western Australia an electrical storm occurred and a one-hundred feet tall redgum tree on the defendant's property was struck by lightning. The defendant alerted the fire authorities, cleared a space around the tree and sprayed it with water. He arranged for it to be cut down and it was felled the following day. He took no further steps after this which would be effective to stop the fire spreading and some two days later the temperature rose and the wind freshened, reviving the fire, which spread across the defendant's paddock and onto the plaintiff's properties.

The Judicial Committee of the Privy Council held the defendant liable for the damage. Lord Wilberforce said:

...the case is not one where a person has brought a source of danger onto his land, nor one where an occupier has so used his property as to cause a danger to his neighbour. It is one where an occupier, faced with a hazard actually arising on his land, fails to act with reasonable prudence so as to remove the hazard...²⁶¹

²⁶⁰ [1967] AC 645.

²⁶¹ [1967] AC 645, 656.

Prima facie it would appear then that no liability for escaping fire accidentally begun would lie under *Rylands v Fletcher* or in negligence but would lie in private nuisance. Yet the position really depends upon which components of the existing rule structures of the actions the higher courts manage reasonably to emphasise, and this can be (although by no means always is) related to policy. Specifically here, the question is are there policy considerations which should incline the courts towards treating fire distinctly or as a member of a relatively discrete class differently; how ‘strict’ do we wish strict liability to be (or what do we wish it to mean)? Clearly, at its earliest, the *Rylands v Fletcher* action was felt to be warranted by a perception of a peculiarly high degree of risk plus a high probability of extensive damage to others. Of two or more parties the one who voluntarily generates the risk must bear it. Obviously the modern negligence action is capable of addressing these considerations also, but there are other matters to consider also, amongst them, the onus of proof. Indeed the majority of the High Court of Australia (with a full bench) in *Burnie Port Authority v General Jones Pty. Ltd.* has opted, with minor reservations, to treat all future *Rylands v Fletcher* situations in terms of the general law of negligence.²⁶²

By contrast it is noticeable that early, for example in *West v Bristol Tramways Co.*, a distinction was maintained between *Rylands v Fletcher* strict liability and some kind of ‘fault’ liability. There at first instance in answers to questions from the trial judge the jury had returned the rather complicated verdict that ‘it was not absolutely necessary for the defendants to pave the road as they did, and at the time they did; and that it was reasonably necessary...according to the knowledge of the defendants at the time, but in the light of the evidence given at the hearing it was not reasonably necessary’.²⁶³

²⁶² McHugh J dissenting: (1994) 179 CLR 520, 560.

²⁶³ [1908] 2 KB 14, 15-16.

Later we find, in *Musgrove v Pandelis*, for example, considerations of negligence alongside *Rylands v Fletcher*:

Whether the damage was caused by Coumis's negligence, for which the defendant is responsible, or by the defendant's own negligence in employing a man with so little knowledge, in either case the judgment must stand.²⁶⁴

Again, as the 'rule' was added to in the resolution of new cases, a subtle interchange occurs with the tort of nuisance. In *Eastern and South African Telegraph Co. Ltd. v Cape Town Tramways Co. Ltd.*, for example, we find a consideration of the selection of priorities between neighbours' interests in terms of *Rylands v Fletcher* 'non-natural' user very reminiscent of modern private nuisance's 'unreasonable user' of land:

A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands v Fletcher*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property.²⁶⁵

There is a number of reasons to explain the fairly fluid relationship between the *Rylands v Fletcher* action and those in negligence and nuisance as the modern law has developed. One appears above. Parallel with this, the now-key nuisance rule element, 'non-natural user', (on the defendant's part) can easily be re-articulated 'has the defendant used the rights over land in a reasonable way i.e. behaved reasonably (in the factual context)? Similarly in negligence: (if a duty of care is owed) then has the defendant failed to meet a reasonable standard of care,

²⁶⁴ [1919] 2 KB 42, 49, per Bankes J.

²⁶⁵ [1902] AC 381, 393 per Lord Robertson. Also, as *Rylands v Fletcher* gradually took the broadest view of the plaintiff's interest vis-a-vis the escape, (but stopped short of recognising an indirect economic interest), so has the modern law of private nuisance with regard to the plaintiff's necessary interest in land.

i.e. behaved reasonably? Of course this is not to deny distinctions of the actions; clearly private nuisance, for example, at the present time offers redress for some grievances where negligence does not.²⁶⁶ Additionally, as the Australian High Court perceived in *Burnie Port Authority v General Jones* there has been a historical trend towards more demanding standards in negligence as the standard of care attributed has become increasingly stringent.²⁶⁷ The duty owed in negligence is tougher in many, if not most, areas of social activity. Negligence is perceived to be much closer to *Rylands v Fletcher* strict liability than ever before. This is equally to do with, however, the very early reception into *Rylands v Fletcher* liability of defences; defences which whilst making a major contribution towards the gradual equalising of *Rylands v Fletcher* and negligence standards over time also, in themselves, either explicitly and/or tacitly mirror ‘defences’ which have similarly availed in negligence law.

Again it appears that very early in the development of *Rylands v Fletcher* the courts felt it inappropriate to impose *Rylands v Fletcher* liability where the damage was due to events utterly beyond the defendant’s control.²⁶⁸ In *Nichols v Marsland*,²⁶⁹ for example, the plaintiff was the county surveyor of Chester who brought an action for damages against the defendant after four county bridges had been swept away when, after a day of extraordinarily heavy rainfall, the defendant’s artificial ornamental lakes had flooded, and the dams at each end of them gave way. The lakes had never previously overflowed in many years since their

²⁶⁶ See also, J Murphy, ‘The Merits of *Rylands v Fletcher*’ 24 *Oxford Journal of Legal Studies* (2004) 643.

²⁶⁷ Contrast *Shiffman v The Order of St. John* [1936] 1 All ER 557 and *Introvine v Commonwealth of Australia* (1982) 150 CLR 258. In *Introvine* a 15 year-old pupil suffered severe injuries when part of the assembly at the top of the flag-pole in the school quadrangle came away and fell. Another Blackburn J dismissed the plaintiff’s claim at first instance. On appeal, the High Court held the school authority liable in negligence, having failed in their duty to provide adequate supervision and to secure the flag-pole fittings as it had done at other times.

²⁶⁸ See also W Goodhart, ‘The Third Man’ 4 *Current Legal Problems* (1951) 178. In Scotland *R.H.M. Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SLT 214 (House of Lords) endorsed the view that *Kerr v Earl of Orkney* (1875) 20 D. 298 (liability for flood damage) rested upon an inference of culpa.

²⁶⁹ [1876] 2 Ex.D. 1

construction and the jury found no evidence of negligence either in their building or maintenance.²⁷⁰

In *Box v Jubb and Anor* the defendants owned and occupied a mill, which was provided with its necessary supply of water from the reservoir on their land, and which had been constructed and used by them for many years. The reservoir was supplied with water from a watercourse over which the defendants possessed rights to obtain a supply of water therefrom. They also had the right to discharge surplus water into the watercourse, which was connected with the reservoir by means of sluice gates, but otherwise they had no control over the watercourse. Owing to the discharge of a large quantity of water into the watercourse at a point well above the defendants' land, and an obstruction of the main drain situated below the outlet of their reservoir, water was forced through the closed sluice gates causing the reservoir to overflow and flood the plaintiff's neighbouring land.

Finding the defendants not liable Kelly CB said '...the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third party may impose.'²⁷¹

Pollock B. added 'The case of *Rylands v Fletcher* is quite distinguishable. The case of *Nichols v Marsland* is more in point.'²⁷²

The defences of act of God and vis major were firmly endorsed by the Judicial Committee of the Privy Council in *Rickards v Lothian*. The defendant was lessee of a building used for

²⁷⁰ Neither could it be said that there was absolute liability under the action on the case; see P Winfield, 'Myth of Absolute Liability' 42 *Law Quarterly Review* (1926) 37.

²⁷¹ [1879] 4 Ex.D. 76, 79.

²⁷² [1879] 4 Ex.D. 76, 79.

business purposes and the plaintiff was tenant of part of the second floor where he kept his stock-in-trade, comprising in the main schoolbooks. On the fourth floor of the building there was a lavatory. Sometime after the caretaker had inspected the lavatory at around 10.20 p.m. one evening, persons unknown had jammed the wastepipe to the hand-basin and turned the water tap on full. The plaintiff's premises were flooded and his stock damaged. He claimed damages from the defendant initially on the basis of the defendant's carelessness or that of his servants or agents in the general management and control of the wash-basin, and alternatively on the ground of breach of an implied covenant for quiet enjoyment. At trial, however, the plaintiff claimed also that the defendant had wrongfully permitted large quantities of water to escape from the basin and enter his premises. It was held that the defendant was not liable for this escape.

Again in the Court of Appeal decision of *Musgrove v Pandelis* Duke LJ observed

I do not see how this case can be taken out of the principle in *Rylands v Fletcher*,...He [the defendant] can excuse himself by showing that the escape was owing to the plaintiff's default or perhaps that it was the consequence of vis major or act of God.²⁷³

And the close relationship between *Rylands v Fletcher* and negligence in this respect is striking in the Court of Appeal decision in *Perry v Kendrick's Transport Ltd*. The defendants, garage and coach proprietors, occupied premises with a garage which had waste land on either side. One end of their premises concluded with an open vehicle park separated from the waste land by a bank and a small wall. People sometimes crossed the vehicle park in order to gain access to the waste land, although the defendants objected to this. Boys playing in the area had from time to time been chased off. A motor coach, its tank emptied of petrol, had

²⁷³ [1919] 2 KB 42, 51.

been left near to the bank at that end of the parking ground for some three months. The plaintiff, a ten year-old boy, had left school in the afternoon, and as he approached the bank at the end of the defendants' parking ground, after crossing the waste land, he noticed two other boys standing at the side of the abandoned coach. As he neared them the boys jumped clear and an explosion followed in which he was seriously injured by burning. Lynskey J at first instance found that the explosion was due to the petrol cap on the coach having been removed and the petrol vapour having been ignited with a match. The learned judge ruled, however, that there had been no negligence on the part of the defendants, since they had done all they could to prevent children from playing in, and people crossing their land. The plaintiff's appeal was dismissed. In the opinion of Singleton LJ, 'It cannot be said that it was something which the defendants ought to have anticipated and it was the act of one who was not under their control in any sense. He was a stranger.'²⁷⁴

Jenkins LJ said:

It is well-settled that an occupant of land cannot be held liable under the rule if the act bringing about the escape was the act of a stranger and not any act or omission of the occupier himself or his servant or agent, or any defect, latent or patent, in the arrangements made for keeping the dangerous thing under control²⁷⁵

Shiffman v Order of St. John, a case frequently associated with *Rylands v Fletcher*, was in fact argued and decided in negligence. Atkinson J added, *obiter*, 'I do not know that it is necessary to decide it, but there is another ground upon which I think that liability might well rest. I cannot myself see why this is not within the rule in *Rylands v Fletcher*.'²⁷⁶

²⁷⁴ [1956] 1 All ER 154, 158.

²⁷⁵ [1956] 1 All ER 154, 159.

²⁷⁶ [1936] 1 All ER 557, 561.

We would now view this is an obvious case of negligence; the flagpole was badly erected, in a manner inconsistent with previous practice (which was simply to situate the base of the pole in a sheath set into the ground). A ‘watchman’ had been stationed near to the pole precisely because the defendants anticipated that children would come and play with it and likely bring it down. He had to abandon his post, although children had been swinging on the ropes, in order to attend to a casualty, and that was what the defendants were there for in the first place. In modern terms one could hardly find a clearer example of ‘foresight’ plus ‘proximity’.²⁷⁷ Given the vitality of the emergent negligence action the proposition that *Shiffman* could properly be brought within the compass or *Rylands v Fletcher* stood no chance of serious endorsement, although it is another indication of the willingness at the earlier stages of the development of the case-law to pursue a policy of expansionism which rather generously embraces a new fact situation.²⁷⁸ But this was 1936; the immediate future paths of negligence were as yet unknown, and in many cases which would on the facts bespeak negligence today, ‘negligence’ was not argued.

Damage

Blackburn J in the original decision referred to ‘all the damage which is the natural consequence of its escape’.²⁷⁹ Early authority indicates that personal injuries come within *Rylands v Fletcher* damage, although obviously in the case itself the damage was property damage. In *Hale v Jennings Bros.*²⁸⁰ the damage was personal injury; in *Shiffman v Order of St. John* where, *obiter*, *Rylands v Fletcher* was applicable, the damage was personal injury.

²⁷⁷ Elements emphasised in a number of recent negligence cases, notably by Deane J in the Australian High Court; see, for example, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

²⁷⁸ For the view that there emerged through the case law two rules in *Rylands v Fletcher*, see A J Waite, ‘Deconstructing the Rule in *Rylands v Fletcher*’ 18 *Journal of Environmental Law* (2006) 423.

²⁷⁹ [1866] LR 1 Ex.D. 265, 279-80.

²⁸⁰ [1938] 1 All ER 579.

In *Kendricks Transport Ltd.* Singleton LJ observed

I assume for this purpose that an action for damages for personal injuries will lie in such a case and I further assume for this purpose that a motor coach which had had petrol in the tank is covered by the words “anything likely to do mischief if it escapes.”²⁸¹

Only in *Read v J Lyons* do we find any significant view to the contrary.²⁸² In the same case Lord Simonds observed however, *obiter*:

...it is not, in my view, necessary to determine whether injury to the person is one of those matters in respect of which damages can be recovered under the rule. Atkinson J thought that it was; see *Shiffman v Order of St. John* and the language of Fletcher Moulton LJ in *Wing v L.G.O.Co.* ([1909] 2 KB 652 at 665)...is to the same effect.’²⁸³

And in *Perry v Kendrick’s Transport Ltd.* Parker LJ observed:

...nor do I think that it is open to this court to hold that the rule applies only to damage to adjoining land or to a proprietary interest in land and not to personal injury. It is true that in *Read v Lyons & Co. Ltd.* Lord MacMillan, Lord Porter and Lord Simonds all doubted whether the rule extended to cover personal injuries, but the final decision in the matter was expressly left over.²⁸⁴

In *Benning v Wong* Barwick CJ, Menzies J and Windeyer J were quite clear on the point, which was articulated without reservation by Barwick CJ:

²⁸¹ [1956] 1 All ER 154, 158.

²⁸² [1946] 2 All ER 471, 476. But more recently there is *Transco v Stockport Metropolitan Borough Council* [2004] 2 AC 1.

²⁸³ [1946] 2 All ER 471, 480.

²⁸⁴ [1956] 1 All ER 154, 162.

The suggestion that the damages for the escape to the land of another of a dangerous thing or substance is so limited, in my opinion, confuses liability with the consequence. It rests, so far as judicial pronouncement is concerned, solely upon Lord MacMillan's judgment in *Read v J Lyons & Co. Ltd.* [1947] AC 156 at 173. That doctrine has not been adopted by any court as the basis of a decision in any subsequently reported case of which I am aware.²⁸⁵

after all, given the standardly projected scale of community values relative to different broad categories of harm, why would not physical injuries constitute damage sufficiently serious to warrant legal reparation?²⁸⁶

Economic Loss

Two cases of different periods, however, would indicate that consequential indirect economic loss never was and is not 'damage' within the rule. In *Eastern and South African Telegraph Co. Ltd. v Cape Town Tramways Co. Ltd.*²⁸⁷ the defendants were companies incorporated to operate tramways in Cape Town and its suburbs. The plaintiffs were incorporated under the English Companies Acts and carried on the business of transmitting telegraphic messages via a submarine cable between Cape Town and Europe. Once the defendants' tramway system came into operation its interaction with the electricity supply disturbed the signals from the plaintiffs' cable to such an extent that it became impossible to use their telegraph facility. The plaintiffs claimed damages. The Judicial Committee of the Privy Council held that there was no resulting injury as to found a claim under *Rylands v Fletcher*.

²⁸⁵ (1972) 122 CLR 249, 275.

²⁸⁶ See also T H Tylor, 'The Restriction of Strict Liability' 10 *Modern Law Review* (1947) 396.

²⁸⁷ [1909] AC 381.

In *Weller v Foot and Mouth Disease Research Institute*²⁸⁸ the defendants owned and occupied premise where they performed experimental work with ‘foot and mouth disease’ in livestock. At one stage a virus imported from Africa for research purposes spread from the defendants’ laboratory into the neighbourhood where it caused an outbreak of the disease amongst cattle. As a result the Minister of Agriculture, in pursuance of statutory powers, issued an order for the closure of local markets. The plaintiffs were local auctioneers who carried on business at these markets and brought an action for damages against the defendants in respect of their financial loss, contending that in the circumstances this damage had to be foreseeable by the defendants. Holding that the defendants were not liable for the plaintiffs’ economic loss, Widgery J said:

The case is pleaded in the alternative on the principle that the virus is a dangerous thing which the defendants have brought on to their premises and for the escape of which they are absolutely liable, but counsel for the plaintiffs has not pressed this argument. It seems to me that the authorities, and in particular the case of *Cattle v Stockton Waterworks Co* [1875] L.R. 10 Q.B. 453, are against them²⁸⁹

In practice, then, thus far it would appear that the issue of ‘damage’ under *Rylands v Fletcher* has been treated in the same way as with negligence. In principle can one contemplate anything significant as between something likely to do mischief if it escapes for all the damage which is the natural consequence of its escape, and damage within a general class of harm which ought reasonably to have been foreseeable by the defendant?²⁹⁰ The question appears to have occurred to Lawton J in *British Celanese v A.H. Hunt Ltd.* where he said:

²⁸⁸ [1966] 1 QB 569.

²⁸⁹ [1965] 3 All ER 560, 570. The learned judge noted that Blackburn J had dismissed the idea that a person with no interest in the property to which the dangerous substance has escaped has standing under the rule; [1875] L.R. 10 Q.B. 453.

²⁹⁰ Negligence remoteness; *The Wagon Mound* [1961] AC 388; *Smith v Leech, Brain* [1962] 2 QB 405; *Hughes v Lord Advocate* [1963] AC 837.

It is unnecessary to decide whether, for the purposes of a successful claim based on strict liability under the rule in *Rylands v Fletcher*, the damages suffered must have been foreseeable by the occupiers of the premises from which there was an escape.²⁹¹

In principle, the question then appears to be whether in a *Rylands v Fletcher* action, damage the ‘natural consequence’ of the escape might yet not be of a reasonably foreseeable class. If the policy considerations dictate that some form of liability should be strict it would seem to follow at least in the abstract that this is possible.²⁹²

In *Burnie Port Authority v General Jones Pty. Ltd.*²⁹³ the plaintiffs stored a large quantity of frozen vegetables in three cold rooms in a building owned by the defendant Authority pursuant to an agreement between the two of them. Occupation of the remainder of the building, including the roof void, remained with the Authority. The Authority was in the process of adding an extension to the building, some of the building work being conducted by their own employees with more specialised tasks entrusted to independent contractors. One such, Wildridge and Sinclair Pty Ltd, was engaged to instal electrical and refrigeration equipment in the extension, the latter necessitating considerable welding and the use of a polystyrene insulating material known as ‘EPS’. If ignited EPS burns at a tremendous and ever-increasing rate.

Some 30 cardboard containers of EPS had been stacked in the roof void of the extension by employees of the contractors. The following day another of their employees was welding close to the store of EPS and a short time thereafter a fire began which quickly turned into a conflagration which destroyed the building and the plaintiffs’ stock, valued at \$2.246 million,

²⁹¹ [1969] 1 WLR 959, 964.

²⁹² In *Re Polemis* [1921] 3 KB 560 the damage was a ‘direct’ consequence although not reasonably foreseeable.

²⁹³ (1994) 179 CLR 520.

It was not contested that the Authority was at all times in occupation of the extension including the roof void where the cartons were stacked. A seven-member bench of the High Court dismissed the Authority's appeal, (Brennan and McHugh JJ dissenting).²⁹⁴ In a combined judgment the majority held that the Authority was liable to the plaintiffs in negligence, ruling that the defendants were under a 'non-delegable' duty of care to ensure that their independent contractor took all reasonable precautions in the storage and handling of the EPS and that in the circumstances the standard of care was a particularly stringent one.²⁹⁵

With some reservations the majority inclined to the view that, in practice, cases which might formerly have attracted liability in the defendant under the rule in *Rylands v Fletcher* can in future be dealt with under the ordinary law of negligence.²⁹⁶

...the rule in *Rylands v Fletcher*, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence.²⁹⁷

²⁹⁴ The trial judge found against General Jones' submission that the Authority was liable under the rule in *Rylands v Fletcher* on the ground that the welding was not a 'non-natural user' of the defendants' premises. On appeal, the Supreme Court of Tasmania in the majority held that the authority *was* liable under *Rylands v Fletcher* because welding in the roof void *did* amount to a non-natural user.

²⁹⁵ 'In the case of such substances or activities...a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of 'reasonable care' may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'; 179 CLR (1994) 520, 554 and citing Lord MacMillan in *Donoghue v Stevenson* [1932] AC 562, 612. The High Court derived some support from dicta of none other than Blackburn J: *Hughes v Percival* [1883] 8 App. Cas. 443, 446.

²⁹⁶ The High Court seems to have added this situation to the negligence categories of non-delegable duty of care. Other non-delegable duty situations mentioned were adjoining landowners in relation to common walls, master and servant in relation to a safe system of working, hospital and patient, school authority and pupil; (1994) 179 CLR 520, 550.

²⁹⁷ (1994) 179 CLR 520, 556.

The House of Lords and Cambridge Water Co. v Eastern Counties Leather Plc.²⁹⁸

The defendants operated a business manufacturing fine leather and involving a tanning process in which pelts were degreased by immersing them in tanks containing water with an addition of a solvent called 'perchloroethane' or 'P.C.E.' During topping-up operations small quantities of P.C.E. were regularly spilt onto the concrete floor of the factory but since it is a highly volatile substance P.C.E. evaporates rapidly in air although it is not readily soluble in water. The plaintiffs were the licensed suppliers of water to the residents of Cambridge wherein the defendants' factory was situated. When local drinking water supplies were tested in connection with new regulations it was discovered that relatively high levels of P.C.E. were present in the water derived from one borehole which was owned and operated by the plaintiff company and situated some 1.3 miles away from the defendants' factory. It was not contended that the water supply so contaminated was dangerous but due to U.K. regulations promulgated in accordance with an E.E.C. Directive the water was not 'wholesome' and therefore could not be supplied as drinking water. The plaintiffs took the affected borehole out of supply and arranged to construct a new pumping station to make up the shortfall in supply. Extensive investigations traced the source of the contamination to the defendants' factory. It was found that some of the neat P.C.E. from the spillages had managed to permeate the concrete floor of the factory and the subsoil beneath until it had reached a relatively impermeable chalk layer at a depth of around fifty metres where it formed pools, dissolving slowly in ground water and then carried away in the direction of the plaintiffs' borehole. The process must have been continuing for some years. The plaintiffs sought to recover substantial damages relating to their costs in arranging an alternative water supply, claiming in negligence, nuisance and under the rule in *Rylands v Fletcher*. The trial judge

²⁹⁸ [1994] 2 WLR 53.

found that the defendants' employees could not reasonably have foreseen that the spillages of P.C.E. would result in contamination of the water supply down-catchment and held that this was fatal *both* to the claim in negligence *and* to the claim in nuisance. *Rylands v Fletcher* liability was rejected on the basis that the storage and usage of P.C.E. at the defendants' factory constituted a natural user of their land.

The Court of Appeal reversed the decision of the trial judge, but on the basis of an early precedent concerned with strict liability for interference with a natural right incident to ownership.²⁹⁹ The defendants' appeal to the House of Lords was allowed. The House agreed with the trial judge that lack of attributable foresight of the kind of damage that occurred defeated the plaintiffs' claim not only in negligence but in nuisance also. Delivering the judgment of the court Lord Goff of Chieveley said:

We are concerned with the liability of a person where a nuisance has been created by one for whose actions he is responsible. Here, as I have said, it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability is a prerequisite of liability in damages for nuisance, as it is of liability in negligence. For if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage. Moreover, this appears to have been the conclusion of the Privy Council in *Overseas Tankship (U.K.) Ltd. v Miller Steamship Co. Pty. (The Wagon Mound (No.2.))* [1967] 1 AC 617.³⁰⁰

²⁹⁹ *Ballard v Tomlinson* [1885] 29 Ch.D. 115.

³⁰⁰ [1994] 2 WLR 65, 75.

The plaintiffs' claim in *Rylands v Fletcher* was also rejected by the House, but not on the ground that the defendants' user of the land was a natural one. The House held that reasonable foresight of damage is applicable to the rule in *Rylands v Fletcher* just as is to negligence and nuisance.

It appears then we now have a remoteness factor in *Rylands v Fletcher* and that it is based upon reasonable foresight of damage of the kind which resulted rather than upon natural and probable consequences of the escape.³⁰¹ There must be some appreciation of *risk* on the part of the defendant, although beyond that it does not avail him that he took all reasonable care to avoid the injury.³⁰² The finding of the House on non-natural user, although not carefully elucidated, is an important one. The trial judge had been influenced by the fact that the defendants' premises were industrial premises and, no doubt with Lord Moulton's reference in *Rickards v Lothian* to the 'general benefit of the community' in mind, by the fact that the leather works was the source of considerable employment in the area. This could have been sufficient to put paid to what has already become an extremely limited form of strict liability had it been accepted by the House. On the other hand with reference to the prospect of developing the *Rylands v Fletcher* action towards a more general form of strict liability in respect of ultra-hazardous operations,³⁰³ Lord Goff said

³⁰¹ Previously the reference of 'all the natural and probable consequences' did not appear to coincide with the directness test in *Re Polemis* [1921] 3 K.B. 560. In *Polemis*, the fire was a direct, but not a probable consequence.

³⁰² Other common law jurisdictions mirror the English courts' interpretation of *Rylands v Fletcher*. In *Hamilton v Papakura District Council* [2002] 3 NZLR 308, where the plaintiffs alleged that their crop of cherry tomatoes had been damaged by contaminants that had found their way into the town water supply, the strict liability claim was rejected, as in *Cambridge Water*, for want of 'foreseeable' damage. In *John Campbell Law Corp. v Owners, Strata Plan 1350* (2001) BCSC 1342, use of a sewer pipe connected to the defendant's land was not a non-natural user, as with *Transco v Stockport Metropolitan Borough Council* [2004] 2 AC 1: water pipe serving residential premises.

³⁰³ In the U.S.A.; rest 2d S520 refers to 'abnormally dangerous' activities as attracting strict liability. The reception of the rule into state law was variable, e.g. *Rylands v Fletcher* was cited as founding liability for escaping manure in *Ball v Nye* 99 Mass. 382 (1868) and specifically rejected over a steam boiler explosion in *Lossee v Buchanan* 51 NY 476 (1873).

...the decision of this House in *Read v J Lyons & Co. Ltd.* which establishes that there can be no liability under the rule except in circumstances where the injury has been caused by an escape from land under the control of the defendant, has effectively precluded any such development.³⁰⁴

A comparison of the history of *Rylands v Fletcher* in Australia and in England and Wales then ultimately then provides a remarkable result. By different routes, and with essentially the same legal references, the courts have produced two legal conclusions, the effects of which appear hardly distinguishable if at all. In the former jurisdiction, the tort is gone, and the action is negligence. In the latter the formal tort remains, but the risk of harm must be foreseeable. If so, reasonable measures must be sought to meet that risk. It appears that the most persuasive explanation is a movement in policy away from the early strict liability origins of the principle, modified by a few defences as they were, to a modern post-*Donoghue v Stevenson* position where views about standards of care are more confidently embraced as providing the means of safeguard against the extravagant risk posed to others.

³⁰⁴ [1994] 2 WLR 65, 79.

Chapter Six

Economic Loss

Foresight, Proximity and Policy

As new categories of liability in tort have emerged in the modern law, the decisions within them have, in the legal reasoning, been variously explained in terms of the concepts of foresight, proximity and policy.³⁰⁵ In *Donoghue v Stevenson* Lord Atkin spoke of ‘proximity’, but related this to his more fundamental concept of foresight. Referring to the earlier judgment of A.L.Smith LJ in *Le Lievre v Gould*³⁰⁶ he said:

The decision of *Heaven v Pender* was founded upon the principle, that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. I think this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.³⁰⁷

The more recent legal history, however, has seen a splitting of the original concept, and a separating out of ‘proximity’, first as a controlling principle of its own in those categories of case where, at least the latent perception is that a denial of foresight would involve too obviously something of a legal fiction,³⁰⁸ and second, still more recent and probably

³⁰⁵ See also, Justice M H McHugh, ‘Neighbourhood, Proximity and Reliance’ in P Finn (ed) *Essays on Torts* (1989).

³⁰⁶ [1893] 1 QB 491, 497, 504.

³⁰⁷ [1932] AC 562, 581.

³⁰⁸ See, for example, the judgment of Deane J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, and that of Lord Keith in *Yuen Kun Yeu v Attorney-General for Hong Kong* [1988] AC 175. Cf. Lord Reid in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

abortive, the appeal to proximity as some kind of new unifying principle.³⁰⁹ Policy' involves a more direct exposition of the reasons for a denial of a duty of care.³¹⁰ However, the potency of these concepts in their influence on determining an outcome, appears clearly to relate to the category of case in terms of damage,³¹¹ and on occasions it is unclear as to how that damage itself is to be properly classified.

The Anns Story

The story of *Anns* commences with the decision of the English Court of Appeal in *Dutton v Bognor Regis Urban District Council*.³¹² A building site in Bognor Regis had been developed for residential housing, which included some land formerly used as a rubbish dump, subsequently filled. The builder's plans were lodged with the defendant local authority, as required by council regulations. When he discovered that the subsoil was unstable, the builder took some measures to strengthen the foundations of the buildings to be erected

³⁰⁹ See the judgments of Deane J in *Jaensch v Coffey* (1984) 155 CLR 549, 584, and McHugh J in *Hill v Van Erp* (1997) 188 CLR 159, 210. In *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497 Deane J said '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 closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained.'

³¹⁰ An example of this is a striking line of cases in which the courts have declined to create a common-law duty of care in negligence on the part of local authorities in the exercise of their welfare functions. See, for example, *X (Minors) v Bedfordshire County Council*; *M (A Minor) v Newham Borough Council* [1994] 2 WLR 554 (consolidated appeals); *Hillman v Black* (1996) 67 SASR 490; *Sullivan v Moody* (2001) 207 CLR 562. More generally the judiciary appear to be alluding to what might be called 'background factors'; matters that may influence the outcome of a case. However, there is no agreement on this, nor upon the broader issue as to whether it is appropriate to have regard to policy factors, and different meanings are attributed to 'policy' in different contexts. See R Dworkin, *Taking Rights Seriously* (1977) 90-100; D Lyons, 'Principles, Positivism and Legal Theory' 85 *Yale Law Journal* (1997) 415, and the judgment of Lord Denning in *Spartan Steel & Alloys Ltd v Martin & Co* [1973] 1 QB 27, 39. The appeal to what is fair, just and reasonable, with its despairing air in terms of explanation, it is submitted, assists in nothing. See, for example, the judgments of Deane J in *Sutherland Shire Council v Heyman* (1984) 157 CLR 424, 498 and Lord Oliver in *Caparo Industries v Dickman* [1990] AC 605, 633.

³¹¹ Lord Oliver in *Caparo Industries v Dickman* described it, accurately in my view, as 'no more than a label', [1990] AC 605, 637.

³¹² [1972] 1 QB 373.

thereon, but these were to prove inadequate. The council's servant however, after an inspection of the building in progress, approved the original plans. Upon completion the house was sold. The purchaser, however, remained in possession for only a matter of months before re-selling to the plaintiff.

It was shortly after Mrs Dutton bought the house and took possession that the signs of damage appeared. Walls cracked and the staircase slipped. Soon after, internal walls began to subside. The only way to remedy this was to revisit and reinforce the foundations, an expensive project, for which Mrs Dutton lacked the means. She sued the local council, alleging that the inspection by their servant had been negligently performed. The trial judge found in favour of Mrs Dutton's claim. Through their inspector, the council had assumed a duty of care towards her. The defendants appealed, contending that Mrs Dutton's damage had wrongly been treated as a case of property damage, to which *Donoghue v Stevenson* had been applied. Even so, it was contended, the trial judge had erred, because to found a duty *Donoghue v Stevenson* requires both foresight and proximity. There was no proximity of relationship between the defendants and the plaintiff; the council knew nothing of Mrs Dutton at the time the inspection was made, and there had never been any dealings between Mrs Dutton and the council. However the case properly belonged within the category of claims for pure economic loss. The plaintiff had paid more for the house than it was worth, because of the defect in the foundations. For duty purposes the controlling case would be *Hedley Byrne*.³¹³ No liability would follow from this, because any representation given by the council's inspector was made to the original builder, not to Mrs Dutton, who therefore had never relied upon it.

³¹³ [1964] AC 465.

The Court of Appeal, however, decided unanimously in favour of Mrs Dutton.

In the opinion of Lord Denning MR, the true nature of Mrs Dutton's claim was physical damage to her house.³¹⁴ As to duty, Lord Denning preferred to found upon considerations of policy. He said:

This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue v Stevenson*: but it is a question whether we should apply them here. In *Dorset Yacht Co. Ltd v Home Office*³¹⁵ Lord Reid said that the words of Lord Atkin expressed a principle which ought to apply in general "unless there is some justification or valid explanation for its exclusion". So did Lord Pearson.³¹⁶ But Lord Diplock spoke differently. He said it was a guide but not a principle of universal application.³¹⁷ It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable or not? Was it too remote? And so forth.

Nowadays we direct ourselves to considerations of policy. In *Rondel v Worsley* [1969] 1 A.C. 191, we thought that if advocates were liable to be sued for negligence they would be hampered in carrying out their duties. In *Dorset Yacht Co. Ltd v Home Office* [1970] A.C.1004, we thought that the Home Office ought to pay for damage done by escaping Borstal boys, if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *S.C.M. (United Kingdom) Ltd. v W.J Whittall & Son Ltd.* [1971] 1 Q. B. 337, some of us thought that economic loss ought not to be put on one pair of shoulders, but spread among all the sufferers. In *Launchbury v Morgans* [1971] 2 Q. B. 245, we thought that as the owner of the family car was insured she

³¹⁴ [1972] 1 QB 373, 396.

³¹⁵ [1970] AC 104, 1023.

³¹⁶ [1970] AC 104, 1054.

³¹⁷ [1970] AC 104, 1060.

should bear the loss. In short, we look at the relationship of the parties: and then say, as a matter of policy, on whom the loss should fall.³¹⁸

In reaching the same conclusion however, his colleagues chose a more orthodox route. Sachs LJ said:

Next came the suggestion that because the plaintiff in the present action was not the original purchaser from the building owner but was next in the line of succession in purchasers the relationship between her and the building owner was not sufficiently proximate. That suggestion overlooks the very essence of the *Donoghue v Stevenson* [1932] A.C. 562 decision. As regards hidden defects the fact that there have been intermediate purchasers or users is not in point where the defect can only come to light at the stage when the plaintiff is injuriously affected.³¹⁹

Stamp LJ also founded liability on *Donoghue v Stevenson*:

Persons who might become the purchaser of a house built upon an insecure foundation are in my judgment so closely and directly affected by the act of a local authority in passing or refusing to pass the foundations as secure, that the authority ought reasonably to have them in contemplation as being affected when the local authority applies its mind to question whether it should or should not do so.³²⁰

Despite considerations as to indeterminate liability,³²¹ the decision in *Dutton* attracted no particular attention.³²² The focal point in terms of the policy debate, the classification of

³¹⁸ [1972] 1 QB 373, 397

³¹⁹ [1971] 1 QB 373, 405

³²⁰ [1971] 1 QB 373, 411. It is respectfully submitted that this is not quite an accurate application of the principle, since the hypothetical question concerns the foresight of the building inspector, and the defendant council bears vicarious liability for the servant.

³²¹ Extra-judicially Lord Denning states 'The case caused us great anxiety...We expected that the Council would appeal to the House of Lords'. Lord Denning, *The Discipline Of Law* (1979) 255.

³²² Lord Denning was right in his view that it would not lead to a flood of cases; [1971] 1 QB 373, 398.

damage, and the related reasoning, was to be the subsequent decision of the House of Lords in *Anns v London Merton Borough Council*.³²³

The plaintiffs in *Anns* were lease-holders of a block of flats which had been constructed in London in 1962; some original lessees, others lessees by subsequent assignment. The predecessor authority of the defendants had at that time, under bye-laws, received and approved building plans. The foundation of the building, as it turned out, did not comply with those shown in the plans. By 1970 the building began to suffer seriously from subsidence. The plaintiffs contended that the defendants had been negligent, either in inspecting and passing the foundations, or in failing to inspect at all.³²⁴ The House held that the defendants were under a duty of care to all the plaintiffs, and found them liable in damages.

The leading judgment was delivered by Lord Wilberforce:

Through the trilogy of cases in this House - *Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co Ltd. v Heller & Partners Ltd* [1964] AC 465 and *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations

³²³ [1978] AC 728.

³²⁴ The plaintiffs did not get very far at first instance. The learned judge held that their claim was time-barred, commencing another debate connected with the policy concern over indeterminacy. The Court of Appeal reversed that finding, holding that the cause of action occurred when the plaintiffs discovered or ought to have discovered the damage, rather than at the much earlier time of inspection or non-inspection. This was upheld in the House of Lords.

which ought to negative, or to reduce or limit the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.³²⁵

The broader policy reasoning of the House of Lords in *Anns*, before long was to become subject of much disapproval.³²⁶ The distinctions between *Dutton's case* and *Anns* were social rather than legal. The plaintiffs in *Anns* were investors rather than house-holders, the *Anns* claims were much larger, and whilst there was remaining doubt as to the liability of the primary tortfeasor, the original builder,³²⁷ since councils last longer than builders

³²⁵ [1978] AC 728, 751-52.

³²⁶ Tony Weir, *A Casebook on Tort* 5th ed (1983) 63 states 'Well intentioned though the decision in *Anns* doubtless was, the damage it has done to society and the law is immense. It is not, however, easy to see how that damage can be stemmed.' It was stemmed abruptly in *Murphy v Brentwood District Council* [1990] 3 WLR 414; (see the speech of Lord Keith at 432). And this has not apparently been the same conclusion in other jurisdictions which, whilst not adopting the *Anns* reasoning, have reached the same conclusion by a different path. See also, R. Kidner, 'Resiling from the *Anns* principle: the variable nature of proximity in negligence' 7 *Legal Studies* (1987) 319.

³²⁷ In that this had not actually been decided, although logic and obiter would have it strongly that liability does follow. See Lord Denning MR in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 398. However, *D & F Estates Ltd. v Church Commissioners for England* [1989] AC 187, involved a claim in negligence by the owners of a flat against the main building contractor for the cost of remedial work after plaster on the ceiling and walls, some of which had fallen off, was found to be defective. The damage occurred some five years or so after the work had been carried out. Again the House of Lords unanimously held that the contractor was not liable. Lord Bridge said 'It seems to me clear that the cost of replacing the defective plaster itself, either as carried out in 1980 or as intended to be carried out in future, was not an item of damage for which the builder of Chelwood House could possibly be made liable in negligence under the principle of *Donoghue v Stevenson* or any legitimate development of that principle. To make him so liable would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose.' [1989] AC 187, 207.

The position in Australia is strikingly different and governed by the High Court of Australia's decision in *Bryan v Maloney* (1995) 182 CLR 609. The defendant was a professional builder in Launceston, Tasmania, who built a house for Mrs Marion in 1979. Subsequently she sold to Mr and Mrs Quittenden, who in 1986 resold the house to Mrs Maloney. Six months later the first cracks appeared in the walls and the damage to the fabric of the house became extensive. It was discovered that given the nature of the subsoil, clay, the footings which the defendant had provided were inadequate. The Supreme Court of Tasmania held the defendant liable in negligence and awarded damages of 34.5 thousand dollars, the estimated diminution in value of the property. The defendant's appeal to the Full Court was dismissed and he appealed. The High Court held the loss to be recoverable whilst fully recognizing it to be a claim for pure economic loss. In the majority judgment it was said '...the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and the first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss.' (1995) 182 CLR 609, 627.

The court did not feel that there was any serious issue as to the 'indeterminacy of class' of potential claimant and, as to 'indeterminacy of time', (1995) 182 CLR 609, 623.

and tend to be better off in terms of resources, claimants who have a choice in the matter are likely to pursue the former.³²⁸

The issue arrived in Australia in 1985 with *Sutherland Shire Council v Heyman*.³²⁹ The plaintiffs had purchased a property in Sydney which had been built upon sloping land, so that part of the house had to be supported by brick piers and steel columns. Since the subsoil was unstable these proved to be inadequate and, in the course of time, that part of the house began to subside. These supports did not comply with the building plans which had been earlier submitted to the council. Otherwise it was unclear on the evidence as to whether the foundations had ever been inspected. In the High Court of Australia, Gibbs CJ and Wilson J were of the opinion that if the Heymans could not establish that any inspection of the foundations had been made, they could not establish that the defendants had acted negligently. The majority reasoning, however, was different. For Brennan, Deane and Wilson JJ, what was critical, and what militated against a finding of liability in

³²⁸ Whether *Anns* actually sparked a large volume of litigation against local authorities we do not know. On the same facts, after *Anns*, they would have been settled. Possibly the issue remained at the level of anxiety. This, however, is not an overwhelming reason of policy against the imposition of a duty of care. For one thing, it is possible to meet the standard of care. Otherwise councils are good loss-spreaders. Mrs Dutton did institute proceedings against the negligent builder, but it was settled at approximately 25% of her claim. She proceeded against the council for the rest. A council found liable in negligence can proceed against the primary tortfeasor for a contribution as joint tortfeasor, or bring the primary tortfeasor into the litigation as a party, but again, of course, this presumes that the builder is in a position to pay. See, for example, *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] 1 All ER 787, where builders, civil engineers and architects were all engaged by the plaintiffs who nonetheless sought to pass the buck to the council. In theory all these parties should carry professional indemnity insurance; all too often in practice they don't. To hold one party responsible in negligence for failing to control the activities of another is unusual but the path was very much open after *Home Office v Dorset Yacht Co. Ltd.* [1970] 2 All ER 294, concerning some borstal trainees who, left to their own devices when their supervising officers had retired for the night, absconded and caused damage to the respondent's yacht which was moored in the nearby harbour. The Home Office was found liable. The decision itself is not startling; the boys were in custody, all with criminal records, some involving criminal damage to property and several with a record of previous escapes from custody. The policy arguments which were to arise later from *Anns*, however, to do with the burdens placed upon those who have responsibility for the exercise of statutory powers, were dealt short shrift by Lord Reid in the House of Lords; [1970] 2 All ER 294, 302. In *Dorset Yacht* the broader problem as to the extent of liability was not on its facts dramatic. Lord Morris said. 'There was a special relation in that the officers were entitled to exercise control over boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand'; [1970] 2 All ER 294, 306. Lord Diplock spoke of 'property situate in the vicinity'; [1970] 2 All ER 294, 334. Had 'They sailed away, for a year and a day, To the land where the bong-tree grows, And there in a wood a Piggy-wig stood, With a ring at the end of his nose', and had they appropriated the ring, issues of proximity would have presented themselves: Edward Lear, *The Owl and the Pusseycat* (1871).

³²⁹ (1985) 157 CLR 424.

the defendants on the facts, was that there had never been any course of dealings between the Heymans and the council, such as would give rise to a reasonable expectation on the part of the former that they could rely upon reasonable care exercised by the latter.³³⁰

The conclusion in *Heyman* then embraces the reasoning presented unsuccessfully by the defendant council in original case of *Dutton*, and is suggestive that by virtue of the type of damage, the claim properly belongs in the category of *Hedley Byrne* liability. The English courts, in contrast, are defining the damage suffered in terms of material, physical damage. In the second perspective the claim properly belongs in the category with *Donoghue v Stevenson*.

At this point it appears that a choice of legal category has presented itself, and this is apparently important if we include the other conclusions of the courts because it will affect first, the outcome of the instant case, and second, the direction of the law within the category. *Prima facie Donoghue v Stevenson* will accept the claim, on the basis of the findings as to foresight and proximity. *Hedley Byrne* will deny the claim, based upon findings as to reliance.

According to the *Anns* reasoning the loss suffered was material physical damage³³¹. Damages recoverable would extend to any personal injury or property damage which resulted from the

³³⁰ Brennan J said: 'Section 317A is the only provision in Pt XI (of the Act) that imposes a duty (namely, a duty to furnish a certificate) that is for the benefit of future purchasers of buildings (inter alios) who apply for such a certificate. Although an intending purchaser of a building constructed since Pt. XI came into force might assume that the council had exercised its powers under Pt XI with reasonable care and that it was therefore likely that the building had been built in compliance with the Act, Ordinance, and approved plans and specifications, s.317A provides for the making of the only representation by the council on which such a purchaser is entitled to rely. The council is under a duty to intending purchasers to use reasonable care in furnishing the certificate, a duty that arises at common law (if it does not arise by statute) when the council knows that reliance will be placed upon it' (1985) 157 CLR 424, 483.

³³¹ In *Sutherland Shire Council v Heyman* Deane J spoke of 'a negligent omission or failure to act where the damage sustained has been merely economic in its nature; (1985) 157 CLR 424, 507. Wilson J appears to

inadequacy of the foundations. Otherwise what could properly be claimed was the amount necessary to restore the building to a safe condition.³³² Lord Salmon however went rather further. In this opinion damages should include the cost of repairing any of the individual flats and any reasonable expenses incurred by the plaintiffs in obtaining alternative accommodation while the structural repairs were effected.³³³ In *Dutton* Lord Denning had rejected the argument that the damage resulting to the plaintiff ought to be treated solely as an economic loss and that liability might follow only in the case where physical injury to someone resulted from the defects.³³⁴ But in *Heyman's* case the categorization has shifted to one of pure economic loss.³³⁵ This would mean that the measure of damage would be the difference between the market-value of the property and its value had the foundations not been defective, which is not necessarily the same as the cost of performing the necessary remedial works, and not particularly easy to reconcile with the English courts' more recent articulation of the duty of care principle itself, which relates to the protection of the physical safety of the occupier, rather than to the plaintiff's economic interests.³³⁶ However, in the

incline to the view that the damage is better postulated in terms of an economic loss; (at 492-3). Gibbs CJ (at 446-7) preferred to see the case as one involving physical damage to the house. The House of Lords in *Peabody Trust v Sir Lindsay Parkinson Ltd* [1985] AC 210 referred to economic loss (at 241-2). Finally in *Murphy v Brentwood District Council* the House opted for the 'pure economic loss' category. See, in particular, the speech of Lord Keith; [1971] 1 AC 398, 460.

³³²[1978] AC 728, 759; per Lord Wilberforce.

³³³[1978] AC 728, 771.

³³⁴[1972] 1 QB 373, 396.

³³⁵(1985) 157 CLR 424. See, for example, the judgment of Deane J (at 507) where he speaks of 'a negligent omission or failure to act or where the damage sustained has been merely economic in its nature', and again concluding (at 509). On closer consideration of the judgments, however, matters appear more complicated. Wilson J (at 471) appears to incline to the view that the damage is better postulated in terms of an economic loss (at 492-3). But Gibbs CJ again preferred to see the case as one involving physical damage to the house (at 446-7). The House of Lords in *Peabody Trust v Sir Lindsay Parkinson Ltd* [1985] AC 210 referred to economic loss (at 241-242). In the subsequent case of *Murphy v Brentwood DC* the House finally opted for the 'pure economic loss' category (see in particular Lord Keith's speech, [1971] 1 AC 398, 46).

³³⁶In *Heyman's* case Mason J took the robust common-sense approach: '...it matters not whether the damage sustained by the respondents is characterized as being economic loss or physical damage. It is how the affair stands, viewed from the appellants' perspective, that is important in relation to a duty of care. The foreseeable

minority reasoning in *Heyman*, any relevant negligence would go to the failure to inspect, and in the reasoning of the majority, any exercise of discretion, in order to found a duty of care in negligence, would have to be invoked by way of reliance.

Related to the above issues there is the question as to the time of the cause of action for limitation purposes.³³⁷ If the cause of action arises at the time that the authority ought to have taken steps to prevent the builder from covering up the inadequate foundations then an action brought by a subsequent purchaser is likely to be time-barred. It seems at least arguable, if inconvenient, that once the building with its bad foundations is completed then the economic loss is experienced, as long as some proprietary interest in it has passed to the plaintiff, since the building would be worth less than it otherwise would. Perhaps it was this difficulty which led Lord Wilberforce to speak of the damage in terms of ‘material physical damage’ in *Anns*.³³⁸

What happens subsequently to *Anns*, one would expect, for whatever reasons, first to settle the choice of legal category, in terms of defining the type of damage. One possibility is that, if *Donoghue v Stevenson* or *Hedley Byrne* can reasonably be interpreted as providing us with a legal rule, the outcome of the later cases can with reasonable conviction be viewed as determined by a rule statement. Another possibility is that Lord Denning’s

consequences of a failure to inspect were physical damage to a particular building resulting from faulty foundations and the incurring of expenditure by a subsequent owner in rectifying the defects...’(1985) 157 CLR 481, 466.

³³⁷The policy behind the law is that we cannot countenance liability ‘in an indeterminable amount for an indeterminate time to an indeterminate class’ (per Cardozo J in *Ultramares Corporation v Touche* 255 NY 170 (1931)).

³³⁸His Lordship said ‘We can leave aside cases of personal injury or damage to other property as presenting no difficulty. It is only the damage for the house which required consideration. In my respectful opinion the Court of Appeal was right when, in *Sparham - Souter v Town and Country Developments (Essex) Ltd* it abjured the view that the cause of action arose immediately on delivery, i.e. conveyance of the defective house. It can only arise when there on the general issue of limitation the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it’ [1978] AC 728,759.

unusually frank articulation, in *Dutton v Bognor Regis*, of a policy-driven construction of the case law, proves to be prescient. Consciously, and articulated or not, the forward direction of the case law proves to be motivated by the influence of policy, not by the application of rules.

Judicial Reconstruction of Anns

The judicial response in England and Wales to the reception of the decision in *Anns* has been dramatic, and in the way of deconstruction.³³⁹ In *Peabody Trust v Sir Lindsay Parkinson Ltd* the plaintiffs were developers of a large residential housing project in London. All concerned with the enterprise were aware that due to the clay subsoil any fixed drains installed below were liable to break up, due to expansion and contraction. To meet this problem, flexible joints were to be used, as indicated in the plans. Instead somehow fixed joints were used, and ultimately the estate was flooded as a result. The plaintiffs were left with costs of repair, lost rents over a period of some years, and other expenses. The House of Lords held that the defendants were under no duty of care to the plaintiffs. The leading judgment was delivered by Lord Keith who sought to emphasize the *purpose* of the bye-laws from which the local authority derives its supervisory powers:

The purpose for which the powers contained in paragraph 15 of part III of schedule 9 have been conferred upon Lambeth is not to safeguard building developers against economic loss resulting from their failure to comply with the approved plans. It is in my opinion to safeguard the occupiers of houses built in the local

³³⁹ A subliminal influence on the fate of *Anns*, I would suggest, was the reception of a different decision of the House of Lords, *Junior Books v Veitchi Ltd* [1983] AC 520, since disavowed; see *Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705.

authority's area, and also members of the public generally, against dangers to their health which may arise from defective drainage installation. The provisions are public health measures.³⁴⁰

This was followed by the Court of Appeal decision in *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council*.³⁴¹ Here a number of warehouses had been constructed for the plaintiffs, who were commercial property developers. They had engaged consulting engineers to prescribe the depth and type of foundations that would be required to support the weight of the buildings, and, consequent upon that, lodged plans with the local council, which the council duly approved. In a very short time the warehouses had either collapsed on their own or required demolition. The plaintiffs' consulting engineers had sent the council a copy of their drawing with details of the foundation and retaining walls, calculated to weight-bearing capacity, and structural work. In the weeks following, council inspections of all sites were carried out prior to further building. It was not contested that the council either knew or should have known of the previous usage of the land. The plaintiffs contended that the defendants had been negligent in approving the plans, and that their inspector had been negligent in passing the foundations in site. Founding upon *Peabody* the court held that the council was not liable for this loss. The plaintiffs relied upon their own experts, rather than upon the council. A duty of care could arise, however, towards an innocent subsequent purchaser whose safety was put at risk by the state of the premises; a different type of damage.³⁴²

³⁴⁰ [1985] AC 210, 241.

³⁴¹ [1986] 1 All ER 787.

³⁴² More generally, in respect of the local authority's duty, Lord Keith emphasized the necessity of a relationship of proximity between the parties and a consideration of whether it is 'just and reasonable' in the circumstances for the law to impose a duty. In the instant case it was not just and reasonable to impose a duty upon the borough when the plaintiff developers should and did place reliance in the relevant respect upon their own architects and contractors.

The brief legal history of *Anns* in its home jurisdiction comes to an end with *Murphy v Brentwood District Council*.³⁴³ Building constructors had built 160 residential houses in London. Two of these were constructed over unstable soil. To meet that condition they had engaged a specialist independent contractor who designed a special concrete raft which the builders used as a foundation. The plaintiff was a householder who purchased one of these properties and entered into possession. It was some twelve years later that the raft cracked and subsidence occurred, with all the standard sort of damage to the fabric of the house. Overruling *Dutton v Bognor Regis County Council*, the House of Lords in *Murphy* held that the council were not liable. The type of damage is now to be viewed as a form of pure economic loss.³⁴⁴ The avoidance of such loss does not properly fall within the scope of any duty owed by the local authority to third parties, with respect to the exercise of their statutory powers.³⁴⁵

³⁴³ [1990] 3 WLR 414.

³⁴⁴ *Dutton v Bognor Regis UDC* was specifically overruled by *Murphy*, as were all the cases which purported to rely upon *Anns*; per Lord Keith [1990] 3 WLR 414, 433; Lord MacKay, [1990] 3 WLR 414, 419; Lord Jauncey [1990] 3 WLR 414, 457. So what in broader social terms was wrong with *Anns*? The academic criticism referred to earlier was often concerned with the increasing level of similar litigation against local authorities as well as expensive out-of-court settlements. This was referred to again in *Murphy* by Lord Keith; [1990] 3 WLR 414, 430. Also *Anns* was applied to a greater or lesser extent in other common-law jurisdictions; in Canada in *City of Kamloops v Nielsen* (1984) 2 S.C.R. 2, and in New Zealand in *Stieller v Porirua City Council* [1986] 1 NZLR, 84 and was regarded as the catalyst for the opening up of negligence liability in a number of other areas. But was it so much what was said in *Anns* that related to the perceived problems as the result? After all, the English courts have in terms of general negligence principle apparently moved to a 'reasonable foresight' plus 'proximity' plus 'fairness and reasonableness' model, (is 'fairness and reasonableness' different to 'reasonableness'?). This does not immediately appear to be markedly different a proposition to Lord Wilberforce's prima facie duty minus policy considerations; the policy considerations distilling into the undesirability of the rate-paying body underwriting the business ventures of corporate enterprise. Once again 'reasonable foresight' of loss does not in practice add much, if anything, since the loss is quite foreseeable; that is the problem. Alone, 'reasonable foresight' would permit too wide a field of liability.

³⁴⁵ Per Lords Keith, Bridge, Brandon, Ackner, Oliver and Jauncy. Conceivably damage to property other than the house might give rise to a duty. Lord Bridge in *D & F Estates Ltd. v Church Commissioners for England* [1989] AC 177, 206 had suggested a 'complex structure' theory according to which different parts of a building might be viewed as distinct. This did not find favour in *Murphy* and in any event, if the damage is defined as economic loss and no duty arises with respect to it, that appears redundant. Lord Keith did concede however that faulty wiring installed which resulted in destruction of the building would render the electrical subcontractor responsible: [1990] 3 WLR 414, 431.

The categorisation of damage in the *Anns* line of cases has proved to be more than an academic matter in terms of the reasoning process.³⁴⁶ As long as one is content to define the loss as a species of physical damage, most of the perceived difficulties involving indeterminacy are avoided. We have found no agreement on this in the case law, and as a result, the duty of care lies uneasily between two categories. In England and Wales the courts have managed to bring the law back to the position prior to *Dutton*, on this occasion in a relatively abrupt fashion. In *Murphy v Brentwood* we learn that the issue in *Anns* itself turns on a matter of risk to personal safety, something that was far from prominent in the reasoning of the *Anns* decision itself. Nothing in the nature of a rule emerged.

In Australia, as we have seen, the High Court in *Heyman*'s case has located the claim within the alternative category controlled by *Hedley Byrne*. On the facts, the decision, in effect, insists upon an active reliance by the plaintiffs, upon the exercise of the defendant council's powers. This is surely a possibility, and therefore it appears that the category of liability is capable of further expansion, in contrast with the fate of *Anns*. None of the subsequent English cases followed the decision in *Anns*, which in itself is not suggestive of the case as representative of a rule. What appears is more in the way of various attempts, ultimately unsuccessful, to reconstruct the *Anns* reasoning in a way which allows for the preservation of the decision itself, but a denial of a duty of care in the later decisions, something which, with the benefit of hindsight, proves to be forlorn. However once again the trend of decisions after *Anns* is clear, and *Dutton* stood apparently untroubled for a considerable period previously. Surely the most persuasive explanation of the legal development is the perception that policy demanded an articulation of *Anns* in terms of some flexible principle which would facilitate the management of extensive liability.

³⁴⁶ Contra Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 481, 466.

Chapter Seven

Property Rights ³⁴⁷

In re Organ Retention Group Litigation ³⁴⁸

At an inquiry into the management of care of children receiving complex heart surgery held at Bristol Royal Infirmary in September 1999 it was revealed publicly that over a long period ‘tissue’ removed from the bodies of deceased children in the course of a post mortem operation had been retained at various hospitals around the country.³⁴⁹ The parents’ consent had not been sought for this, and they had no knowledge at the time that it had been done.³⁵⁰ The bodies were returned to them for burial but, unbeknown to them, without one or more of the organs. In 2001 letters were sent out by hospitals to parents of these children informing them of this circumstance. This led to in excess of two thousand claims against the hospitals brought by parents so affected. Many sought the return of the deceased child’s organ.³⁵¹

Sometimes the organ was available and could be released to them. In other cases the organ had since been destroyed, so return was not possible. In the latter case the parents sought damages for an interference with their civil right in relation to the child’s organ. Generally

³⁴⁷ A version of this chapter appears as ‘Rights in the Human Body’ 4 *University of New England Law Journal* (2009) 3.

³⁴⁸ [2005] 2 WLR 431, before Gage J.

³⁴⁹ In medical usage the term ‘tissue’ is taken to include body organs but this was not understood by some parents, which confused the issue of consent.

³⁵⁰ Under the *Coroners Act 1988* and regulations made under that Act, in certain circumstances when a person dies in hospital the coroner must be informed. In the *Carpenter* claim, *infra* pp.109-110, the child had died shortly following surgery. This constituted a sudden death within the provisions of the Act. The coroner is empowered to direct that a post mortem operation be performed to ascertain the cause of death and appoint a pathologist for this purpose. In this case no further consent is necessary and the coroner has lawful possession of the body for as long as is necessary to achieve this purpose. This is known as the coroner’s post mortem. In other cases the *Human Tissue Act 1961* makes ‘non-objection’ of relatives a pre-condition of the post mortem, and in fact consent is sought. This is known as the Hospital post mortem.

³⁵¹ Some parents wished to have the organs interred with the remains.

parents sought damages for psychological injury occasioned by them because of this practice and their belated discovery of it. All their claims were founded in tort.

*The Harris Claim*³⁵²

Mrs Harris became pregnant in 1995. Ten weeks into the pregnancy she was diagnosed as diabetic. At 20 weeks she and her husband were informed that it was likely that the baby would suffer from a rare and serious affliction and they were strongly advised by their doctors to have the pregnancy terminated. They declined to do so. At 28 weeks Mrs Harris was admitted to West Dorset General Hospital where by caesarean section her baby daughter was delivered prematurely. The baby was born with severe multiple abnormalities and died two days later in hospital. A post mortem operation was carried out in which the child's brain, heart, lungs and spinal cord were removed and retained in the Southampton University Hospital. Subsequently these organs were disposed of.

Mr and Mrs Harris averred that not only had they not given consent for the retention of any organs from the child's body, but they had specifically stated that all organs removed must be returned so that they could attend to the child's burial.³⁵³ Apart from Mr and Mrs Harris' claims against the two hospitals for wrongful withholding of the body parts Mrs Harris brought a further claim for the psychiatric damage which she had personally suffered immediately following her appreciation of the events upon her reading the letter from the hospital in May 2001.³⁵⁴

³⁵² [2005] 2 WLR 358, 361-62.

³⁵³ Several years had elapsed since the events occurred and there was often a conflict of evidence over the discussions between the doctors and the parents. The judge preferred the evidence of the parents on these matters since he inclined to the view that given the drama of the situation to them it was more likely that the details would more clearly remain in their memory.

³⁵⁴ Referred to in the case and hereinafter as 'organ retention knowledge'.

The Carpenter Claim³⁵⁵

Mrs Carpenter gave birth to her first child, a boy, in 1985. The pregnancy was normal and it was not until some twelve months of age that the child manifested any signs of illness, but in February 1987 he was diagnosed with a brain tumour. An operation to remove the tumour, which was found to be around the brain stem, was carried out at Southampton General Hospital. After some initial improvement the child's health rapidly deteriorated and he died in hospital a few days later. A post mortem was performed at the hospital and some days later the body was returned to Mr and Mrs Carpenter for burial. It was not until 2001 that by letter they were informed that the brain had been removed during the procedure and retained at the hospital. By that time the brain had been cremated. As with the *Harris* claim both parents sought damages for wrongful interference with the organ and in addition Mrs Carpenter claimed damages for her depressive illness brought about by organ retention knowledge following her appreciation of the information in the letter.

The Shorter Claim³⁵⁶

Early in 1992 Mrs Shorter became pregnant with her first baby. At 40 weeks of pregnancy she went into spontaneous labour but the midwife who attended her at her home was unable to detect a foetal heartbeat, so she was admitted to the John Radcliffe Hospital in Oxford. An ultra-sound scan indicated no heartbeat and Mrs Shorter was informed that the baby was dead. The following day Mrs Shorter gave birth to a baby girl stillborn. A post mortem was carried out at the hospital and the body was returned and buried approximately one week later. It was not until November 2001 that the hospital informed Mrs Shorter by letter that the

³⁵⁵ [2005] 2 WLR 358, 362.

³⁵⁶ [2005] 2 WLR 358, 383.

brain and heart had been removed and retained by the hospital. Again the parents alleged a wrongful interference with the body parts sounding in damages in tort. Again Mrs Shorter sought damages for her psychological injury brought about by the organ retention knowledge.

The Organs: a Tort of Wrongful Interference

All plaintiffs contended that the removal and retention of the body parts by the defendants constituted a tort actionable in itself,³⁵⁷ although the stronger argument is that the retention and alteration and ultimately destruction of the organs is so actionable, since this avoids difficulties over the issue of consent. In some cases consent to perform the post mortem was not lawfully required. In others there was no dispute that consent was given, but there was doubt as to what the parents understood the post mortem procedure to involve. It was common ground, however, that the plaintiffs had not consented to the retention and usage of the parts.

At common law an action in conversion may lie for a direct and intentional interference with the plaintiff's goods. It is established that conversion is a tort against possession, and there is authority that a plaintiff's constructive possession, i.e. a legal right to possess, is sufficient to found the action.³⁵⁸ Moreover as a form of trespass the tort is actionable *per se*.³⁵⁹ The problem facing all of the plaintiffs was whether they had any such right to possession of the deceased child's organs.

³⁵⁷ A claim in deceit was abandoned; [2005] 2 WLR 358, 363. For a general history of conversion see S F C Milsom, *Historical Foundations of the Common Law* 2nd ed (1981) 365.

³⁵⁸ *Bailiffs of Dunwich v Sterry* (1831) 1 B. & Ad. 831.

³⁵⁹ The tort of detainee was abolished in the UK by the *Torts (Interference with Goods) Act 1977*. The action in conversion remains. D Nicol, 'Property in Human Tissue and the Right of Commercialisation' (2004) 30 *Monash Law Review* 139, 150-52 discusses the possibilities in bailment and its attendant remedies.

The few available authorities included the High Court of Australia decision in *Doodeward v Spence*.³⁶⁰ In 1870 a stillborn foetus had been removed by the doctor who preserved it in a jar with spirits. When the doctor died two years later his effects, including the jar, went to auction, where the jar was purchased by a stranger. On the death of the purchaser the jar passed with the rest of the estate to his son. So it was that after nearly 40 years, the jar, together with contents, was on display as part of an exhibition, and it was seized by police. An action for its recovery was allowed by the majority.

The action was framed in detinue. Reviewing the earlier authorities, Griffith CJ in the High Court found that there existed from very early times a right in family members to possession of, and delivery up of, a corpse for burial purposes, but this was a specific right derived from a duty to bury the deceased.³⁶¹ More generally there could exist no property in a corpse.³⁶² However where a person has lawful possession of a human body, and lawfully exercises some work and skill upon part of it, so that the part acquires attributes which distinguish it from an ordinary corpse awaiting burial, that person acquires some possessory right in the item capable of vindication under the law of trespass. He added, however, that the party has this right ‘at least as against any person not entitled to have it delivered to him for the purpose of burial’.³⁶³

The right to have the body delivered up for burial has been confirmed by the English courts in *R v Gwynedd County Council, Ex p B*,³⁶⁴ involving a local authority’s decision to pass the

³⁶⁰ (1908) 6 CLR 406.

³⁶¹ See, for example, *R v Vann* (1851) 2 Den 325; *Foster v Dodd* (1867) LR 3 QB 67. The policy behind the rule, however, was about obviating a public nuisance.

³⁶² The few early authorities are clear on this; for example, Willes CJ., in relation to the action in trover, asserted that no person has any property in a corpse, 2 *East’s Pleas of the Crown* 652.

³⁶³ (1908) 6 CLR 406, 414. In *Roche v Douglas* (2000) 22 WAR 331 in an application for DNA testing of tissue specimen of deceased to establish paternity the question of property arose, but this was for the purposes of the Supreme Court Rules.

³⁶⁴ [1992] 3 All ER 317.

body of a young child who had died in foster care to the natural parents for burial against the wishes of the foster parents.

In *Dobson v North Tyneside Health Authority*³⁶⁵ a woman had suddenly collapsed while at work and was admitted to the defendant hospital from which she was discharged after five days. Soon afterwards she became extremely ill and was admitted to the Royal Victoria Hospital in Newcastle. There she was diagnosed as suffering from two brain tumours, but she died before she could be operated on. On the instructions of the coroner a post mortem operation was performed in the course of which her brain was removed and fixed. The cause of death was certified but no other report was made. The brain was returned to the Newcastle hospital where it was stored for some time and then disposed of. The patient's grandmother as executrix of her estate, and as next friend in respect of her son, commenced an action in negligence against the defendant (first) hospital. They contended that a routine CT scan would have revealed the presence of the tumours. Had they been benign the patient could have been treated and would have recovered. Had they proved to be malignant she probably would have died. It was important for their case, then, that they could ascertain the condition of the brain. However when their solicitors wrote to the second hospital in relation to this matter they were informed that neither any report nor the brain itself existed. In an action against the second hospital it was held that the defendants were not liable in conversion since the plaintiffs had no actual possession or immediate right to possession of the brain.

In relation to the organ retention situation, these authorities would suggest that given the hospital has lawful possession of the body, once an organ has been removed and 'processed' a right to possession of that part accrues to the hospital. However this leaves open the

³⁶⁵ [1997] 1 WLR 596.

situation where the organ has simply been removed and retained. Even in the former circumstance the question is not clearly resolved, since it remains to be answered whether the parents' right to possession of the body for burial means a right to the 'whole' body. It would appear that there are competing rights of possession.³⁶⁶ .

Negligence: the Duty of Care

The *Organ Litigation* plaintiffs alleged that the defendant hospitals, through their doctors, owed them a duty of care when pursuing their consent to a post mortem operation, which consisted of counselling them appropriately with respect to the nature of the medical procedure necessarily involved, and which included disclosure of the fact that organs would be removed and some might be retained, and, further, to comply with the plaintiffs' wishes with respect to the child's body. In relation to the *Harris* claim and the *Shorter* claim there was no difficulty over this issue, since the requisite duty arose simply by virtue of the doctor-patient relationship. In relation to the *Harris* claim, where a child is born alive and dies soon afterwards, the doctor must be under a duty to advise the mother on the prospect for future pregnancies. This is supported by the fact that the stated purpose of the post mortem itself was to assist the doctors in ascertaining whether or not the child's abnormalities were genetic for the benefit of so advising Mrs Harris.

Much the same considerations were true of the *Shorter* claim. The *Carpenter* claim differed in that the patient was the child, and the defendants contended in effect that their professional duty stopped there. In their own evidence, however, the doctors agreed that their ethical sense

³⁶⁶ There is isolated Canadian authority for the proposition that an *unauthorised* interference with constructive possession of a corpse is actionable; *Edmonds v Armstrong Funeral Home Ltd* [1931] 1 DLR 676; plaintiff claiming damages for mental suffering caused to him by unlawful autopsy performed upon deceased wife. See also R Atherton, 'Who owns Your Body' (2003) 77 *Australian Law Journal* 178, 180-84. The author concludes (at 193) "The body/corpse lies in ambiguous zone."

dictated that they should to some extent proffer their assistance to the grieving mother in the direct aftermath of the tragic event. The court found that a duty of care arose in all three situations.

Breach of Duty

Much more difficult was the issue as to whether the defendants were in breach of their duty by failing to exercise proper professional care in the course of their discussions with the plaintiffs concerning the post mortem procedures.³⁶⁷ This involved both a question of law and a question of fact. On the former, generally speaking, not any and every risk of injury to a plaintiff will fall within the scope of the defendant's duty of care. As a matter of law the breach question is essentially one of risk management.³⁶⁸ The duty is to take care to avoid foreseeable risks in the sense that the doctor should take care to address risks which should reasonably have been foreseen.

On the factual issue the essence of the matter went to the proper scope of the aftermath counselling process, and that question involved, in so far as is relevant, what was appropriate to discuss with the mother in the context of medical and general knowledge pertaining to the time of the events rather than to the date of trial. Accepting that it was a delicate matter to decide in what sort of detail in explaining what would be involved in the post mortem operation to be performed on the deceased child of a newly bereaved mother, the judge reached the factual conclusion that given the importance of the crucial information, and given

³⁶⁷ The court was referred to the so-called *Bolam* principle, from *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, according to which the court should be guided what is the practice of a responsible body of medical opinion. The judge concluded, however, that at the pertinent time there was actually no established practice relating to the post death discussions with relatives, [2005] 2 WLR 358, 409-13.

³⁶⁸ See, for example, *Bolton v Stone* [1951] AC 850; dicta of Lord Porter (at 858) and Lord Reid (at 867); Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

that the mother's level of distress in the course of these events was already such that divulging it was unlikely significantly to worsen it, the defendants were in breach of their duty of care by failing to do so.

The question remained whether the psychiatric illness suffered by the plaintiffs fell within the notion of 'reasonable foresight' for the purposes of determining the breach issue. Here the judge differed between the claimants in his conclusion since it was necessary to take into account all the factors of her personal life and disposition of which the doctor was aware at the time of the events.³⁶⁹

Mrs Harris was found to be a robust person who would not be expected by the ordinary treating doctor to collapse under the strain of organ retention knowledge.³⁷⁰ The risk of psychiatric injury to Mrs Harris as a result of failing to disclose the information was not sufficiently probable to bring it into the circle of the 'reasonably foreseeable'. For this reason the *Harris* claim failed. Similarly Mrs Carpenter was found to be a 'well adjusted, practical and sensible woman' to the knowledge of her treating doctor.³⁷¹

Mrs Shorter, however, at the time of the relevant consultation was obviously in an extremely distressed condition and emotionally fragile following the stillbirth. When asked in evidence whether he could have foreseen psychiatric harm resulting to Mrs Shorter in the circumstances, a member of the obstetric team which had been treating her answered in the affirmative. In relation to the *Shorter* claim alone, then, the defendants were found to be in breach of their duty of care.³⁷²

³⁶⁹ [2005] 2 WLR 358, 406.

³⁷⁰ [2005] 2 WLR 358, 416-17.

³⁷¹ [2005] 2 WLR 358, 421.

³⁷² [2005] 2 WLR 358, 407.

Psychiatric Injury

Each of the lead claimants in the *Organ litigation* was found to be suffering from a psychiatric condition capable of sounding in damages in tort.³⁷³ An analytical difficulty with the case arises, inasmuch as, in the tort of negligence, in modern law the question as to whether a defendant is liable for the infliction of a purely psychological injury is normally initially addressed in terms of whether any duty is owed by the defendant in respect of that type of harm. However in the instant case a duty of a general kind was found to have been assumed by the doctors in the course of dealing with the parents at the time of the death or stillbirth of the children.³⁷⁴

Nevertheless there was argument as to whether the claimants, in the context of this type of damage, constituted ‘primary’ or ‘secondary’ victims. This is the dichotomy between the situation where the plaintiff is directly so affected by the defendant’s negligent conduct and the situation in which the plaintiff suffers the psychiatric injury through an emotional reaction to the injuries inflicted upon another person.³⁷⁵ The practical importance of the distinction

³⁷³ Windeyer J explains the distinction between grief and psychological injury in *Mount Isa Mines v Pusey* (1970) 125 CLR 383, 394.

³⁷⁴ I would suggest that a way to deal with this, conceptually, where a general duty of care arises by virtue of an existing relationship between the parties, would be to treat the question of liability for psychological injury as an issue of remoteness.

³⁷⁵ An example of the former is *Page v Smith* [1995] 2 WLR 644; motorist in collision physically unscathed but suffering psychiatric injury. This situation is as old as *Dulieu v White* [1901] 2 KB 669. An example of the latter is *Jaensch v Coffey* (1983) 155 CLR 549; wife developing psychiatric illness as a result of injuries sustained by husband in motor collision. In Victoria, Australia, the *Wrongs Act 1958* s.72 speaks of the second situation as ‘pure mental harm’ and codifies the common law. Similar legislation exists in the other states and territories.

lies in the fact that the law will more readily impose liability in the case of the former than the latter, largely due to the policy concern over the multiplicity of claims.³⁷⁶

Historically the prototype situation of the secondary victim is the case where the mother is afflicted with psychological illness as a result of the death or injury which the defendant causes to her child.³⁷⁷

In relation to the ‘secondary’ victim, the various ‘control’ factors,³⁷⁸ often collectively articulated in terms of ‘proximity’, are important in establishing a duty of care and therefore liability.³⁷⁹ But there is scant authority for the proposition that a corpse is capable of constituting a primary victim for these purposes,³⁸⁰ and one must have a primary victim before there can arise any issue as to a secondary victim. The court found the mothers to fall into the category of primary victims.³⁸¹ As such they were not affected by the ‘control’ factors;³⁸² the question was whether the defendants owed the duty of care for this damage through their direct dealings with them, not via any prior treatment of the children.

³⁷⁶ See, notably, *Alcock v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907; the famous Hillsborough football stadium tragedy.

³⁷⁷ The earliest successful case is *Hambrook v Stokes Brothers* [1925] 1 KB 141. Fathers were formally included under the rule in *Boardman v Sanderson* [1964] 1 WLR 1317. .

³⁷⁸ See generally N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 1993 chs 4, 5, 6, 7.

³⁷⁹ See *Alcock v Chief Constable of South Yorkshire* [1991] 4 All ER 907.

³⁸⁰ *Owens v Liverpool Corporation* [1939] 1 KB 394 stands alone in this regard and, although a decision of the Court of Appeal, is usually ignored.

³⁸¹ [2005] 2 WLR 358, 404-5.

³⁸² The House of Lords and the High Court of Australia have been proceeding in opposite directions in relation to controlling liability for psychiatric injury, with the former rewriting legal history in *Frost v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509, and the latter possibly commencing an unravelling of the law in *Gifford v Strang Patrick Stevedoring Ltd* (2003) 214 CLR 269.

Causation and Damage

One of the most problematic aspects of the *Organ Litigation* case, both in terms of fact and law, is the issue of causation. I shall turn first to the findings of fact.

The Harris Claim

The evidence was that the period of a year following the death of her baby was a particularly bad time for Mrs Harris, but for a further period of three to four years after the death, she and her husband blamed each other. She had just begun to cope with the death and the fact that she could have no further children when she received the letter from the hospital. She underwent emotional collapse. Since that time she had nightmares and once again blamed her husband. She stated that there was no aspect of their lives that had not been affected by the organ retention knowledge.

However, in addition to the emotional trauma following the death of her child, Mrs Harris had been afflicted by other problems, including her inability to conceive, behavioural problems of her stepson, who since 1997 had been living in the marital home, and her husband's general breakdown of health which left him unable to work. By the date of trial she had been undergoing counselling and was taking an anti-depressant. Allowing for some divergence in expert opinion on the matter the judge found that Mrs Harris was already suffering from some kind of recognised psychological disorder prior to her receiving the hospital's letter in May 2001. The judge found further that the letter and the connected organ retention knowledge exacerbated this disorder, making some contribution to her present condition.

However the judge accepted the expert evidence that that additional contribution would be negated once the effect upon her of the litigation itself was brought to an end. In factual terms, the damage, then, consisted of the aggravation of the plaintiff's condition for the period between the receipt of the letter and the cessation of the legal proceedings. The judge rejected the defence argument this was so minimal a contribution to Mrs Harris' existing harm as to be insufficiently material to warrant compensation, describing it as 'small...but...material and quantifiable'.³⁸³

The Carpenter Claim

The situation following the tragic death of Mrs Carpenter's young son was thankfully a happier one, and it was agreed that the event did not cause her to succumb to any psychological illness. However during the years which elapsed between the death and the time at which Mrs Carpenter acquired the organ retention knowledge she experienced a number of other significant personal setbacks. In 1987 she had to terminate another pregnancy on medical advice. In 1990 she miscarried with a further pregnancy and was involved in a motor accident. In 1991 she had another miscarriage. In 1992 she and her husband were confronted with financial problems. In 1997 the sudden death of her aunt through illness caused Mrs Carpenter to have a depressive episode. In March 2001 she received the hospital's letter. In September 2001 she was subject to an inquiry at work which resulted in her being suspended for 28 days. Following the organ retention knowledge Mrs Carpenter had difficulty sleeping and experienced mood swings, irritability, poor concentration, breathlessness and panic attacks.

³⁸³ [2005] 2 WLR 358, 375.

Again allowing for some differences in the expert testimony, the judge found that at some stage in 2001 Mrs Carpenter suffered a recognised psychological disorder either due to the organ retention knowledge itself or because that very knowledge had rendered her susceptible to a psychological illness, although it did not occur until her problems over her employment eventuated in the following September. It was found that she had recovered from the psychological disorder at the date of trial but remained susceptible to it in the future. In factual terms, Mrs Carpenter's damage consisted of her illness which subsisted between March and September 2001, and her future continuing vulnerability to psychological disorder.

The Shorter Claim

Following the stillbirth of her child in 1992 Mrs Shorter continued to grieve for a number of years. In 1994 she gave birth to a healthy daughter but there were some mixed feelings of guilt in this. After acquiring the organ retention knowledge she lost her confidence and went onto a course of anti-depressants. She was able to function adequately in the home. The evidence was that Mrs Shorter had suffered a pathological grief reaction as a result of the stillbirth, and this was exacerbated by the organ retention knowledge for a period of approximately one year. Mrs Shorter's damage, therefore, consisted of the degree of exacerbation of her initial psychological injury projected over one year.

*Causation as a Matter of Law*³⁸⁴

It would appear from the above that each plaintiff's 'overall' psychological illness was brought about not solely because of the organ retention knowledge but by other events as well, stemming initially from the death of the child itself. In a number of relatively recent decisions the English House of Lords has appeared to return to a more traditional stance on the issue of causation, holding that it is incumbent upon the plaintiff to establish that the defendant's negligence was the predominant cause of the damage complained of.³⁸⁵ In the event of other 'competing' factors this can be a serious problem for the plaintiff. A different view is that that the defendant may be liable if the defendant's negligence made a material contribution to the damage suffered.³⁸⁶

³⁸⁴ See generally H L A Hart and A Honore, *Causation in the Law* 1985; J Wright, 'Causation in Tort Law' 73 *California Law Review* (1985) 1735.

³⁸⁵ In *Hotson v East Berkshire Area Health Authority* [1987] 3 WLR 232 a boy injured his hip when he fell several feet from a tree. He was admitted to hospital but his condition was not diagnosed until five days afterwards. He developed 'avascular necrosis' as a result of a failure of blood supply to the hip. On the evidence there was a 75% chance that this condition would have occurred regardless of the delay in diagnosis and treatment. The defendant hospital admitted liability for five days pain and suffering but was found not liable for the ongoing condition. In *Wilsher v Essex Area Health Authority* [1988] AC 1074 a baby born prematurely was administered excessive oxygen and found to be blind. A one-in-six chance that the error brought about the blindness was not sufficient to satisfy the requirement of causation. Recently the High Court of Australia has endorsed this approach; *Tabet v Gett* [2010] HCA 12. One exceptional decision is *Bailey v Ministry of Defence* [2009] 1 WLR 1052; see K A Warner, 'Consecutive Causes' 159 *New Law Journal* (2009) 845. The Supreme Court of England and Wales has developed an exception to the normal rule on causation in certain, confined circumstances, where the aetiology of a disease is unknown, which would demand of the plaintiff an impossible task; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, developing the House of Lords decisions in *Fairchild v Glenhaven Funeral Services Ltd* [2003] AC 32 and *Barker v Corus UK Ltd* [2006] 2 AC 572, as amended by the *Compensation Act 2006 (UK)*. See K A Warner, 'Causation and Industrial Disease' 161 *New Law Journal* (2011) 835.

³⁸⁶ In *Bonnington Castings v Wardlaw* [1956] 1 All ER 615 the House of Lords preferred an approach based on 'material contribution', Lord Reid opining that material contribution is a question of degree (at p. 618). *McGhee v National Coal Board* [1972] 3 All ER 1008 seemed to endorse this approach. In *March v Stramare* (1991) 171 CLR 506 Mason CJ advocated an approach of applying common sense to the facts of each particular case, but this raises difficulties over predictability. In *Chappel v Hart* (1998) 195 CLR 232 the majority of the High Court of Australia appeared to follow the 'material contribution' approach. In civil systems where an Aquilian action is available the position appears to be the same, see, for example, *Minister of Police v Skosana* 1977 (1) SA 31 (A) 33, 34-5, 43-4. A comparison of the two approaches appears in A I Ogus, *The Law of Damages* 1973, 64. See also H McGregor, 'Successive Causes of Personal Injury' 33 *Modern Law Review* (1970) 386. For an American view, see Robert J Peaslea, 'Multiple Causation and Damage' 47 *Harvard Law Review* (1934) 1127.

In the *Organ Retention* case, possibly one can conceptually view the exacerbation of the plaintiff's original condition due to the organ retention knowledge as distinct damage in itself. In that case on the evidence the causal link is clearly made out, but it must be admitted that this is not a comfortable distinction to make. Otherwise it is apparent that we do have competing factors in causation and the defendants' liability would have to be justified on the basis of the 'material contribution' version of the causation requirement.³⁸⁷

A Tort of Wrongful Interference

The plaintiffs' argument that they were entitled to damages based upon some form of trespass could not be sustained. On the authorities their possessory right to a family member's body was qualified at common law and, in some cases, by statute. The common law recognises a right to possess a corpse for burial, though the prior removal of organs and its effect is undecided. The right derives from antiquity and does not rely on notions of ownership or property. Generally, the law does not recognise property in a corpse or its body parts, so that any action based on possession must fail. The major exception is where lawful work or skill has been exercised on the corpse, or its parts, which distinguishes it from a corpse awaiting burial. In such cases a property right may be recognised.

³⁸⁷ With respect to the learned judge, whilst on one view fair as between the parties, this approach does not appear consonant with mainstream principle, and may be seen to invite confusion. A duty of care arose in these cases because of the professional relationship between defendant and plaintiff. The judge found as a matter of fact that there had been a breach of duty. In relation to the breach issue foresight is relevant only inasmuch as it bears upon the apprehension of risk; see, for example, *Roe v Minister of Health* [1954] 2 QB 66. Risk of injury is one consideration involved in making that decision on the facts; If the organ retention knowledge was the operative cause of the plaintiffs' psychiatric harm (and there is considerable doubt over this on the facts), then the defendant should be liable for the whole of that claim.

Negligence

On the basis of the decision most claimants, like *Harris* and *Carpenter*, would fail on the breach issue, since the finding was that psychiatric illness as a result of non disclosure of organ retention was not such a significant risk as to bring it within the range of the ‘foreseeable’. The *Shorter* (and other like) claim(s) succeeded because the plaintiff’s vulnerable condition, which was known to the defendant at the time, was such as to render that risk appreciable.³⁸⁸ In all such cases the aggravation of pathological grief disorder brought about by the death of the infant itself into a psychological illness due to the organ retention knowledge constituted compensable damage.³⁸⁹

As a conclusion, it would seem then, that the common law imposes some sort of duty to inform close relatives who are entitled to possession of the deceased’s body for burial that organs have been removed in those situations where the law allows for a right to remove them. However such is the conflict of possessory rights that it does not follow that there will arise liability in damages in tort for a failure to do so.

In relation to the negligence claims, and the requirement that the plaintiffs must be demonstrably susceptible to psychiatric injury, it might be observed that the law has not

³⁸⁸ Exemplary damages were refused; [2005] 2 WLR 358, 419.

³⁸⁹ The position in Australia would appear to conform with this, e.g. *Wrongs Act 1958 (Vic)* s.74(1)(b) provides ‘A person is not entitled to recover damages...for consequential mental harm unless...the defendant knew, or ought to have known, that the plaintiff is a person of less than normal fortitude and foresaw or ought to have foreseen that the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness’. The position appears to be the same under legislation existing in the other states and territories; (s.34 *Civil Law (Wrongs) Act (ACT)*; s.32 *Civil Liability Act 2002 (NSW)*; s.33 *Civil Liability Act 1936 (SA)*; s.34 *Civil Liability Act 2002 (Tas)*; s.5S *Civil Liability Amendment Act 2003 (WA)*). However these provisions relate to the issue as to whether a duty of care arises. The position seems to be that provided psychiatric injury ought to be a foreseeable consequence of the defendant’s negligence, a duty of care may arise, in which case the vulnerability of this particular plaintiff to that consequence will not matter. Neither will any unforeseeable severity of harm under the rule in *Smith v Leech, Brain*. [1962] 2 QB 405. If the plaintiff is unforeseeable in this sense, the claim should fail, either for want of duty, or for remoteness. See, for example, *Tame v N.S.W.* (2002) 211 CLR 317.

imposed such strict requirements on mothers or fathers witnessing or apprehending the aftermath of the death of their children.³⁹⁰

For the model of rules, ultimately the organ litigation case law may best be separated into the two types of claim, the claim in negligence, and the claim in trespass. For the former, although this of course, unlike wrongful life, is not a new category of damage, similar issues concerning the ways one conceives of causation provide avenues for inconsistent outcomes which again militate against the rule model.

In terms of outcome the claim is open-ended. In the one case there clearly exists on the previous case law a category of duty; medical practitioner to patient, yet in relation to the category of damage, the remoteness concept intrudes. In the second case the relationship between plaintiff and defendant falls, on the facts, outside that category, and the duty relationship itself is also in question. None of this is supportive of a view that rules are determinative of outcome, so much as more flexible principles.

The trespass claim stands differently. It remains the case that in order to succeed the plaintiff must show a stronger possessory interest in the goods than the defendant has, and, (subject to the exceptions noticed) if the equities are equal the plaintiff will fail. This, despite the cogent moral objections advanced and considered in support of a different outcome. Whilst it is arguable, then, that the survey of trespass indicates that it is possible to present an area of tort law in terms of the positivist position on rules, I do not think that it is alone sufficient to support the position that a broad perspective supports the proposition that a rule model is characteristic. I shall attempt to explain the unusual position of trespass in the final chapter.

³⁹⁰ See, for example, *Hambrook v Stokes Bros* [1925] 1 KB 141; *Boardman v Sanderson* [1964] 1 WLR 1317; *inz v Berry*; [1970] 1 All ER 1074; *Benson v Lee* [1972] VR 879.

Chapter Eight

Conclusions

I have generally concluded in respect of the various fields of case law in tort that I have pursued herein that the theoretical model of law as rule does not provide a convincing explanation of the developments of law presented. I have preferred a view of case law as a moving picture, where categories of liability or harm are created, and the picture changes as further case are decided and the factual variables are added to or subtracted from in the process of inductive reasoning. Indeed, within the categories I have little place for rules.

It may be said that wrongful life, replete though the judgments specifically are, with moral considerations, is yet a new category, and rule-statements may yet emerge as subsequent case-law presents itself. Illegality is clearly in the nature of extended principle. Both categories are small. Both might be exceptional.

Then one comes to the category of psychological injury. In this category of case-law the English courts have most recently restored the law to an earlier and more restricted position, I have said motivated by policy. In Australia the category contains now, at best, principle awaiting further judicial consideration. Similarly it can be said of the category of economic loss, with the English courts motivated by policy to withdraw the law behind lines guarded from indeterminacy, and the Australian position undecided between two categories.

My view is that there never was a rule in *Rylands v Fletcher*. The principle was born of a policy concern over the harm which could, and often was, inflicted by the emerging industrial

interests of the time. The elements of the tort were treated so malleably by the courts as to be virtually superficial. Only when the modern negligence action begins seriously to vie with *Rylands v Fletcher* liability, do we see those elements to take on real significance.

Overall then, in respect of the categories of tort law herein considered, trespass appears to stand alone as actually supportive of the positivist version of law as a system of rules, and one would have to conclude that, at least on the evidence of the fields considered, that this is not sufficient to endorse the positivist position. However it seems fair to attempt an explanation.

I have considered herein only one type of trespass and one may observe more generally the rather voracious tendency of modern negligence to usurp the territory of the older torts.³⁹¹ So on one view the growth of trespass has been stunted, when the general movement of tort law is preponderantly in terms of the expansion of modern negligence. Even then, one may observe, this is not without some temptation for the merger of the smaller judicial creature into a province of the larger. For example in *Hackshaw v Shaw*³⁹² on the facts, it is arguable that the defendant firing off his shotgun in the direction of the departing vehicle, and injuring the person who happened to be present in the passenger seat, provides an argument for an action in negligence.³⁹³ But quite possibly the origins of trespass in a punitive action has its vestiges in an unarticulated modern policy of deterrence, which vindicates itself in the persistence of trespass as the remedial course where the infliction of the plaintiff's injury is intentional rather than careless.³⁹⁴ The earliest terms of the writ of trespass as *vi et armis et*

³⁹¹ See, for example, MA Millner, *Negligence in Modern Law* (1967) 180-213.

³⁹² (1984) 155 CLR 614.

³⁹³ Elsewhere we find a flirtation with the idea of a negligent trespass; *Fowler v Lanning* [1959] 1 QB 426.

³⁹⁴ One may note, in modern times, legislation which has abolished exemplary or punitive damages in negligence actions, nonetheless retains them in an action in trespass. See, for example, ss 5 (1) (2) *Civil Liability Act 2003 (Qld)*; s 21 *Civil Liability Act 2002 (NSW)*.

contra pacem indicate the original state interest; the incidence of armed force which is threatening to the peace of the realm.³⁹⁵ By the 19th century ‘inevitable accident’ has emerged as a defence to a trespass action, emphasising the element of ‘wilfulness’ in addition to the ‘directness’.³⁹⁶ Without wilfulness, there must be, then, fault, and we may observe that another set of situations falls to be subsumed into the more general context of negligence law.³⁹⁷ In *Letang v Cooper*, where the plaintiff found herself time-barred from bringing her action for injuries sustained by the driving of the defendant’s motor car, she sought in the alternative to found her action in trespass. The court declined to allow this.³⁹⁸ Lord Denning MR said:³⁹⁹

The truth is that the distinction between trespass and case is obsolete. We have a different subdivision altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or *case* (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally... If he does not inflict the injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care.

Some support for this hypothesis may be found in a brief reconsideration of the case-law of psychological injury.⁴⁰⁰ Could the facts of *Coultas v Victorian Railway*⁴⁰¹ be articulated as a case of trespass? If ‘fault’ is substituted for ‘intent’, then the answer is yes, and there are

³⁹⁵ C H S Fifoot, *History and Sources of the Common Law* (1949).

³⁹⁶ *Stanley v Powell* [1891] 1 QB 86.

³⁹⁷ In Roman law, where the delictual action was essentially punitive, either culpa (negligence) or dolus (wrongful intent) was understood to provide the necessary ‘fault’. See B Nicholas, *An Introduction to Roman Law* (1962) 218. In *Reynolds v Clark* (1725) 1 Stra. 634, 636 it was said, if a log was thrown into the highway and hit someone, it was trespass; if someone later fell over it, that would be case. Today both would be negligence. The distinction that intent would ground the first situation in trespass, since the tort is actionable *per se*, is surely otiose, since the trespass would be complete only upon the log’s striking someone, which then would give rise to damage for the purposes of negligence. It might be, however, countered that, should the plaintiff see the log coming and manage to avoid it, whilst this would not be actionable in negligence, liability would follow in assault.

³⁹⁸ [1964] 2 All ER 929.

³⁹⁹ [1964] 2 All ER 929, 932.

⁴⁰⁰ *Supra* pp.36-61.

⁴⁰¹ (1888) 13 App Cas 222.

indications in the early law which vindicate that position since fear of personal injury from the speeding train on the plaintiff's part, is surely reasonable and foreseeable.⁴⁰² But by the time of that decision my intuition is that the court would be seeking the more modern distinction of fault which is capable conceptually of converting an action on the same set of facts to one of negligence.⁴⁰³ By the time of *Dulieu v White & Sons*,⁴⁰⁴ negligence law has taken this situation into its own ambit.

Again, can the facts of the typical shock-related injury case be articulated in terms of a trespass in that the plaintiff's mind has been afflicted with an apprehension of fear of violent harm to another? At the present point of time this would appear overly, and unnecessarily, imaginative. But again if one substitutes the modern requirement of intention with the earlier emphasis of the trespass action on directness, such a conception is possible.⁴⁰⁵ By the time of *Hambrook v Stokes Bros*,⁴⁰⁶ a different, and preferable, course was open. *Bourhill v Young*,⁴⁰⁷ although ultimately resulting in a denial of liability on the facts, brings the shock-related injury case fairly within the scope of the developing negligence in that category of harm.

What I have traversed above, *prima facie*, seems to offer an explanation, and a considerable modification of the significance, of the apparently exceptional resilience to matters of

⁴⁰² Supra p.37

⁴⁰³ Possibly counsel thought so too, since it was not argued, and rather the plaintiff relied on analogous decisions founded on contract. Could *Wilkinson v Downton* [1897] 2 QB 57 be argued as a negligence action today? The defendant had caused the plaintiff injury by falsely telling her that her husband had been badly injured in an accident.

⁴⁰⁴ [1901] 2 KB 669.

⁴⁰⁵ In *Scott v Shepherd* (1773) 2 Wm. Bl. 892, where the defendant threw a lighted squib into the market place, there was no argument as to intent, but rather as to 'directness'. The case has become a principal reference in negligence law for the *novus actus interveniens*. The foreseeable event does not sever the defendant's liability for the ultimate harm, but this is now negligence. Perhaps coincidentally 'directness' found its way into negligence law elsewhere in terms of remoteness, in *Re Polemis* [1921] 3 KB 560, later abandoned in *Wagon Mound* [1961] AC 388.

⁴⁰⁶ [1925] 1 KB 141. We may note that the case precedes *Donoghue v Stevenson*. It was an action brought by the widow on Mrs Hambrook's death for loss of consortium. However, the outcome turned on a duty to Mrs Hambrook and foresight; negligence notions.

⁴⁰⁷ [1943] AC 92.

principle and policy,⁴⁰⁸ ostensibly provided by the trespass tort alone, in terms of the elucidation of that form of the tort surveyed in detail here.⁴⁰⁹ Conversely policy may provide an unarticulated reason for turning to trespass, in modern law, to provide exceptionally a merited response for harm which is, as yet beyond the reach of negligence.⁴¹⁰

The general picture of tort law, then, that has emerged from this study is one of movement in terms of the creation of legal categories, and development of the common law within them, over the course of time, with policy providing the conscious drive of the law, and principle supplying its internal process of drift. With respect to the latter, the articulation of the law in cases is eminently suited. For within the judgment statements, elements or variables if you like, can be emphasised or not emphasised subsequently, explained or muted to a point of insignificance, so that a different position is reached at some point, without the appearance of dramatic or even conscious change.⁴¹¹

This brings us to a general conclusion in terms of the jurisprudence of tort law. As I have proceeded with analysis of common law in this study, I have found myself less and less convinced by the positivist theory that rests so heavily on the dominant concept of the legal rule, and of the legal rule as determinant of the legal decision. Other influences, to my thinking, have appeared more influential, and more importantly with respect to the latter, the

⁴⁰⁸ One can conjecture that the older policy concern with punishment retains some validity in the modern circumstance, since a court may feel more at liberty to award exemplary or aggravated damages, where the defendant's conduct is intentional (although strictly the aggravated award goes to the condition of the plaintiff rather than the conduct of the defendant). See, for example, the recent case of *Carter v Walker* [2010] VSCA 340.

⁴⁰⁹ One may note that it has also been a candidate for legislative rather than judicial attention in modern times. See, for example, the *Torts (Interference with Goods) Act 1977 (UK)*.

⁴¹⁰ Perhaps, for example, the destruction of the plaintiff's animal companion, resulting in mental harm. Cf *Davies v Bennison* (1927) Tas LR 52.

⁴¹¹ Although not specifically included herein, it is suggested confidently that the same could be said of the law of private nuisance. The preserve of nuisance lies, for the main part, in that it offers protection for forms of damage in the nature of annoyance, too subtle to qualify as actionable damage in negligence. Modern authority has it that, although in principle the actions often overlap, a view is expressed that the appropriate action for a claim for personal injury is negligence in *Hunter v Canary Wharf Ltd.* [1997] 2 All ER 426.

contribution of subsequent cases, once the legal category has been established, in the developing the story, cannot realistically be so underestimated.

The overall impression which emerges from this juristic analysis of several areas of tort law is one of case law as a moving picture. Once the legal category is established, the development of the law proceeds by way of inductive reasoning. However the inductive reasoning is of an imperfect nature, since at some point the variables in the formulation of the legal proposition are liable to adjustment in a subsequent legal decision. This flexible quality in the nature of the legal propositions of tort law, I have concluded, is better represented in terms of legal principle than legal rule. In addition I have concluded that the broader drive, or direction of the case law, at certain points of time, is best understood as a response to policy, whether articulated as such or not.

To the idea of case law as a moving picture, I have added a dimension of prediction.⁴¹² To know what the law is, we must sometimes predict, and, in doing so, often it is necessary to include considerations of social morality which may influence a court's decision.

⁴¹² In a collection of his lectures Llewellyn famously wrote 'What these officials do about disputes, is to my mind, the law itself': K N Llewellyn, *The Bramble Bush* (1930) 12. He never developed the idea, but rather, after much undue criticism, repudiated the statement as 'unhappy words when not fully developed and they are plainly at best a very partial statement of the truth': *The Bramble Bush* 2nd ed (1951) 9. He later explained that his critics were simply mistaken in interpreting the statement as in any way fundamental to his own juristic perspective on case law: K N Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 511. Elsewhere one does find reference to the importance of prediction, but this is in relation to the outcome of a case, and usually in the context of the role of the legal adviser. See, for example, R Sartorius, 'Hart's Concept of Law' in R S Summers ed *More Essays in Legal Philosophy* (1971) 154-156. Laws, and outcomes, are conceptually distinct, although related, concepts. For example the outcome of a case may actually be determined by a matter of evidence, or by the subsidiary issue of the onus of proof.

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