

HOW COMMON IS THE COMMON LAW AND OTHER MISCELLANY?

KEYNOTE ADDRESS – NEW SOUTH WALES BAR ASSOCIATION COMMON LAW CONFERENCE

THE HONOURABLE JUSTICE RUTH MCCOLL AO
COURT OF APPEAL
SUPREME COURT OF NEW SOUTH WALES
HILTON HOTEL
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- 1 I acknowledge the Gadigal people of the Eora nation and pay my respects to their elders, past and present for they hold the memories, the traditions, the culture and hopes of Indigenous Australia.

Themes

- 2 I want to address a number of issues this morning.
- 3 First, how the common law on fundamental issues has taken different paths in Australia and the United Kingdom – why is it so? How is it that two polities at essentially the same stages of social and economic development and with the same jurisprudential parentage have diverged quite radically?
- 4 As part of this discussion I want to address the issue of how to identify whether a duty of care is owed in novel cases, a topic not touched in large part by the *Civil Liability Act 2002* (NSW).
- 5 Secondly, I want to touch on some issues concerning textual differences between the civil liability legislation enacted around the country and the potential for divergence between the states and territories of Australia on common law principles at least insofar as the law of tort is concerned.

¹ I acknowledge the invaluable assistance of Henry Cornwell, my 2015 legal researcher, Harjeevan Narulla, the 2015 Researcher to the Court of Appeal and Greta Ulbrick, my 2016 legal researcher, in the preparation of this address.

6 Finally, under the “miscellaneous heading”, I will address a couple of practical matters about trial work and appearing in the Court of Appeal.

Disclaimer

7 A couple of months ago Jack Kennedy, a contributor to the UKSC Blog, wrote²:

“Extra judicial speeches by sitting members of the bench can be something of a hit-or-miss affair. Those in the legal community hoping for a moment of revelation (or, more accurately, weakness) where the judge indicates their position on an area of law, are routinely disappointed. The judge is all too aware of the need to remain tight-lipped lest someone read too much into his or her pronouncements. Immediately, the difficulty for the judge in question is clear – how do you reveal as little as possible about one’s own views to an audience that often wants exactly that, and at the same time remain engaging?”

8 I hope I can be engaging. Conscious that your CPD strands include “substantive law” and “practice and procedure”, I hope that you will find some practical utility in what I say in at least some of those areas. Nevertheless, you should not read into any of my remarks that I am expressing a position on an area of law.

Australia’s common law

9 But first, a bit of history.

10 The common law of course is a body of law created and defined by the courts.³

11 English law was the foundation of the Australian legal system.⁴ The operation of constitutional principles, which began to evolve in the earliest years of Britain’s colonial expansion, provided for the transfer of English law to each of

² “Lord Neuberger: Reflections on the ICLR top 15 cases and the Singapore Academy of Law Annual Lecture 2015” UK Supreme Court Blog, 17 November 2015: <http://ukscblog.com/lord-neuberger-reflections-on-the-iclr-top-15-cases-and-the-singapore-academy-of-law-annual-lecture-2015>. (accessed 18 November 2015).

³ *Lipohar v R* [1999] HCA 65; 200 CLR 485 (at [44]) per Gaudron, Gummow and Hayne JJ (*Lipohar*).

⁴ Alex C Castles, “The Reception and Status of English Law in Australia” [1963] *AdelLawRw*1; (1963) 2(1) *Adelaide Law Review* 1, 1 (Castles).

the Australian States and ensured that the heritage of English law would be shared in Britain's Australian possessions.⁵ Indeed, “a strong sense of unity was maintained between the unenacted law of England and Australia”.⁶ This was, in part, attributable to “a general disinclination on the part of Australian courts to take into account special local conditions in deciding whether the general principles of unenacted law should apply”.⁷ Uniformity was also promoted by the fact that the tribunal of ultimate resort for each of the Australian colonies was the Privy Council.⁸ Finally, the Australian judiciary placed great weight on the authority of decisions handed down by the higher English courts.⁹

- 12 As the plurality explained in *Lipohar*, while “[a]t the time of federation the English common law was treated as a single body of law, ... local conditions might render a particular part of it ‘inapplicable’”.¹⁰
- 13 For most of the 20th century while appeals still lay to the Privy Council, both from the High Court and direct from State Supreme Courts, decisions of the House of Lords, as well as the Privy Council, were regarded as authoritative in all Australian courts. It has only been since 1986 when appeals to the Privy Council were finally abolished that the High Court has been, for all purposes, at the apex of the Australian judicial system.¹¹
- 14 As Gleeson CJ explained in an address in 2007, as long as appeals to the Privy Council continued, the capacity of the common law in Australia to differ from the common law as declared in the United Kingdom was very limited. Maintaining the uniformity of the common law was one of the principal functions of the Privy Council, and that uniformity was generally regarded in Australia, throughout most of the 20th century, as a strength. There came a time, in the 1970s, however, when the Privy Council accepted that the

⁵ *Ibid.*, 1.

⁶ *Ibid.*, 9.

⁷ *Ibid.*, 9.

⁸ *Ibid.*, 10; see also *Lipohar* (at [253]) per Callinan J.

⁹ *Ibid.*

¹⁰ *Lipohar* (at [55]).

¹¹ Gleeson CJ, “Australia’s contribution to the common law”, Singapore Academy of Law, 20 September 2007 (Singapore Address), 4.

common law of Australia need not be the same as that of England. In practice, however, as long as Australian appeals could end up in London, there was little opportunity for the common law of Australia to strike out on a course of its own.¹²

15 However, the limited avenue for departure from the British common law Australian courts enjoyed was recognised before appeals to the Privy Council ceased in 1986. Thus, Lord Diplock, speaking for the Judicial Committee of the Privy Council in *Geelong Harbor Trust Commissioners v Gibbs Bright & Co*,¹³ drew attention to the fact that the way in which the law, as enunciated by a particular judicial decision, works in practice is an important factor to be weighed against the more theoretical interests of legal science. His Lordship said that “[t]he High Court, sitting regularly in the capitals of the various States which are also the main ports and commercial centres of Australia, is much better qualified than their Lordships are to assess the importance of this factor.”¹⁴

16 It is now accepted that, unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State.¹⁵ Thus, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.¹⁶

The Ipp Report

17 In what follows, I propose to examine two important areas of the law of tort, the law of nuisance and the principles concerning the identification of a duty of care in tort in novel situations, in which respect English and Australian authorities have diverged.

¹² Singapore Address, 4.

¹³ *Geelong Harbor Trust Commissioners v Gibbs Bright & Co* [1974] AC 810 (*Geelong*).

¹⁴ *Geelong* (at 819).

¹⁵ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 (at 112) per McHugh J.

¹⁶ *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 (at 563).

- 18 When considering the principles concerning identification of the duty of care, it is important to remember that the 2002 *Review of the Law of Negligence Report*¹⁷ left that issue at large. This is even though the authors of the Ipp Report approached their Terms of Reference on the basis that they were “formulated around the elements of the tort of negligence, namely duty of care, breach of duty (...standard of care), causation and remoteness of damage”.¹⁸
- 19 Insofar as duty of care in the tort of negligence was concerned, however, the Ipp Report recited “the basic principle ... that a person owes a duty of care to another if the person can reasonably be expected to have foreseen that if they did not take care, the other would suffer personal injury or death”.¹⁹ Otherwise the Ipp Report, and consequently, it would appear, the civil liability legislation based upon it, does not deal with the general principles for determining the existence of a duty of care.
- 20 Thus, as I am sure all of you are aware, although the title of Division 2 of Part 1A of the NSW CLA is “Duty of Care”, it in fact deals with the principles relating to the test for negligence or breach of duty and the standard of care.²⁰ There are parts of the CLA dealing with specific duties of care. For example, there is no proactive duty to warn of obvious risk,²¹ and there is no duty of care to another person who engages in a recreational activity to take care in respect of a risk of that activity if the risk was the subject of a risk warning to the plaintiff.²² Section 32 deals with the circumstances in which a person owes a duty of care to another person to take care not to cause the plaintiff mental harm – a subject to which I will return.

¹⁷ Commonwealth of Australia, *Review of the Law of Negligence Report*, Canberra, 2002, chaired by Justice Ipp (Ipp Report).

¹⁸ Ipp Report, at [7.2].

¹⁹ Ipp Report, at [7.4].

²⁰ *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48; (2009) 239 CLR 420 (at [13]) (*Adeels Palace*). In *Hoffmann v Boland* [2013] NSWCA 158 (at [2]), Basten JA observed that “the proposition [that s 5B, is concerned with breach of duty, rather than the existence, scope and content of the duty] is only partly true, for the reason that factors relevant to duty and breach, at least in their practical application, do not easily fit within watertight compartments.”

²¹ CLA, s 5H.

²² CLA, s 5M.

21 However, as I have said, the Ipp Report did not attempt to formulate any statutory test for determining when a duty of care will be held to exist, no doubt because, as the following discussion makes clear, formulating a common law test for identifying a duty of care applicable to all cases is still a work in progress in the High Court and is an area in which courts in the common law world have gone their separate ways.

The ICLR top 15 cases

22 The blogger to whom I earlier referred was writing by way of introduction to two recent speeches given by Lord Neuberger, the President of the UK Supreme Court. One was Lord Neuberger's address, "Reflections on the ICLR top 15 cases: A Talk to Commemorate the ICLR's 150th Anniversary" (ICLR Address) given at the 150th anniversary of the Incorporated Council of Law Reporting (the ICLR). The ICLR had invited its subscribers to nominate the fifteen most important cases to reach the English courts in the 150 years since its inception.

23 Among the nominated cases were two, *Rylands v Fletcher* (1866) LR 3 HL 330 and *Donoghue v Stevenson* [1932] AC 562, the importance of which I do not need to emphasise to this audience. Lord Neuberger described *Donoghue* and *Rylands* as landmark cases in tort.²³ Both established fundamental principles of common law in relation to nuisance and negligence respectively. Another of the cases nominated for Lord Neuberger's consideration was *Caparo Industries Plc v Dickman*,²⁴ the case in which the House of Lords formulated the threefold test concerning the imposition of a duty of care in novel cases.

24 What, if any, influence do these three "most important cases to reach the English courts" have on Australian jurisprudence?

²³ Lord Neuberger, "Reflections on the ICLR Top Fifteen Cases: A talk to commemorate the ICLR's 150th Anniversary", 6 October 2015, <https://www.supremecourt.uk/docs/speech-151006.pdf> (at [11]) (ICLR Address).

²⁴ *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (*Caparo*).

- 25 Notwithstanding the regard in which these three cases are held in the United Kingdom, the “rule in *Rylands v Fletcher*” is no longer the law in Australia, the High Court having spoken with respect to “the common law of Australia” in *Burnie Port Authority v General Jones Pty Ltd*.²⁵ Further, while of course *Donoghue v Stevenson* retains its place as enunciating the fundamental principle to identify when a duty of care is owed, “any duty of care the High Court identifies has to be “a duty ... expressed as part of the single and unified common law of Australia”.²⁶ That has led to departures from the course English law has taken to identify when a duty of care is owed. In particular, the *Caparo* test is not applied in this country.
- 26 Recognising that “local conditions” might render a particular part of the English common law “inapplicable”, what is it about the local conditions which may have lead to what has been a fundamental departure from the rule in *Rylands v Fletcher* and the High Court rejecting the test the English courts have developed to give content to the meaning of the “neighbour principle” Lord Atkins identified?

Donoghue v Stevenson and Caparo Industries Plc v Dickman

- 27 In *Donoghue v Stevenson* Lord Atkin formulated “an over-arching principle to decide when a defendant will be made liable for damage caused to another through failure to take reasonable care.”²⁷ His Lordship was “concerned with identifying a general unifying proposition which explained why a duty to take care to avoid injury to another had been recognised in past cases in the courts.”²⁸ It was the classic example of the “strict logic” needed for the judicial development of the common law.²⁹
- 28 In his 2007 address, Gleeson CJ described Lord Atkin’s formulation of principle “a triumph of common law jurisprudence”, but remarked that as

²⁵ *Lipohar* (at [47]) referring to *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520 (*Burnie*).

²⁶ *Stuart v Kirkland-Veenstra* [2009] HCA 15; (2009) 237 CLR 215 (at [102]) per Gummow, Hayne and Heydon JJ.

²⁷ Singapore Address, 15.

²⁸ *Burnie* (at 541) per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

²⁹ *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 (at 319) per Brennan J.

“Australia, like all other common law jurisdictions, has experienced the relentless progress of the tort of negligence...[the] full implications [of the case] are still being worked out.”³⁰

- 29 *Donoghue v Stevenson*, of course, formulated the circumstances in which a person owed a duty of care to avoid acts or omissions which could be reasonably foreseen to be likely to injure his or her neighbour.³¹ Lord Atkin, in his formulation of principle, was seeking to find "a valuable practical guide", and warned against "the danger of stating propositions of law in wider terms than is necessary".³²
- 30 In his ICLR address, Lord Neuberger remarked that the full importance of Lord Atkin's speech only became clear over thirty years later as a result of two further landmark decisions of the House of Lords: First, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*³³ when the duty of care described by Lord Atkin was extended to apply to negligent misstatements and, secondly, in 1970 in *Home Office v Dorset Yacht Co Ltd*,³⁴ in which "Lord Reid described *Donoghue* as 'a milestone', and said that 'Lord Atkin's speech should be regarded as a statement of principle [which] ought to apply unless there is some justification ... for its exclusion'".³⁵
- 31 In the United Kingdom, the scope of the duty of care Lord Atkin formulated was developed through the two stage approach identified in *Anns v Merton London Borough Council*³⁶ based on reasonably foreseeability, to an expanded three stage approach in *Caparo Industries Plc v Dickman*,³⁷ which continued to use proximity as a duty indicator.³⁸
- 32 Lord Neuberger said of these cases:

³⁰ Singapore Address, 15.

³¹ *Donoghue v Stevenson* [1932] AC 562 (at 580) per Lord Atkin.

³² *Ibid* (at 583-584); *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562 (at [47]).

³³ *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465.

³⁴ *Home Office v Dorset Yacht Co* [1970] AC 1004.

³⁵ ICLR Address (at [36]).

³⁶ *Anns v Merton London Borough Council* [1978] AC 728.

³⁷ *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

³⁸ *Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180 (at [77]) per McHugh J.

“37. As often happens, the pendulum then swung too far the other way. Having been too restrictive before *Donoghue*, the scope of duty of care not merely developed as I have just described, but became too expansive. This was principally as a result of the 1977 decision of the House of Lords in *Anns v Merton*, whose effect was to create a risk of ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’, to quote from the great US judge Cardozo J. Indeed, that quotation is to be found in the leading speech of Lord Bridge in the 1990 decision of *Caparo*, the next case to be considered, **which represents the current end-point of the chain of cases which started with *Donoghue*.**

38. The House of Lords in *Caparo* identified a three-part test which has to be satisfied if a negligence claim is to succeed, namely (a) damage must be reasonably foreseeable as a result of the defendant’s conduct, (b) the parties must be in a relationship of proximity or neighbourhood, and (c) it must be fair, just and reasonable to impose liability on the defendant. As a result, reversing the Court of Appeal, the House held that accountants did not owe a duty of care to the actual or potential shareholders when carrying out a statutory audit of a company’s accounts, as the purpose of the audit was to enable shareholders, as a class, to decide how to vote at general meetings”.³⁹ (Emphasis added)

33 *Caparo* was most recently referred to with approval in the United Kingdom by its Supreme Court on 10 February 2016 in *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6 (at [32], [107] and [114]). It has not had such a happy reception in this country.

34 While *Donoghue v Stevenson* of course still holds sway in Australia, the working out process to which Gleeson CJ referred has taken this country down a different path to that followed by the English courts.

35 By 1994, the “‘general conception’ of a relationship of proximity” Lord Atkin identified in *Donoghue v Stevenson* as the “‘element common to the cases where [liability in negligence] is found to exist’ and as the basis of the duty of care which is common to all such cases [had] been stressed and developed in judgments in recent cases in the [High] Court”.⁴⁰ The “detailed definition of the objective standard of care [under the ordinary law of negligence] for the purposes of a particular category of case” was seen to depend upon “the

³⁹ ICLR Address (at [37] – [38]).

⁴⁰ *Burnie* (at 542).

relationship of proximity” which was “the touchstone and control of the relevant category” of negligence.⁴¹

36 However, as Gleeson CJ said in 2007, from about 1997, a number of decisions of the High Court “reflected a resistance to the assumption that all expansions of liability in negligence are legally progressive. One manifestation of that resistance [was] ... the High Court's unwillingness to adopt a single comprehensive test for determining whether there exists, between the parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence”.⁴²

37 In a series of decisions, the Court rejected both the two stage approach identified in *Anns* and the three-stage approach identified in *Caparo* to the determination of a duty of care. Rather in this field, the emphasis in Australia has been on incremental development of principle, although, as Gleeson CJ remarked, the expression "incremental development" carries the unfortunate implication that all change ought to be in the direction of expanding liability.⁴³

38 In *Sullivan v Moody*, the High Court rejected the notion of “proximity” as a determinant of whether a duty of care of the kind necessary for actionable negligence existed. The Court said:

“Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established.”⁴⁴

39 The Court recognised in that case, that “[d]evelopments in the law of negligence over the last 30 or more years reveal[ed] the difficulty of identifying

⁴¹ *Burnie* (at 550), referring to *Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376 (at 382).

⁴² Singapore Address, 15.

⁴³ Singapore Address (at 17 – 18); Gleeson CJ gave the following examples: *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254; *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562.

⁴⁴ *Sullivan v Moody* (at [48]); however see Nettle J's discussion in *King v Philcox* [2015] HCA 19; (2015) 89 ALJR 582 (at [80] – [81]) of the continuing relevance of the concept of proximity as “giving focus to the inquiry” as to whether a duty of care is owed in particular circumstances.

unifying principles that would allow ready solution of novel problems.”⁴⁵ Rather, “[d]ifferent classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care”.⁴⁶ Among the factors to be taken into account in determining whether a duty of care existed in such cases were:

- (1) the harm suffered by the plaintiff, as, for example, where its direct cause was the criminal conduct of some third party;
- (2) the fact that the defendant is the repository of a statutory power or discretion;⁴⁷
- (3) the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits; and
- (4) the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships.

The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.⁴⁸

40 In *Brodie v Singleton Shire Council*,⁴⁹ Hayne J somewhat despairingly observed:

“[316] It can readily be accepted that the search for a principled basis, or bases, upon which a duty of care will be found to exist is a search that continues. We have seen the rise and fall of notions of proximity, and of

⁴⁵ *Sullivan v Moody* (at [53]).

⁴⁶ *Sullivan v Moody* (at [50]).

⁴⁷ In *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999) 200 CLR 1 (at [5]) Gleeson CJ observed that “[a]cceptance that a statutory authority, in the discharge of its functions, owed a duty of care to a person, or class of persons, is only the first step in an evaluation of the authority’s conduct for the purpose of determining tortious liability” and that “[i]n some cases, the difficulty of formulating the practical content of a duty ... for the purpose of measuring the performance of an authority against such a duty, may be a reason for denying the duty”.

⁴⁸ *Sullivan v Moody* (at [50]).

⁴⁹ *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512 (at [316]) (*Brodie*); see more recently, *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* [2014] HCA 36; (2014) 254 CLR 185 (at [19] – [25]) per French CJ.

general reliance. We have seen reference to vulnerability, to encouragement, and to open-ended statements of conclusion like the three-part incantation said to derive from *Caparo Industries Plc v Dickman*. None has proved a satisfactory explanation of what it is that has moved the debate in a particular case to the conclusion that was reached. We have, at least for the moment, retreated to what is thought to be the safe haven of incremental development, perhaps hoping that, in time, a unifying principle or principles will emerge.”

41 Allsop P has concluded that the effect of the High Court authorities to which I have referred was that “[i]f ... the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the ‘salient features’ or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.”⁵⁰

The fate of the rule in *Rylands v Fletcher*

42 *Rylands v Fletcher* “decided that, where a person keeps something on his land which is likely to do damage if it escapes, he is liable for any damage which is the natural consequence of its escape”.⁵¹ It was treated as creating a new eponymous tort, thereafter known as the “rule in *Rylands v Fletcher*.” It was, as Lord Hoffmann has said, “an innovation in being the first clear imposition of liability for damage caused by an escape which was not alleged to be either intended or reasonably foreseeable.”⁵² Significantly, the main principle *Rylands v Fletcher* established was that negligence is not an element in the tort of nuisance.⁵³

43 In his ICLR address, Lord Neuberger expressed the view that “particularly over the past thirty years, the significance of *Rylands v Fletcher* has been fading.”⁵⁴ It had been described as a “heresy” in Scotland and as having never been part of that country’s law, rejected as a separate category of tort in

⁵⁰ *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; (2009) 75 NSWLR 649 (at [102]) (Simpson J agreeing); see also *Perre v Apand* (at [93]) per McHugh J; (at [333]) per Hayne J.

⁵¹ ICLR Address (at [19]).

⁵² *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1 (at [27]) (*Transco*) per Lord Hoffmann.

⁵³ *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1993] UKHL 12; [1994] 2 AC 264 (*Cambridge Water*) (at 298) per Lord Goff of Chieveley referring with approval to that statement in Professor Newark, “The Boundaries of Nuisance” (1949) 65 LQR 480 (at 487 – 488).

⁵⁴ ICLR Address (at [21]).

Australia, while the effect of *Cambridge Water* and *Transco*, to which I will refer, “appears to be that *Rylands* did not give rise to a new tort or a claim in negligence, but was simply an extension of the law of nuisance in cases of isolated escape”.⁵⁵

44 In 1993, in *Cambridge Water Co Ltd v Eastern Counties Leather Plc*, the House of Lords maintained strict liability for damage in the event of escape of harmful things from the defendant's premises where damage of the relevant type was foreseeable if the thing should escape. Lord Goff of Chieveley considered whether foreseeability of damage should be regarded as a prerequisite for recovery of damages under the rule in *Rylands v Fletcher*.⁵⁶ His Lordship accepted that, reasoning by analogy with such cases as *The Wagon Mound (No 2)*,⁵⁷ in which the Privy Council held that the recovery of damages in private nuisance depended on foreseeability by the defendant of the relevant type of damage, it was logical to extend the same requirement to liability under the rule in *Rylands v Fletcher*.⁵⁸ It “would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established [was] not limited to escapes which are in fact isolated”.⁵⁹

45 In *Burnie Port Authority v General Jones Pty Ltd*,⁶⁰ a majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that much of the rule in *Rylands v Fletcher* should be treated as subsumed in the ordinary law of negligence. In their Honours’ view, the rule was “all but obliterated by subsequent judicial explanations and qualifications” which had “introduced

⁵⁵ *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* (1985) SLT 214 (at 217).

⁵⁶ *Cambridge Water* (at 301ff).

⁵⁷ *The Wagon Mound (No 2)* [1967] 1 AC 617.

⁵⁸ *Cambridge Water* (at 304, 306).

⁵⁹ *Cambridge Water* (at 306).

⁶⁰ *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520; in *Burnie*, the majority accepted “that there may remain cases in which it is preferable to see a defendant’s liability in a *Rylands v Fletcher* situation as lying in nuisance (or even trespass) and not in negligence”, referring, inter alia, to *Cambridge Water*. In *Gales Holdings Pty Limited v Tweed Shire Council* [2013] NSWCA 382; (2013) 85 NSWLR 514 (at [278]) Leeming JA (Sackville AJA agreeing) observed that “there are difficulties sustaining the reasoning [in *Burnie*] today to the extent it is based on proximity”.

and exacerbated uncertainties about its content and application.”⁶¹ Thus the majority was of the view that the rule had been weakened from within by subsequent judicial decisions, and, too, weakened “[f]rom without, [as] ordinary negligence ... progressively assumed dominion in the general territory of tortious liability for unintended physical damage, including the area in which the rule in *Rylands v Fletcher* once held sway.”⁶² Indeed, in the majority’s view, the rule had “been increasingly qualified and adjusted to reflect basic aspects of the law of ordinary negligence” as, too, in Australia, had principles concerning the “damages recoverable under the rule”.⁶³

46 The majority held:

“The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in *Rylands v Fletcher* operates. Any case in which an owner or occupier brings onto premises or collects or keeps a ‘dangerous substance’ in the course of a ‘non-natural use’ of the land will inevitably fall within a category of case in which a relationship of proximity under ordinary negligence principles will exist between owner or occupier and someone whose person or property is at risk of physical injury or damage in the event of the ‘escape’ of the substance. Indeed, so much was made clear in *Donoghue v Stevenson*.”⁶⁴

47 Without the “common element of a relationship of proximity”, in the majority’s view, “the tort of negligence would be reduced to a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity or consistency.”⁶⁵

48 The “practical utility” of the requirement of proximity was seen to lie “essentially in understanding and identifying the *categories* of case in which a duty of care arises under the common law of negligence rather than as a test

⁶¹ *Burnie* (at 536, 537).

⁶² *Burnie* (at 540 – 541).

⁶³ *Burnie* (at 545); see also (at 547).

⁶⁴ *Burnie* (at 547).

⁶⁵ *Burnie* (at 543).

for determining whether the circumstances of a particular case bring it within such a category, either established or developing.”⁶⁶ (Emphasis in original)

49 The majority in *Burnie* concluded:

“Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in *Rylands v Fletcher* gives rise to a non-delegable duty of care and that the dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent, subject to one qualification, that the stage has been reached where it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the rule in *Rylands v Fletcher*.”⁶⁷

50 The majority referred briefly to *Cambridge Water*, which was decided while the judgment in *Burnie* was reserved. Their Honours appear to have considered it a case in which it “may remain ... preferable to see a defendant’s liability in a *Rylands v Fletcher* situation as lying in nuisance (or even trespass) and not in negligence.”⁶⁸ McHugh J, who dissented, nevertheless expressed the view that the decision in *Cambridge Water* that as “liability under *Rylands v Fletcher* is limited to damage which is reasonably foreseeable”, the “remoteness rule applied to nuisance actions and that, because a *Rylands v Fletcher* action was an extension of the action for nuisance, it was logical to apply the same remoteness rule to it”, was “inconsistent with the rationale of the rule in *Rylands v Fletcher*.”⁶⁹

51 In 2003, in *Transco Plc v Stockport Metropolitan Borough Council*,⁷⁰ the House of Lords was “called upon to review the scope and application, in modern conditions, of the rule” in *Rylands v Fletcher*,⁷¹ or as Lord Hoffmann

⁶⁶ *Ibid.*

⁶⁷ *Burnie* (at 555).

⁶⁸ *Burnie* (at 556). The majority did accept (at 556) “that there may remain cases in which it is preferable to see a defendant’s liability in a *Rylands v Fletcher* situation as lying in nuisance (or even trespass) and not in negligence”, referring, inter alia, to *Cambridge Water*.

⁶⁹ *Burnie* (at 591).

⁷⁰ *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1.

⁷¹ *Transco* (at [1]).

put it, “to kill off the rule in England in similar fashion” to *Burnie*.⁷² The House declined to follow that path.

52 Lord Bingham of Cornhill described the majority decision in *Burnie* as a “[bold] course” and “trailblazing”.⁷³ His Lordship recognised that the majority’s rationale “commanded respect” and had a “theoretical attraction”.⁷⁴ However, his Lordship was moved by more practical considerations not to follow the *Burnie* approach. Some of those considerations were influenced by peculiarly English considerations. For example, his Lordship was concerned that “common law rules do not exist in a vacuum, least of all rules which have stood for over a century” and that “there has been detailed statutory regulation of matters to which they might potentially relate” so that adopting the *Burnie* approach “might ... falsify the assumption on which Parliament has legislated, by significantly modifying rights which Parliament may have assumed would continue to exist”.⁷⁵ Secondly, the House of Lords had resisted a similar invitation in *Cambridge Water*, instead “look[ing] forward to a more principled and better controlled application of the existing rule”. Lord Bingham was concerned that “‘stop-go’ is in general as bad an approach to legal development as to economic management”.⁷⁶

53 Lord Hoffmann thought abolishing the rule would be “too radical a step to take” in relation to a rule which had been “part of English law for nearly 150 years”.⁷⁷ While Lord Walker of Gestingthorpe regarded the majority judgment in *Burnie* as “[as] a tour de force”,⁷⁸ it did not, in his opinion, “make out the case for writing off *Rylands v Fletcher* as a dead letter.”⁷⁹ In his Lordship’s view, “the principle in *Rylands v Fletcher* [was] the area of nuisance least open to ... assimilation [of the principles of nuisance and negligence]”.⁸⁰

⁷² *Transco* (at [40]).

⁷³ *Transco* (at [4]).

⁷⁴ *Transco* (at [5]).

⁷⁵ *Transco* (at [6]).

⁷⁶ *Ibid.*

⁷⁷ *Transco* (at [43]).

⁷⁸ *Transco* (at [98]).

⁷⁹ *Transco* (at [99]).

⁸⁰ *Transco* (at [109]).

54 I conclude this section of my address by reminding you of Brennan J's statement in *Dietrich v R* that "[t]he common law has been created by the Courts and the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society".⁸¹

55 You might not think that the "contemporary values" of Australia and the United Kingdom differed greatly, yet as the foregoing discussion reveals, their courts have followed very different paths on the same issues.

56 In 1943, Sir Owen Dixon, speaking to the section of the American Bar Association for International and Comparative Law, said:

"[The general common law] is one system which should receive a uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs."⁸²

57 As can be seen from the foregoing discussion, this is one of the few statements Sir Owen made which has not been followed by the High Court!

The civil liability legislation

58 There is, as I can see from the topics addressed by previous keynote speakers at this conference, no address which is complete without a discussion of the civil liability legislation. Consistent I hope with the subject of my address, my "angle" addresses the fallout from the fact that the desire for uniformity and consistency across the federation in the enactment of civil liability legislation was not realised.

The common law and the Civil Liability Act 2002 (NSW)

59 It must be accepted that "[s]ignificant elements of what now is regarded as 'common law' had their origin in statute or as glosses on statute or as responses to statute".⁸³

⁸¹ *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 (at 319).

⁸² Sir Owen Dixon, "Address to the section of the American Bar Association for International and Comparative Law", 17 *Australian Law Journal* 138 (at 139); see also *Jesting Pilate* (Law Book Company Limited, 1965) 198 (at 199).

60 In considering the development of the common law of Australia, it is necessary to consider whether there is a “consistent pattern of legislative policy to which the common law in Australia can adapt itself”.⁸⁴

61 With the introduction of various versions of the civil liability legislation in Australia, one academic has mooted that “tort law ... can no longer be regarded as largely a common law field [but] must now well and truly grapple with theoretical and practical issues of statutory scope and interpretation that have arisen in many other fields of law”.⁸⁵

Textual differences between Civil Liability Acts and analogous legislation

62 The Ipp Report recommended that its proposed legislation be incorporated ‘in a single statute . . . to be enacted in each jurisdiction’.⁸⁶ This recommendation was based on the Panel’s support for “the desirability of enacting measures to bring the law in all the Australian jurisdictions as far as possible into conformity”.⁸⁷ However, the desire for uniformity and consistency was not achieved. I will not attempt to descend to the particular differences between the Acts. There are plenty of resources where you can find that information, not least in the practice books concerning the civil liability act regimes.⁸⁸

63 Even in relation to something as important as breach, the various civil liability acts may differ. No state enacted the recommendations of the Ipp Panel in

⁸³ *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 (at [19]) per Gleeson CJ, Gaudron and Gummow JJ; for an erudite discussion of this proposition, see Mark Leeming, “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” [2013] UNSWLawJl 40; (2013) 36(3) *University of New South Wales Law Journal* 1002.

⁸⁴ *Imbree v McNeilly* [2008] HCA 40; (2008) 236 CLR 510 (at [64]) per Gummow, Hayne and Kiefel JJ (Gleeson CJ agreeing); see also Kirby J (at [129]).

⁸⁵ Barbara McDonald, “Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia”, [2005] *SydLawRw* 22; (2005) 27(3) *Sydney Law Review* 443.

⁸⁶ Ipp Report (at [2.1]).

⁸⁷ Ipp Report (at [1.9]).

⁸⁸ See also Des Butler, “A comparison of the adoption of the Ipp report recommendations and other personal injuries liability reforms” (2005) 13 *Torts Law Journal* 203.

their entirety. Various states change some of the recommended provisions, adopt others word for word or did not adopt others at all.⁸⁹

64 Thus, s 48(1) and (2) of the *Wrongs Act 1958* (Vic) repeat s 5B(1) and (2) of the New South Wales CLA dealing with the issue of breach of duty. However, s 48(3) then provides:

- (3) For the purposes of subsection (1)(b) —
- (a) **insignificant risks** include, but are not limited to, risks that are far fetched or fanciful; and
- (b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks. (Emphasis in original)

65 I have not seen any authority dealing with the interpretation of s 48(3).

66 There are also differences between, for example, New South Wales' provisions concerning recovery for pure mental harm arising from shock,⁹⁰ and those in s 53 of the South Australian *Civil Liability Act 1936* concerning "Damages for mental harm".

67 These differences were not appreciated by the Full Court of South Australia in *Philcox v King*,⁹¹ a matter remarked upon on appeal in the High Court.⁹²

68 In that case a passenger was fatally injured in a motor vehicle accident as a result of the negligence of the driver of the vehicle. He died while trapped in the motor vehicle. The passenger's brother heard of the accident, which caused his brother's death, a few hours later. He realised that he had driven past the location of the accident earlier that day while the vehicle in which his

⁸⁹ McDonald, *op cit*, (at 478). This is despite the fact that at the time the civil liability reforms recommended by the Ipp Report were enacted throughout Australia, "a number of factors point[ed] to the desirability of a nationwide response, involving the Commonwealth, the States and the Territories" such as the fact that by reason of Australia's unified common law "perceived defects in the common law ... are a shared concern of all States and Territories": Robert Debus, "Tort Law Reform in New South Wales: State and Federal Interactions" [2002] UNSWLawJl 47; (2002) 25(3) *University of New South Wales Law Journal* 825 (at 827).

⁹⁰ CLA, s 30.

⁹¹ *Philcox v King* [2014] SASFC 38; (2014) 119 SASR 71.

⁹² *King v Philcox* [2015] HCA 19; (2015) 89 ALJR 582 (at [25] – [26]) per French CJ, Kiefel and Gageler JJ; (at [37] – [46]) per Keane J.

brother was trapped and dying was still there. Subsequently, he developed a major depressive disorder. He sought to recover damages on the basis that he was “present at the scene of the accident when the accident occurred”.⁹³

69 The District Court found that while the defendant owed the plaintiff a duty of care, he could not recover damages as, *inter alia*, he did not satisfy the requirements of s 53. On appeal the Full Court of the Supreme Court of South Australia overturned the decision, and found that the respondent was present “when the accident occurred” within the meaning of s 53(1)(a). The High Court allowed the appeal, holding that the respondent was not “present” at the scene of the accident, nor was he present when the accident occurred.

70 The Full Court had reasoned to its conclusion by construing s 53 by reference to the reasoning adopted by the High Court in respect of s 30 of the NSW CLA considered in *Wicks v State Rail Authority of New South Wales*.⁹⁴ However, as the plurality in the High Court observed, “the text of s 53 ... [was] significantly different” from the analogous text of s 30 of the New South Wales CLA.⁹⁵

71 Under s 30 CLA (NSW), it was a necessary condition of the entitlement to recover damages for pure mental harm for any person other than a close member of the victim’s family that “the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril”. In the plurality’s view, “[t]here was, therefore, a degree of symmetry within the New South Wales statute that is missing from the South Australian Act, “such that the text of s 30(2)(a) required a different inquiry from that required by the text of s 53(1)(a) of the *Civil Liability Act (SA)*.”⁹⁶ Accordingly, “having regard to the textual differences and the enquiry which they require of a court in determining whether damages

⁹³ CLA (SA), s 53(1).

⁹⁴ *Wicks v State Rail Authority of New South Wales* [2010] HCA 22; (2010) 241 CLR 60 (*Wicks*).

⁹⁵ *King v Philcox* (at [25]).

⁹⁶ *King v Philcox* (at [25]).

are recoverable, the statement [in the Full Court’s decision] that ‘Section 30 is broadly comparable to s 53’ is apt to lead to error, as it did in this case.”⁹⁷

Miscellany

72 Finally, I turn to some miscellaneous matters. There are various whinges under this heading, most under the general heading of “proper assistance to the Court.”

You’ve got to focus on the statute

73 In the years after the CLA was enacted, which coincided with my first years on the Bench, numerous tort cases came before the Court in which the primary judge had not been taken to the Act or, if he or she had been, no useful assistance had been afforded by counsel as to the principles to be applied in its interpretation. Needless to say, there were many judicial exhortations reminding counsel (and primary judges) of their obligations in this respect.

74 If a higher authority than the Court of Appeal was required, one need only look to the High Court’s statement in *Adeels Palace Pty Ltd* that it is of the “first importance” to identify the proper starting point, which in a case of tort will usually be the *Civil Liability Act*, without which there is “serious risk that the inquiries about duty, breach and causation will miscarry”.⁹⁸

75 Sadly, those exhortations still appear to be like water off a duck’s back.

76 Just last year in *Uniting Church in Australia Property Trust (NSW) v Miller* [2015] NSWCA 320, speaking of a 2014 trial in the Supreme Court, Leeming JA (Basten and Simpson JJA agreeing) observed that:

“[100] Ms Miller’s pleading made no allegation based on the *Civil Liability Act*. At trial there was no opening, and Ms Miller’s closing submissions scarcely mentioned the Act. The primary judge, unsurprisingly, adopted a similar approach. When dealing with the plaintiff’s claims, his Honour said at [186]:

⁹⁷ *King v Philcox* (at [26]).

⁹⁸ *Adeels Palace* (at [11]).

‘In summary, the school was negligent and that negligence caused the Plaintiff’s injuries. I make it clear that in so concluding I have taken into account the stipulations in the *Civil Liability Act*, particularly s 5D.’”

You’ve got to assist the judge with the evidence

- 77 Among the Court of Appeal’s ten most cited 2015 cases is *Redbro Investments Pty Ltd v Ceva Logistics (Australia) Pty Ltd*,⁹⁹ which has been cited for Leeming JA’s proposition, by reference to copious authority, that a court is required in its reasons to “grapple” or “engage” with the cases presented by the parties and to address real conflicts in the evidence.
- 78 The “point of the metaphor of ‘grappling’ is that it is not sufficient to set out the conflicting evidence and conclude, without analysis, that the judge prefers one body to another.”¹⁰⁰ If the court cannot see that the judge analysed “evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, it is apparent that the process of fact finding miscarried.”¹⁰¹
- 79 Turning to one example, a judge is required to analyse expert evidence in the manner explained by Ipp JA in *Wiki v Atlantis Relocations (NSW) Pty Ltd*.¹⁰² In particular, “[w]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he [or she] prefers one case over the other.”¹⁰³
- 80 In many appeals, particularly those from the District Court, in cases where there are many expert reports, but none of the experts have been required for cross-examination, we see instances where it does not appear that counsel have afforded the trial judge any, or any useful, assistance in resolving the disputes between the experts. It is not sufficient for counsel simply to tender

⁹⁹ *Redbro Investments Pty Ltd v Ceva Logistics (Australia) Pty Ltd* [2015] NSWCA 73 (at [53]). As to other most cited cases, see Daniel Reynolds and Lyndon Goddard, “Leading Cases in Australian Law: A Guide to the 200 Most Frequently Cited Judgments” (The Federation Press, 2016).

¹⁰⁰ *Bradley v Matloob* [2015] NSWCA 239; (2015) 72 MVR 194 (at [17]).

¹⁰¹ *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 (at [66]) per McColl JA.

¹⁰² *Wiki v Atlantis Relocations (NSW) Pty Ltd* [2004] NSWCA 174; (2004) 60 NSWLR 127 (with whom Bryson JA and Stein AJA agreed) (*Wiki*).

¹⁰³ *Wiki* (at [62]).

bundles of reports and expect the trial judge to analyse them without counsel's assistance. Counsel are in the best position to know the extent of the dispute between the experts – a matter which may not become apparent to the trial judge until he or she tries to tackle the expert issues. Counsel should assist the judge to understand their respective cases as to why they contend their experts' evidence should be preferred.

The facts!

81 I do not need to dwell on this one, save to remind you that 90 per cent of cases are won on the facts. It is important to be across the facts in the Court of Appeal, in particular in drawing the Court's attention to particular aspects of the factual material you rely upon.

The Law!

82 A wise appellate judge once said that your judgments only last 15 years at best. Of course there are great judges of whom that cannot be said. And there are appellate judgments which do not concern any matter of enduring principle, but are only of real interest to the parties.

83 Speaking personally, I would like to think my and my colleagues' judgments last at least a few years. There has never been a time when judgments are more accessible than now. Significant judgments of the Court of Appeal are usually the subject of a judgment summary which is tweeted to all who follow the Court. They go up on the Court's Facebook page. But practitioners don't need social media to keep up to date with judgments. All you have to do is regularly scroll down the Court's webpage to identify the latest judgments. And yet we still have counsel appearing in our court who have not apparently taken the time to do so. We deserve better!
