*R. J. Bailey**

"TRESPASS, NEGLIGENCE AND VENNING v. CHIN"

The decision of the High Court of Australia marks the conclusion of the history of *Venning* v. *Chin*[1]. That decision does not reflect the true interest of the case, for, regrettably, the points of law discussed at length in the courts below were not argued before the High Court. The central issue in the case was the relationship between the torts of trespass to the person and negligence[2]. However, the pattern of its progress through the courts gives *Venning* v. *Chin* an interest of a wider nature. In the background lies the perennial problem of how best to compensate for personal injuries. The law of torts has in general denied recovery to an injured person who fails to prove negligence on the part of the defendant. This philosophy of "no liability without fault" has attracted particular criticism in the sphere of road accidents. How appropriate is it that, in an area where the risk of injury is so high and the consequences so serious for the individuals concerned, recovery of compensation should continue to depend on proof of fault? The difficulties of adducing satisfactory evidence of negligence in the ordinary type of collision case are well-known. The way in which *Venning* v. *Chin* was approached by the courts at three levels provides an interesting illustration of differing judicial attitudes to the ability of the common law to meet this problem.

Venning v. *Chin* is a classic example of a road accident case in which it was difficult for the plaintiff to prove negligence on the defendant's part. The decision of Hogarth J. at first instance[3] was an attempt to use the common law to reformulate the traditional law governing highway accidents by reviving the tort of trespass to the person and thereby providing a remedy of stricter liability. When the case reached the Full Court of the Supreme Court of South Australia[4], this attempted reformulation was emphatically rejected, the members of the Full Court adopting a position of strict orthodoxy. At the same time, the case was given an elaborate conceptual analysis. But in the High Court, *Venning* v. *Chin* lapsed into mundaneness and became simply another case on negligence and the evidence required to prove it. The controversial points of law were not raised, and only Gibbs J. made some remarks *obiter*. At the end of the day, the person who is injured but cannot prove fault gets no help from the common law. A system of no-fault compensation for injuries or death arising from motor accidents has been introduced by legislation in Victoria and Tasmania[5], but in other jurisdictions the problem remains

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1. (1975) 49 A.L.J.R. 378.
2. The literature on the relationship between the torts of trespass to the person and negligence in extensive. See, *inter alia:* Winfield & Goodhart, (1933) 49 *L.Q.R. 359;* Heffey & Glasbeck, (1966) 5 *U.M.L.R.* 158; Fridman, (1971) *9 Alberta L.R.* 250, Trinidade, (1971) 20 *F.C.L.Q.* 706.
3. (1974) 8 S.A.S.R. 397.
4. (1975) 10 S.A.S.R. 299.
5. Motor Accidents Act, 1973 (Vic.); Motor Accidents (Liabilities and Compensation Act, 1973 (Tas.). A scheme of no-fault compensation for road accident victims operates in Saskatchewan: its operation is explained by Green, "The Auto Accident Insurance Act of Saskatchewan", (1949) 31 *J. Comp. Leg. (3d)* 39. In the United States, a model scheme was proposed by Professors Keeton and O'Connell in *Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance*, (1965). For a survey of the Canadian and American no-fault schemes, see Hepple and Mathews, *Tort: Cases and Materials*, (1974). In France, something approaching strict liability in traffic accidents has been developed by the courts' twentieth century interpretations of the Code Civil, Art. 1384: see Tunc, 'La Sécurité Routière", (1965) 79 *Harvard L.R.* 1409.

unsolved. The fate of *Venning* v. *Chin* itself may illustrate the inability of the common law to provide a solution.

Venning v. *Chin* involved a highway accident, in which a woman pedestrian was knocked down and seriously injured by a motor car while she was crossing a road in Adelaide. The woman claimed damages for her injuries, and her husband claimed damages for loss of her services and society. These actions were consolidated. The woman plaintiff alleged that the driver of the car had been guilty of negligence; the driver denied this, and alleged that the plaintiff had been guilty of contributory negligence. The trial judge, Hogarth J., was unable, on the facts, "to find positively that the defendant was guilty of any negligence which caused or contributed to the occurrence of the accident". However, he was equally "unable to find positively that he was not guilty of such negligence"[6]. As a result, if the plaintiff's action was framed in negligence, she would fail. However, Hogarth J. suggested that the plaintiff might bring an action for trespass to the person; in such an action, once the injury was proved to have been caused directly by the act of the defendant, the onus was on him to prove that the act was neither intentional nor negligent—and this was true notwithstanding the fact that the accident occurred on the highway. Having held that on the pleadings as they stood the plaintiff was entitled to a claim for a trespass, Hogarth J. held that the defendant had failed to discharge the onus of disproving negligence, and that the plaintiff was therefore entitled to recover. He further held that although the plaintiff had succeeded in an action for trespass, the apportionment legislation (s.27a, Wrongs Act, 1936-72 (S.A.)) nevertheless applied, and that the plaintiff's damages were to be reduced on account of her contributory negligence. He held the plaintiff 60% to blame for the accident, and reduced the damages accordingly.

Both sides appealed from this decision. The injured woman and her husband contended that the apportionment legislation was inapplicable to an action for trespass, and that they should have been awarded the full amount of damages. Alternatively, they contended that the trial judge's findings of fact were wrong, that the driver should have been found guilty of negligence and the woman appellant absolved from contributory negligence. The driver contended, in cross-appeal, (a) that the action for trespass would not lie at all for injuries negligently caused, or at least not in cases of highway accidents; (b) that if the action was available, the onus of proof was on the appellants, in all cases or at least in cases of highway accidents; (c) that the claim in trespass was not open on the present pleadings, and that no amendment should have been allowed; (d) that if trespass did lie, the apportionment legislation applied; and (e) that the finding of contributory negligence on the part of the appellant was correct.

This appeal and cross-appeal came before the Full Court of the Supreme Court of South Australia (Bray C.J., Jacobs and Bright JJ.). The judgments[7] (most notably that of Bray C.J.) contain detailed and elaborate discussions of the issues of law involved. In the result, the Full Court held, unanimously, that the action for trespass to the person is still available for personal injuries caused by negligence, that the statement of claim in this case sufficiently pleaded a cause of action in trespass, but that (contrary to the view held by Hogarth J.) in an action for trespass in respect of an injury received on the

6. (1974) 8 S.A.S.R. 397, 400.
7. (1975) 10 S.A.S.R. 299.

highway, the burden (by way of exception to the general rule in trespass) is on the plaintiff to prove either intention or negligence on the part of the defendant. The Full Court further held (once again unanimously) that, on the facts, Hogarth J. should have found that negligence had been proved against both the pedestrian and the driver. All three members agreed that the statutory provisions for apportionment of liability were applicable to an action in trespass, but they differed in their conclusions as to the correct apportionment of responsibility in this case. Bray C.J. and Bright J. held that Hogarth J's apportionment should be varied to 40% against the appellant and 60% against the respondent, while Jacobs J. held that the original apportionment should stand.

From this decision, the driver of the car appealed to the High Court of Australia, but the appeal did not involve any of the complex points of law discussed in the courts below. It was based solely on the contentions that the Full Court had been wrong in finding that Hogarth J. had misapprehended the evidence, and also wrong in substituting its apportionment of responsibility for that of Hogarth J. The Full Court (McTiernan A.C.J., Gibbs, Stephen, Mason and Murphy JJ.) unanimously dismissed the appeal and affirmed the decision of the Full Court[8].

The Present Law on Trespass to the Person

In any examination of the present law on the action for trespass to the person, the area which attracts most notice is that of personal injury directly caused by negligent conduct, since it is here that the tort of trespass overlaps with the tort of negligence and the problem of the relationship between them arises.

The present law can best be stated in the light of answers to certain basic questions. Can the action for trespass to the person be maintained where the injury was caused without any negligence at all? The second issue is whether, in a case of personal injury directly caused by negligent conduct, the one fact-situation can give rise to both trespass and negligence as causes of action which may be pleaded in the alternative. Assuming that trespass is available as a cause of action in such cases, the next question to be considered is the way in which it differs in substance from the action of negligence. Here, rules as to onus of proof and the applicability of the defence of contributory negligence must be examined. In answering these questions, one must consider whether the courts draw any distinction between accidents occurring on the highway and other accidents.

(A) IS FAULT AN ESSENTIAL ELEMENT OF THE TORT OF TRESPASS?

Hogarth J. did not go so far as to argue that trespass is a tort of strict liability under which proof of fault of some kind is not required. He accepted as conclusive the decision in *Stanley* v. *Powell*[9] that if injury is inflicted purely accidentally, there is no remedy in trespass to the person. He accepted this principle without qualification, and without making any distinction between cases of accidents on the highway and those occurring elsewhere.

In the Full Court, Bray C.J. adopted the same position as Hogarth J.[10] However, Bray C.J.'s assumption that fault (in the sense of intention or

8. (1975) 49 A.L.J.R. 378.
9. [1891] 1 Q.B. 86.
10. (1975) 10 S.A.S.R. 299, 310. See also 326, *per* Jacobs J.

negligence) is an essential element in all actions for trespass to the person is not easy to reconcile with certain observations made by the High Court of Australia in *Williams* v. *Milotin*[11]. In the joint judgment (Dixon C.J., McTiernan, Williams, Webb, Kitto JJ.) there appears a distinction between trespass on the highway and trespass off the highway:

> "It is true that in the absence of intention or want of due care, a violation [of the protection which the law throws round the person] occurring in the course of traffic in a thoroughfare is not actionable as a trespass. It is unnecessary to inquire how that came about. It is perhaps a modification of the general law of trespass to the person"[12].

But what did the High Court consider to be the "general law of trespass"—that is, trespass occurring other than on the highway? The joint judgment contrasted the elements of the tort of negligence with those of trespass:

> "The essential ingredients in an action of negligence for personal injuries include the special or particular damage . . . and want of due care. Trespass to the person includes neither"[13].

These remarks form no part of the *ratio decidendi* of the case, which was concerned with the interpretation of the limitation statute. But the High Court appeared to take it for granted that, in an action for trespass to the person occurring off the highway (the "general" law of trespass), fault is not an essential element of the action; it is, by way of exception, in the case of highway accidents. However, in *Venning* v. *Chin*, Bray C.J. construed the High Court's statements as having been made with reference to the question of burden of proof; in other words, he did not see them as pronouncements on the nature of liability at all[14].

When one turns to the English authorities, it appears that there is no room for controversy, nor for the distinction between highway and non-highway cases. It is settled law in England that fault is an essential element in all actions for trespass to the person[15]. The pronouncements in *Stanley* v. *Powell*[16] are accepted as the general rule. In *Fowler* v. *Lanning* (a case of a shooting accident on private land), Diplock J. said:

> "I can summarize the law as I understand it from my examination of the cases as follows:
> (1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.
> (2) Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place"[17].

(B) IN CASES OF PERSONAL INJURIES DIRECTLY CAUSED BY NEGLIGENT CONDUCT, DOES THE SINGLE FACT-SITUATION GIVE RISE TO TWO CAUSES OF ACTION?

In *Venning* v. *Chin*, the plaintiff's claim was originally conceived as an action in negligence. The idea of an action in trespass came from Hogarth J.

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11. (1957) 97 C.L.R. 465.
12. *Id.*, 474.
13. *Ibid.*
14. (1975) 10 S.A.S.R. 299, 314.
15. Assuming that the action for trespass to the person is available at all in cases of unintentionally caused personal injuries. See *Letang* v. *Cooper* [1965] 1 Q.B. 232, and the discussion, *infra*.
16. [1891] 1 Q.B. 86.
17. [1959] 1 Q.B. 426, 439.

himself. The plaintiff's original pleading was in negligence, but Hogarth J. found that the statement of claim sufficiently disclosed the elements of the tort of trespass to the person. Since a plaintiff no longer has to state a cause of action in the pleadings, Hogarth J. held that he was permitted to treat the claim as one in trespass.

The Full Court held in *Venning* v. *Chin* that the action for trespass to the person is still available for personal injuries caused by negligence, whether on or off the highway. Judgment was given on this basis. In so holding, the Full Court accepted that the same fact-situation may give rise to an action both in trespass and in negligence.

It appears, therefore, that in Australia the action for trespass to the person is still very much alive in the context of personal injuries caused by negligence. With this may be contrasted the position in England, where the judgment of Lord Denning M.R. in *Letang* v. *Cooper*[18] is outspoken in its assertion that the action for trespass has no part to play in the modern law of compensation for personal injuries negligently inflicted. That case concerned an accident occurring in the grounds of a hotel; the plaintiff brought an action for damages for personal injuries, claiming in negligence and alternatively for trespass to the person. The Court of Appeal (Lord Denning M.R., Danckwerts and Diplock L.JJ.), held that the plaintiff's action was statute-barred. One of the grounds for the decision (that put forward by Lord Denning M.R.) was that as the personal injury to the plaintiff had been inflicted unintentionally, her only cause of action at the present day lay in negligence. The Master of the Rolls was clearly unwilling to allow the action for trespass any scope in relation to negligently caused injuries. He said[19]:

> "I must say that if we are, at this distance of time, to revive the distinction between trespass and case, we should get into the most utter confusion . . . These forms of action have served their day. They did at one time form a guide to substantive rights, but they do so no longer."

Hence Lord Denning saw the action for trespass as being confined to injuries intentionally inflicted, while for cases of injuries unintentionally caused, the only cause of action is an action in negligence[20]. In *Venning* v. *Chin*, Bray C.J. dismissed Lord Denning's remarks as "judicial legislation"[21].

(C) ASSUMING THAT THE ACTION FOR TRESPASS IS AVAILABLE FOR PERSONAL INJURIES DIRECTLY CAUSED BY NEGLIGENT CONDUCT, HOW DOES IT DIFFER FROM THE ACTION IN NEGLIGENCE?

One must first consider the rules on burden of proof. Does the burden of proving negligence fall on the plaintiff in all cases, irrespective of whether he frames his action in trespass or negligence, or whether the accident occurred on or off the highway?

Venning v. *Chin* was a case in which it was difficult for the plaintiff to prove negligence on the defendant's part. The facts of the situation were equivocal. As we have seen, Hogarth J. was unable affirmatively either to find or deny negligence on the part of the defendant. Had an action in negligence been the only remedy available to the plaintiff, she would have recovered nothing. The *Venning* v. *Chin* situation, where there is insufficient

18. [1965] 1 Q.B. 232.
19. *Id.*, 238.
20. *Cf.* the judgment of Diplock L.J., *id.*, 243.
21. (1975) 10 S.A.S.R. 299, 307.

evidence of negligence, is a common one in the field of road accidents. How desirable is it that a person injured in such a situation should be left wholly without remedy? Is it realistic to require proof of negligence in a situation where the facts may have occurred very quickly, or where there may have been no eye-witnesses? It may be that liability for personal injuries suffered in road accidents should not be fault-based at all. Stricter liability may be justified in view of the high degree of risk, the inevitability of a large number of accidents and disastrous effects of such accidents on the lives of individuals. The need to provide compensation to meet this social problem, and the existence of insurance which means that ultimately the loss is spread over the whole road-using community are further arguments in favour of stricter liability.

Such considerations may well have influenced the approach of Hogarth J. in *Venning* v. *Chin*. Although the plaintiff had pleaded her claim solely as an action in negligence, the learned judge suggested that the claim could be treated as one for trespass to the person. He then made a bold attempt to interpret the tort of trespass in a way which would give the plaintiff the advantage as regards the rules on burden of proof, in traffic cases as elsewhere. Had this approach been approved by the higher courts, it might well have revived the tort of trespass to the person as a means of providing compensation for traffic accident victims who cannot prove fault.

Given his findings on the facts, Hogarth J. had to overcome the obstacles in the way of permitting the plaintiff in *Venning* v. *Chin* to recover. He did so by maintaining that if the plaintiff brings an action for trespass to the person, the burden of proving negligence does not fall on him, but rather the onus of disproving negligence lies on the defendant. The novelty of Hogarth J.'s judgment lay in the fact that he considered that this rule applied in all types of case, including cases of accidents on the highways. Much judicial and academic opinion was against him on this point, it being thought that highway cases were an exception to the general law of trespass in that in them, the burden of proving negligence lay on the plaintiff. Hogarth J. challenged this view, and went to considerable pains to show that there was no binding authority to that effect.

Hogarth J. regarded as a "heresy"[22] the supposed principle that a plaintiff in a case of a running down accident on the highway must prove negligence even if he sues in trespass. He set out to examine whether that heresy had become orthodox doctrine. As a result of his construction of the authorities[23], he felt able to conclude that in an action for trespass, the onus always lay on the defendant to disprove negligence, and that no modification of this general rule had occurred in respect of highway accidents. On the facts of *Venning* v. *Chin*, the defendant had failed to show that the accident was not due to negligence on his part, and so the plaintiff was entitled to judgment.

It is interesting to compare Hogarth J.'s approach in *Venning* v. *Chin* with his approach in an earlier case. *Nesterczuk* v. *Mortimore*[24] provides a classic illustration of the imperfections of a system of fault-based liability in the field of road accidents. There were no eye-witnesses to the accident, in which a motor car and a motor cycle travelling in opposite directions collided on a straight road near Adelaide. Each driver sued the other for damages for

22. (1974) 8 S.A.S.R. 397, 402.
23. *Id.*, 402-411.
24. [1965] S.A.S.R. 81.

personal injuries. Each asserted that the other had swerved against him. There was no other evidence showing how the accident had happened. At first instance, Travers J. held that he was unable to find for either driver, and he dismissed both claims.

> "The plaintiff in this case has suffered very severe injuries indeed, and this is the kind of case which gives very considerable support to an ever-increasing body of responsible opinion that the risks attendant on road traffic have become such that compensation in cases of serious disabling injuries should no longer be dependant upon proof of causal negligence. Such proof, however, is necessary, and in respect of both claims and counterclaims I can find no such proof"[25].

The case went on appeal to the Full Court. There, Napier C.J., dissenting, invoked the doctrine of *res ipsa loquitur*; in his opinion, the only reasonable inference upon the evidence was that both drivers were to blame. Accordingly, each should recover half the full damages from the other. Considerations of fairness may have motivated the Chief Justice, who was well aware of the social problem arising from limiting recovery in road accidents to cases where fault can be proved:

> "All I would add is that, in my opinion, this result is required by law and by the weight of the evidence, but I think that it is, at the same time, the result which accords with reason and justice, and with social policy and the interests of the public . . . What we refer to as the "toll of the road" is a distressing reality . . . "[26]

However, Chamberlain & Hogarth JJ. held that since neither party could prove negligence on the part of the other, the judgment of Travers J. must be affirmed. Hogarth J. said[27]:

> "As I understand the law, a judge is not at liberty to hold both drivers guilty of negligence, in a case where he is satisfied that either one or the other has, or both have, been guilty of negligence, but the evidence does not show where the fault lies."

He added that this was so even where a plaintiff sues in trespass to the person. His approach demonstrated strict adherence to the principle of "no liability without fault":

> ". . . for a court to substitute guess-work for proof, and to apportion liability between the parties in such a case, is equally open to the criticism that it is a denial of justice. It constitutes the imposition of liability upon a person who has not been proved guilty of any wrong-doing. . . . The spirit of the common law is that a man is not to be held guilty of either a crime or of a civil wrong until he has been proved guilty"[28].

The stringency of this contrasts forcefully with his approach nine years later in *Venning* v. *Chin*. However, in *Nesterczuk* v. *Mortimore,* Hogarth J. showed that he was far from satisfied with the existing principles by which he felt himself bound.

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25. *Id.*, 84.
26. *Id.*, 96.
27. *Id.*, 104.
28. *Ibid.*

> "There is much to be said for the view that, in conditions of modern traffic, the traditional view that an injured man cannot recover damages unless he proves fault on the part of the opponent is no longer appropriate. This concept means that the victim's right of recovering damages is dependent upon the chance of their being sufficient evidence available—that is to say, upon the chance of there being witnesses present; and on the further chance of those witnesses being the sort of people who can observe and remember with sufficient accuracy what they see; who are articulate enough to describe what happened; and are able to withstand the pitfalls and tribulations of cross-examination"[29].

For the moment, however, he was not prepared to depart from the existing rules:

> "Whatever may be thought of the desirability of amendment of the Law, however, there is no room for doubt that under the present Law a man is not to be held liable for damages arising out of his management of a vehicle on a public highway unless he has been shown to have been guilty of negligence"[30].

In *Venning* v. *Chin*, Hogarth J. set about effecting the desired reform in the law by manipulating the rules relating to burden of proof in the tort of trespass to the person. His bold attempt did not survive on appeal, and the Full Court reasserted the orthodox doctrine. Bray C.J. was persuaded, in view of the older authorities and the decision of Windeyer J. in *McHale* v. *Watson*[31], that the general rule in trespass cases was that the onus lay on the defendant to disprove negligence. However, he considered that "the exception has become established in the category of claims in trespass arising out of highway accidents"[32]. He did not reach this conclusion without difficulty, and admitted that he found the onus of proof issue "one of the two most difficult questions in the case"[33]. Jacobs J. felt less doubt about the matter[34]. In the High Court, Gibbs J. took pains to emphasize that a plaintiff in a highway case must always prove negligence, however his action is framed[35].

As a result, liability for accidents occurring on private land is stricter in Australian law than liability for accidents occurring on the highway. By contrast, in England it appears to be settled law that, in all cases of trespass to the person, whether on or off the highway, the burden of proving negligence rests on the plaintiff. In *Fowler* v. *Lanning*[36], Diplock J. said:

> "The onus of proving negligence, where the trespass is not intentional, lies upon the plaintiff, whether the action be framed in trespass, or in negligence. This has been unquestioned law in highway cases ever since *Holmes* v. *Mather* (L.R. 10 Ex. 261, 268) and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases."

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29. *Id.*, 105.
30. *Ibid.*
31. (1964) 111 C.L.R. 384.
32. (1975) 10 S.A.S.R. 299, 315.
33. *Id.*, 310. The Chief Justice's refutation of Hogarth J's argument occupies six pages of the report (310-316). The other difficult issue in the case was the question of the applicability of the apportionment legislation.
34. *Id.*. 326. See also *per* Bright J., 323.
35. (1975) 49 A.L.J.R. 378, 379.
36. [1959] 1 Q.B. 426, 439.

This was accepted by the Court of Appeal in *Letang* v. *Cooper*[37]. In England, therefore, liability for accidents on private land is no stricter than liability for accidents on the highway. All actions for trespass are fault-based, and the onus is on the plaintiff to prove negligence. So, even if the same fact-situation can give rise to both an action for trespass and an action in negligence, the two causes of action differ little in substance[38].

The next point is whether there is any difference between the torts of trespass and negligence as regards the defence of contributory negligence. *Venning* v. *Chin* raised the question whether the apportionment legislation (Wrongs Act, 1936-1972 (S.A.), s.27(a)) applies in a claim for negligent trespass where the plaintiff is guilty of what in the case of an ordinary action for negligence would be classed as contributory negligence. In the Full Court, Bray C.J. described this as "the most difficult question in this difficult case"[39], and Bright J. found himself "troubled" by it[40]. No agreement is found amongst text writers: Fleming considers that contributory negligence is a defence to any tort claim for negligent injury, whether the claim be formulated as actionable negligence or as an action for trespass[41], whereas Salmond states baldly that contributory negligence is not a defence in an action for trespass to the person[42]. In *Venning* v. *Chin*, all three members of the Full Court held that the apportionment legislation did apply to a claim in trespass to the person, but the reasoning by which they arrived at this conclusion was not free from difficulty.

Section 27(a)(3) of the Wrongs Act (S.A.) provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage."

Section 27(a)(1) defines "fault" as

> "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".

There would appear to be three possible approaches to the question of whether this legislation applies in a claim framed in trespass—a "definitional" approach, a "common-sense" approach, and an historical approach. None of these can be exclusive, and each presents its own problems.

The "definitional" approach in particular is fraught with difficulty. It involves looking at the wording of s.27(a)(1) and (3), to decide whether the words used there can, as a matter of construction, apply to a claim in trespass. The basic problem is that s.27(a)(3) uses the word "fault" twice; when it first occurs, it refers to the fault of the plaintiff ("contributory fault"), and where it occurs the second time it refers to the

37. [1965] 1 Q.B. 232.
38. For a discussion of the possible differences, see *infra*, 415-418.
39. (1975) 10 S.A.S.R. 299, 316.
40. *Id.*, 323.
41. *The Law of Torts* (4th ed., 1971), 227-228.
42. *Salmond on Torts* (16th ed., 1973 [ed. Heuston]), 531.

defendant's fault ("original fault")[43]. But s.27(a)(1) gives only a single definition of fault. Is s.27(a)(1) to be read as a whole, so that the whole of the definition therein applies to the conduct of both plaintiff and defendant? Or is the definition to be severed in some way, so that only part of it applies to a plaintiff's conduct, and another part of it to the conduct of a defendant? Hogarth J. in deciding *Venning* v. *Chin* at first instance, appeared to adopt a "definitional" approach. He looked to the definitional section as it applied to a defendant's conduct, and decided that unless trespass to the person is a "fault" within the meaning of the legislation, then contributory negligence cannot apply in a claim in trespass.[44] How much of the definition in s.27(a)(1) applies to the conduct of a defendant? Hogarth J, asked himself whether the defendant's conduct in *Venning* v. *Chin* amounted to "fault" within the meaning of s.27(a)(1), but proceeded to answer this by reference to the meaning of "fault" as applied to a plaintiff's conduct. He considered that "fault" is not confined to cases in which a plaintiff would before the passing of the legislation have been defeated by the defence of contributory negligence; the "last opportunity" rule does not survive. Having held that the definition in s.27(a)(1) must be read broadly in relation to a plaintiff's conduct, Hogarth J. adopted the same approach to the defendant's conduct, and considered that it should be read widely enough to include a negligent trespass. But, with respect, this passes over the finer problems of construction which were raised in the Full Court.

Before the Full Court, counsel for the pedestrian contended that the definition contained in s.27(a)(1) should be severed, so that part of it should be read as applying to the fault of the defendant, and part of it to the fault of the plaintiff. Bright and Jacobs JJ. rejected this, and considered that the entire definition applies to the conduct of both plaintiffs and defendants. But, with respect, such a construction involves impossible corollaries. If the whole of the definition applies to the conduct of a plaintiff, then the words "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort" must apply to a plaintiff. Contributory negligence does not involve breach of a duty to another by a plaintiff, much less the commission of any other tort by him. If the whole of the definition is to be read as applying to a plaintiff's conduct, does this mean that his damages are to be reduced because of his liability in tort not to the defendant, but to a third party? Yet such liability would not be in issue in the proceedings. Suppose that A steals a car, and through negligent driving collides with another car whose driver was also negligent; are the damages which A can recover from the other driver to be reduced not only because of his negligent driving contributing to the accident, but also (and further) because of his liability in conversion to the car's owner? Or take the related situation, where a tort is committeed against A by B in circumstances where A is not at fault at all vis-á-vis B, but has committed a tort against C. Are the damages which he recovers from B to be reduced because of his liability towards C (provided of course that there was a causal link between the commission of the tort by A and the commission of the tort against A)? Bray C.J. pointed out this difficulty:

> "Suppose that the plaintiff at the time he comes into collision with the defendant's car is driving a stolen car. He is under a liability in tort to the owner. If he had not wrongly taken the car, he would not have

43. The terminology is that used by Glanville Williams, *Joint Torts & Contributory Negligence* (1951), 318-319.
44. (1974) 8 S.A.S.R. 397, 411-412.

been on the road when and where he was. Are his damages to be reduced even though there was no fault with his driving?"[45]

Moreover, if the words "breach of statutory duty" apply to the conduct of a plaintiff, are the plaintiff's damages to be reduced if at the time of the accident he was in breach of a statute and that breach was causally related to the injury he suffers? A vast number of statutes regulate many aspects of modern life, and the opportunities for an individual to be in breach of statute (perhaps unknowingly) are very great. This is particularly true in the case of industrial workers and road users. Is any breach (however trivial) of any statute to be treated as reducing damages provided it is causally related to the accident? This would restore a "penal" flavour to the defence of contributory negligence, which would be particularly inappropriate in the high-risk areas of industrial and road accidents where the individual recovers damages ultimately from an insurance company and the loss is thereby borne by the community in general[46].

It is submitted that to read "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort" in s.27(a)(1) of the Wrongs Act (S.A.) as applying to a plaintiff's conduct, with the consequences discussed above, would be retrogressive and out of keeping with modern ideas on the rationale of contributory negligence as a defence. The modern view accepts both the inevitability of accidents and the unreality of attributing blame to one individual, and attempts to do justice in a situation where both parties may need compensation. The construction discussed above would involve considerations unrelated to this area.

Conversely, if the whole of the definition of "fault" in s.27(a)(1) of the Wrongs Act (S.A.) applies to the conduct of plaintiffs as well as defendants, does the whole definition also apply to defendants as well as plaintiffs? This would lead to absurd results. For if the words "or would, apart from this Act, give rise to the defence of contributory negligence" apply to a defendant's conduct, should the court inquire whether he has been guilty of some conduct which before the passing of the legislation would have been described as contributory negligence had he been a plaintiff? Would this mean that an action could now be brought for a fault which before the passing of legislation would merely have given rise to the defence of contributory negligence, with the result that an action for damages for contributory negligence is created. This cannot have been the intention of the legislature. It is settled law that contributory negligence as a defence does not involve breach of a duty

45. (1975) 10 S.A.S.R. 299, 317.

46. It is interesting to note an example from the field of road accidents where South Australian law rejects the notion that breach of statute reduces damages. Failure to wear a seat belt in contravention of the Road Traffic Act is not regarded as contributory negligence, and does not reduce damages: see the Road Traffic Act Amendment Act, 1971 (S.A.); *Hancock* v. *Commercial Union Assurance Co. of Australia Ltd.* (1975) 10 S.A.S.R. 185, 188; *Grantham* v. *State of South Australia and Industrial Sales and Services* (1975) 12 S.A.S.R. 74. Moreover, it has been held by the Supreme Court of South Australia that failure to wear a seat-belt is not to be regarded as contributory negligence even where there is no statutory requirement that a seat-belt be worn in the particular circumstances: see *Rust* v. *Needham* (1974) 9 S.A.S.R. 510; *Hancock* v. *Commercial Union Assurance Co. of Australia Ltd.* (1975) 10 S.A.S.R. 185; *Grantham* v. *State of South Australia and Industrial Sales and Services* (1975) 12 S.A.S.R. 74.
Contrast the position in England, where the wearing of seatbelts is not made compulsory by statute. The English Court of Appeal has held that the failure to wear a seatbelt is evidence of contributory negligence: *Froom* v. *Butcher* [1975] 3 W.L.R. 379.

of care owed by the plaintiff to the defendant or to any other individual. All that is required is that the plaintiff should have failed to take reasonable care for his own safety: *Davies* v. *Swan Motor Co. (Swansea) Ltd.*[47] Equally well established is the principle that, for an action for damages in negligence to lie at the suit of a particular plaintiff, that plaintiff must show that a duty of care was owed to him: *Bourhill* v. *Young*[48]. If s.27(a)(1) of the Wrongs Act (S.A.) is to be read in a way which entails the creation of an action for damages for what before the enactment of the legislation would have been regarded as contributory negligence, this would mean that the principle in *Bourhill* v. *Young* had been indirectly abrogated—and this can hardly be the case.

On the other hand, if the definition of "fault" in s.27(a)(1) is really two definitions, one applying to a defendant's conduct and one to a plaintiff's, so that the definition needs to be severed, where exactly is the severance to be made? The Full Court apparently envisaged s.27(a)(1) as having two limbs, the first being "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort", and the second "or would, apart from this Act, give rise to the defence of contributory negligence". If the first limb were applied to the conduct of a defendant, this would mean that the definition is wide enough to include the tort of trespass. Fleming adopts this method of severing the definition[49]. But grammatically, it is unacceptable, because it leaves the second limb without any noun. Where is the noun governing "would, apart from this Act, give rise to the defence of contributory negligence"? Is it "other act or omission which . . .", or is it "Negligence, breach of statutory duty or other act or omission which . . ."? If it is the latter[50] this raises the problems (already discussed) of a plaintiff's liability towards third parties and breach of statute. The problems involved here demonstrate the futility of a strictly "definitional" approach. It is impossible to decide whether the apportionment legislation applies to a claim in trespass by merely looking at the wording of the relevant sections. It is difficult to avoid the conclusion that the position would have been clearer had the South Australian legislature not modelled s.27 of the Wrongs Act so exactly on ss.1 and 4 of the English Law Reform (Contributory Negligence) Act of 1945. Had the definitional section contained two definitions of "fault", one applying to "original fault" and the other to "contributory fault", the problems discussed here would not have arisen.

If the "definitional" approach is of limited utility, a "common-sense" approach may be more helpful. Looking at the matter broadly, is it reasonable to suppose that the apportionment legislation was intended to apply to a claim for negligent injury framed in trespass to the person as well as to one framed in negligence? The judgments of Bright and Jacobs JJ. in *Venning* v. *Chin* show an adherence to this approach, which envisages the apportionment legislation as applying in cases where both parties are at "fault" in a non-technical sense. Bright J. said:

> " . . . the whole situation is to be looked at broadly . . . The legislation confers rights and creates liabilities on persons involved in situations where each was at fault and one or both sustained damage. The

47. [1949] 2 K.B. 29.
48. [1943] A.C. 92.
49. *Op. cit.*, 228.
50. As Glanville Williams suggests: *op. cit.*, 318-319.

> subsequent nature of the proceedings, whether in case or in trespass, will not affect those rights and liabilities"[51].

Jacobs J. also spoke of the need to keep the purpose of the legislation in mind. But the problem with a so-called "common sense approach" is that it cannot be guaranteed to produce a uniform or certain result. Judicial opinions on the true purpose of this legislation may vary[52].

The Chief Justice chose to adopt an historical approach to the problem. He considered that if contributory negligence would have been a defence to an action for trespass in the circumstances of the present case before the enactment of the apportionment legislation, then the legislation applies in a claim for trespass. On examining the authorities, he came to the conclusion that it would. Because of the lack of authority in the period between the enactment of the Common Law Procedure Act, 1852, and the enactment of the apportionment legislation, the Chief Justice was forced to look back to the pre-1852 period. From this, he considered that the negligence of the plaintiff was always a defence to an action for trespass, even in mediaeval times, since a plaintiff's neglect of his own safety could be the cause of his injury, rather than the defendant's act. However, in respect of the action on the case for negligence, the plaintiff's own negligence came to be a defence, not merely when it was the sole cause of the injury, but also when it was a "contributory cause" together with the defendant's negligence. "Did a similar development take place in trespass?"[53] The Chief Justice recognized the difficulties of saying that it did, for in cases where the plaintiff's negligence and the defendant's negligence were both causes of the injury, the defendant could not say that the accident occurred "utterly without his fault" and so the defence would not be allowed. However, his Honour overcame this difficulty by using the analysis that the plaintiff's negligence was treated in such cases as the sole effective cause for legal purposes, notwithstanding the concurrent negligence of the defendant. He expressed the reservation that this may be "too bold an analysis"[54], and with respect, it is not clear from the authorities that the defence of contributory negligence as it existed at common law had its sole rationale in notions of causation. However, his Honour found nothing in the old cases or books of pleading pre-dating the Common Law Procedure Act, 1852, to suggest that a plaintiff's negligence was treated differently in an action for trespass from an action in negligence, and he therefore concluded that before s.27 of the Wrongs Act was enacted, the defence of contributory negligence was available in an action for trespass to the person arising out of a highway accident where the injury had been caused negligently. He confined this conclusion to actions for trespass in respect of injuries negligently caused, since it was "clear" that contributory negligence could never be a defence to an intentional tort[55].

In the result, all three members of the Full Court in *Venning* v. *Chin* held that the apportionment legislation applies to an action in trespass for injuries caused by negligence. In this respect, there is no material difference between the torts of trespass and negligence. It is worth noting that, according to

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51. (1975) 10 S.A.S.R. 299, 324.
52. See, *e.g.*, the dispute over the survival or otherwise of the so-called "rule of last opportunity". See Fleming, *op. cit.*, 223-225, for a review of the differing views.
53. (1975) 10 S.A.S.R. 299, 318.
54. *Id.*, 319.
55. *Id.*, 317.

Venning v. *Chin*, the defence of contributory negligence apparently applies only to actions for unintentional trespasses, and not to intentional trespasses. This distinction between the two types of trespasses may perhaps be justified if it is considered that the element of wrongful intention requires the imposition of a more stringent form of liability than does mere negligent conduct.

Critique

One must consider the desirability of the developments in the relationship between the two torts of trespass to the person and negligence. How satisfactory is the present law? Where differences occur, is the Australian approach to be preferred to the English one? Should trespass to the person continue to exist as a separate tort, in the area of injuries caused by negligence or elsewhere?

First, one must look at the area where the two torts overlap—that of personal injuries directly caused by negligent conduct. The law in Australia at present, as appears from the decisions in *Williams* v. *Milotin*[56] and *Venning* v. *Chin*[57], is that this fact-situation gives rise to two causes of action, one in negligence and one in trespass to the person. How desirable is this? The justification for the existence of different nominate torts is that they offer different protection to different interests. Here, there is but a single interest—the right not to be injured by the negligent conduct of others. Why should this single interest require two torts to protect it? Serious objections arise if the two causes of action offer the single interest different degrees of protection, as will be the case if the torts of trespass and negligence differ in their substantive details even in the area of injuries directly caused by negligence. We know that a single fact-situation can give rise to the two causes of action. How justifiable is this, if the two causes of action differ in their substance and so may produce different results as to liability on the same facts?

The rules as to burden of proof are of importance here. According to the Australian authorities, the onus is on the plaintiff to prove negligence on the part of the defendant in cases of highway accidents, whether he sues in negligence or in trespass. But in cases of accidents occurring off the highway, if the plaintiff sues in trespass the onus is on the defendant to disprove negligence. In the latter type of case, a plaintiff who sues in trespass is clearly at an advantage over one who sues in negligence; the difficulties of proving a negative are well known. This difference will be of particular importance in a case where the evidence is equivocal, and a judge is unable to find positively that the defendant was negligent, but is equally unable to find positively that he was not negligent. In such a case, it appears that, in Australia, a plaintiff would succeed in trespass, but fail in negligence.

Another possible distinction between the two torts concerns the rules of remoteness of damage. In an action framed in negligence, the test for remoteness of damage is now accepted to be that of foreseeability[58]. However, it has been suggested[59] that the proper test applicable in an action for trespass is directness—something akin to the *Re Polemis*[60] approach. If this is so, then a plaintiff might recover more in a trespass action than in an action in negligence. Suppose that an injury is directly inflicted, but the consequences of that injury (in terms of physical results or financial loss) are unforeseeable,

56. (1957) 97 C.L.R. 465.
57. (1975) 10 S.A.S.R. 299.
58. *The Wagon Mound (No. 1)* [1965] A.C. 388.
59. See, *e.g.*, Salmond, *op. cit.*, 138.
60. [1921] 3 K.B. 560.

though the direct result of the original negligent conduct. Trespass would permit a plaintiff to recover for such losses where negligence would not.

Finally, considering cases of highway accidents where a plaintiff must prove negligence on the part of the defendant even if he sues in trespass, one may ask whether "negligence" in a trespass action means something different from "negligence" in the action in negligence itself. In order to establish "negligence" in the tort of negligence, a plaintiff must show that he was owed a duty of care by the defendant, and that the defendant was in breach of this duty. Does "negligence" in an action for trespass involve the requirement of such a duty of care? Or is it used in a less technical sense, to mean mere carelessness? If it does not involve the requirement of a duty of care, then is it possible that an "unforeseeable plaintiff", unable to recover in negligence, might nevertheless be able to succeed in trespass? The authorities contain surprisingly little discussion of this point. The very absence of discussion may suggest that "negligence" in a trespass action means the same as it does in a negligence action, for the courts would surely have taken notice of any proposition so surprising as one which gives a right of action to an "unforeseeable plaintiff" in respect of injuries caused by negligence.

In *Letang* v. *Cooper*[61] Diplock L.J. appeared to assume that "negligence" when used in relation to an action for trespass involves a duty of care in the Atkinian sense, for he spoke of

> ". . . the duty of care, whether in negligence or unintentional trespass . . . to take reasonable care to avoid causing damage to one's neighbour"[62].

But what is meant by "duty"? The term "duty of care" when used in the context of the tort of negligence has a specific meaning derived from its usage by Lord Atkin in *Donoghue* v. *Stevenson*[63]. Such a duty is owed by a particular defendant to a particular plaintiff, determined according to the concept of reasonable foresight. Diplock L.J. envisaged trespass to the person as involving breach of duty in this sense. However, it could be argued that "duty" in the context of trespass to the person has a wider meaning. Does trespass involve the concept of a "duty" not to inflict direct injury on others—a duty which is general in that it is owed to the world at large and is not limited to its scope to those within the area of reasonable foresight? The difficulty with this argument is that it may give the word "duty" such a wide meaning as to deprive it of significance. The point arose in *Letang* v. *Cooper*, where one question was whether the phrase "actions for damages for breach of duty" in s.2(1), Law Reform (Limitations of Actions, etc.) Act, 1954 (U.K.)[64], could be construed to include the tort of trespass to the person. Elwes J. at first instance decided that it would not. He said[65]:

61. [1965] 1 Q.B. 232.
62. *Id.*, 245.
63. [1932] A.C. 562.
64. Law Reform (Limitation of Actions etc.) Act, 1954 (U.K.), s.2(1) provides that at the end of s.2(1) of the Limitation Act, 1939 [which subsection provides, amongst other things, that there shall be a limitation period of six years for actions founded on simple contract or tort], the following proviso shall be inserted—"Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."
65. [1964] 2 Q.B. 55, 60.

> "In trespass to the person, the plaintiff is not concerned to prove a breach of a particular duty. It may be said that a defendant in trespass to the person must always be proved in breach of a general duty not to inflict injury on anybody, but this is not to use the language of precision known to the law."

In the context of the statute, His Honour was unwilling to construe "duty" simply as the obverse of "right". The Court of Appeal reversed his decision, and held that the words of the statute were wide enough to include all tortious breaches of duty, including trespass to the person. Lord Denning M.R. gave a wide meaning to the word "duty", using it to mean simply an infringement of a right recognized by law. He said[66]:

> "Our whole law of tort today proceeds on the footing that there is a duty owed by every man not to injure his neighbour in a way forbidden by law. Negligence is a breach of such a duty. So is nuisance. So is trespass to the person. So is false imprisonment, malicious prosecution or defamation of character".

With respect, this gives "duty" such a wide meaning as to equate it with liability in tort, for such a "duty" is breached whenever a person acts in such a way as to give rise to a claim recognized by the law of torts. It is not easy to see how this can be a correct construction of the section which the Court of Appeal in *Letang* v. *Cooper* had to consider. S.2(1), Limitation Act, 1939, lays down a six year limitation period for "actions founded on simple contract or tort". The 1954 statute inserted a proviso to that subsection, creating a three year limitation period for actions for personal injuries resulting from "negligence, nuisance or breach of duty"[67]. If "breach of duty" was intended by the legislature to cover all liability in tort, it is difficult to see why the specific words "negligence, nuisance or breach of duty" were used. If the legislature in 1954 intended simply to create a three year limitation period for all personal injuries actions founded on tort (that is, for all personal injuries, whatever tort they are caused by), why did it not use the general expression "tort" found in the original 1939 provision? The proviso could have applied the three year limitation period to "actions for damages founded on . . . tort . . . where the damage claimed by the plaintiff consists of or includes damages in respect of personal injuries . . ." The use of the words "negligence, nuisance or breach of duty" appears to indicate that the proviso should have a less general effect.

Diplock L.J., too, gave "duty" a wide meaning. He said:

> "A has a cause of action against B for any infringement by B of a right of A which is recognized by law . . . B has a corresponding duty owed to A not to infringe any right of A which is recognized by law . . . In the context of civil actions, a duty is merely the obverse of a right recognized by law . . . right and duty are but two sides of a single medal"[68].

It is obvious that the term "duty" can mean whatever one wishes it to mean. Once one moves beyond using "duty" in the limited sense in which it is used in the tort of negligence, the problem is where to stop. The next step would be to say that a duty is owed not to inflict direct injury on others, and

66. [1965] 1 Q.B. 232, 241.
67. See note 63, *supra*.
68. [1965] 1 Q.B. 232, 246.

so the tort of trespass involves "breach of duty". But if this step is taken, there is no reason why the commission of any tort should not be termed breach of a duty not to infringe a right recognized by law, and eventually the position is reached whereby "duty" is merely the obverse of "right". It is submitted that this was not the correct construction of the statutory provision which the Court of Appeal had before it in *Letang* v. *Cooper*.

It appears that there are certain substantive differences between trespass and negligence as separate causes of action arising from a single fact-situation. But what is meant by "cause of action"? It is not surprising that judges come to differing conclusions on the relationship between trespass and negligence if they have differing notions of what a "cause of action" is.

As a starting point, let us look at the position adopted by the Australian courts. In *Williams* v. *Milotin*[69], the plaintiff brought an action to recover damages for personal injuries sustained in a collision on the highway and caused by the defendant's negligence. The South Australian Limitation of Actions Act, 1936-1948, then in force fixed a six year period of limitation for actions which formerly might have been brought in the form of actions called "actions on the case", and a three year period for, *inter alia*, trespass to the person. The plaintiff commenced his action more than three but less than six years after the date of the accident. The High Court held that the action might formerly have been brought in the form of an "action on the case", but that it also might formerly have been brought as an action for "trespass to the person". The same facts thus supported two causes of action; since the plaintiff had elected to rely on the one for which the limitation period was six years, as he was permitted to do, his action was not statute-barred. In a joint judgment, the High Court said:

> "The problem is reduced to the simple position that on the same set of facts two causes of action arose to which different periods of limitation were respectively affixed . . .
> The two causes of action are not the same now and they never were. When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce . . . It happens in this case that the actual facts will or may fulfil the requirements of each cause of action. But that does not mean that . . . only one cause of action is vested in the plaintiff"[70].

This approach was followed by the Full Court of the Supreme Court of South Australia in *Venning* v. *Chin*[71], which accepted that both an action for trespass and an action in negligence could arise from the facts of the case. Speaking of the allegations in the plaintiff's statement of claim, the Chief Justice said:

> "If the set of facts which the plaintiff alleges is sufficient to found more than one cause of action, the defendant must be prepared to meet them all"[72].

In these cases, the Australian courts appear to see "cause of action" as a specific category of legal claim, the elements or ingredients of which are

69. (1957) 97 C.L.R. 465.
70. *Id.*, 473-474.
71. (1975) 10 S.A.S.R. 299.
72. *Id.*, 309.

satisfied by the fact situation of the case in question. "Cause of action" is the conceptual link between the fact situation and the obtaining of a remedy in the form of damages.

With this Australian approach may be contrasted that of Diplock L.J. in the English case of *Letang* v. *Cooper,* which, like *Williams* v. *Milotin,* involved a question of the interpretation of a limitation statute. For present purposes the judgment of Diplock L.J. is of primary interest, for his Lordship identified "cause of action" with the fact situation itself from which the claim arises:

> "A cause of action is simply a fact situation the existence of which entitles one person to obtain from the court a remedy against another person"[73].

In reference to the case in question, he said:

> "If A, by failing to exercise reasonable care, inflicts direct personal injuries on B, it is permissible today to describe this factual situation indifferently, either as a cause of action in negligence or as a cause of action in trespass . . . They are simply alternative ways of describing the same factual situation . . . But that . . . does not mean that there are two causes of action. It merely means that there are two apt descriptions of the same cause of action. It does not cease to be the tort of negligence because it can also be called by another name. An action founded upon it is nonetheless an action for negligence because it can also be called an action for trespass to the person"[74].

One ground for Diplock L.J.'s judgment was that the plaintiff's action could be described as an action for negligence, and so was statute-barred as having been commenced outside the three year limitation period[75]. As this approach differs radically from that of the High Court in *Williams* v. *Milotin*, it calls for some comment.

The approach adopted by Diplock L.J. would apparently entail the court playing a very positive role in proceedings. If " cause of action" is merely the fact-situation set out in the statement of claim, is the court then left to decide into what particular category of legal claim the plaintiff's action falls? Secondly, if an action founded on a certain fact-situation is "nonetheless an action for negligence because it can also be called an action for trespass to the person", so that it "does not cease to be the tort of negligence because it can also be called by another name", why should the converse not be equally true? An action for trespass to the person does not cease to be the tort of trespass because it can also be described as the tort of negligence. If this is so, why was the plaintiff in *Letang* v. *Cooper* not allowed to take advantage of the six-year limitation period applying to trespass?[76]

Perhaps the most serious criticism that can be levelled against Diplock L.J.'s reasoning is that if it were correct, a plaintiff would simply not know what to plead. In a statement of claim, the facts are of significance only to the extent to which they refer to one or more legal categories, that is to say, satisfy the

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73. [1965] 1 Q.B. 232, 242-243.
74. *Id.,* 243-244.
75. The alternative ground was that trespass to the person constitutes a "breach of duty" within the terms of the statute, to which the three year limitation period applies.
76. One reason is found in the alternative *ratio;* see note 75, *supra.* For comments on the reasoning of Diplock L.J., see Jolowicz, (1964) *C.L.J.* 200.

elements of a recognised legal claim. If "cause of action" is nothing more than the fact-situation itself, what facts would a plaintiff know to stress?

Furthermore, although Diplock L.J. may have been correct in saying that no procedural consequences flow from the pleader's choice of description of the fact-situation giving rise to his claim, it is clear that substantive consequences must flow from the exercise of that choice. As Jolowicz points out[77], the names of the old forms of action are used today to describe the various categories of factual situations giving rise to legal remedies. More than one description may apply to a given fact-situation, and the substantive rules applying to one description may differ from those applying to another, with the inevitable result that a plaintiff may fail in one action but succeed in another. For example, if I build a reservoir on my land, and water escapes from it causing damage to my neighbour's land, my action might be described as the tort of negligence, which involves proof of want of due care. But my action might also be described as attracting liability under the rule in *Rylands* v. *Fletcher*[78]. My proving that I was not negligent does not necessarily absolve me from liability under *Rylands* v. *Fletcher*, although it will absolve me from liability in negligence. This is simply the result of the fact that two sets of rules apply to the two descriptions appropriate to the single fact-situation. It would be incorrect for a court to apply a single set of rules to both descriptions.

It is interesting to compare Diplock L.J.'s conception of "cause of action" expressed in *Letang* v. *Cooper* with that expressed by him (in a different context) in a case decided only a year earlier, for the two conceptions are notably inconsistent. *General & Finance Facilities Ltd.* v. *Cooks Cars (Romford) Ltd.*[79] concerned the relationship between detinue and conversion as alternative causes of action. Diplock L.J. said:

> "There are important distinctions between a cause of action in conversion and a cause of action in detinue . . . Even where, as in the present case, the chattel is in the actual possession of the defendant at the time of the demand to deliver up possession, so that the plaintiff has alternative causes of action in detinue or conversion based upon the refusal to comply with that demand, he has a right to elect which cause of action he will pursue . . . and the remedies available to him will differ according to his election"[80].

This is very different from his equation of "cause of action" with "a fact situation the existence of which entitles one person to obtain from the court a remedy against another person" in *Letang* v. *Cooper*. It is much closer to the formulation of the Australian courts in *Williams* v. *Milotin* and *Venning* v. *Chin*[81].

Let us now look beyond the area where the torts of trespass and negligence obviously overlap (that of injuries directly caused by negligent conduct), to see whether there is any interest protected by trespass to the person which is not protected by negligence. Are there fact-situations where trespass can

77. *Id.*, 202.
78. (1868) L.R. 1 Ex. 265.
79. [1963] 1 W.L.R. 644.
80. *Id.*, 648-649.
81. For a third interpretation of "cause of action", see *Brunsden* v. *Humphrey* (1884) 14 Q.B.D. 141. However, *Brunsden* v. *Humphrey* was concerned with the quite different problem of *res judicata* (a distinction perhaps not appreciated by Gerber (1970) 44 *A.L.J.* 19), *Brundsen* v. *Humphrey* was not followed in *Cahoon* v. *Franks* [1967] S.C.R. 455.

provide a remedy where negligence cannot? The answer to this may determine whether there is any justification for the existence of trespass to the person as a separate tort.

Traditionally, trespass has been regarded as actionable *per se*, whereas negligence is actionable only on proof of damage actually suffered by the plaintiff. This immediately reveals something which trespass to the person can do which negligence cannot: it can provide a remedy where no actual damage has been caused. But how important is this in practice? There will be few plaintiffs who will bring an action for bodily contact which involves no loss. If such an action were successful, the damages awarded would be nominal. The character of trespass as a tort actionable *per se* might have led to its development as a remedy for the protection of personal dignity, a remedy against indignity arising from bodily contact. But this development has never taken place, and it seems unlikely to begin now.

The next point to consider is the nature of liability in trespass. We have seen that in *Williams* v. *Milotin*[82] the High Court appeared to assume that trespass to the person, at least in cases of accidents occurring other than on the highway, does not necessarily involve want of due care[83]. If this assumption is correct, then trespass to the person must be a tort of strict liability in non-highway cases, and a plaintiff would succeed even if the accident occurred without any fault on the defendant's part. This would be a most important difference between trespass and negligence. But the majority of modern opinion seems to be against trespass being a tort of strict liability in any case, and the absence of reported attempts to treat it as such bears this out. On the other hand, it has never been disputed that intentionally inflicted injuries are actionable in trespass. Lord Denning in *Letang* v.*Cooper*[84] went so far as to say that the tort of trespass to the person is now confined to intentional acts—although as we have seen, this view is not accepted in Australia. It is clear that trespass is a remedy for injuries intentionally inflicted. Is it the only remedy? The possibility of an action being brought in negligence for injuries intentionally inflicted is not often considered, and there is little clear authority on the point. *Williams* v. *Holland*[85] concerned a collision between two horse-drawn vehicles. The plaintiff's declaration alleged that the defendant had been negligent. The question was whether an action on the case could be brought by the plaintiff, or whether an action for trespass was the sole appropriate action, the act of the defendant having been the immediate cause of the injury. Tindal C.J. said:

> ". . . where the injury is occasioned by the carelessness of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act"[86].

Tindal C.J. cited the earlier case of Moreton v. Hardern[87], a case of personal injuries caused by the negligent driving of a coach. The question was whether the injured plaintiff could bring an action on the case against the three proprietors of the coach, one of whom was driving when the accident happened. The court held that an action on the case could be brought against

82. (1957) 97 C.L.R. 465.
83. *Id.*, 474.
84. [1965] 1 Q.B. 232.
85. (1883) 10 Bing. 112.
86. *Id.*, 117-118.
87. (1825) 4 B. & C. 223.

all three proprietors, although the action in trespass might have been brought against the one who drove the coach. On the question whether an action on the case could be brought in respect of injuries wilfully inflicted, *Moreton* v. *Hardern* contains nothing more than the observation:

> "No doubt that action [*i.e.*, trespass] lies where injury is inflicted by the wilful act of the defendant, but it is also clear that case will lie where the act is negligent and not wilful"[88].

The more recent *dictum* is to be found in the joint judgment of the High Court of Australia in *Williams* v. *Milotin,* where the following passage appears:

> ". . . The facts which the plaintiff . . . wishes to allege are that he was immediately or directly hit by the motor car driven by the defendant as a result of the negligence of the defendant himself. There is no suggestion that the defendant intended to strike him. If that had been the allegation, the action could have been brought in trespass and not otherwise"[89].

However, from an analytical point of view there would seem to be no reason why an intentional act should not be actionable in negligence. The success of an action in negligence depends on establishing a duty of care owed by the defendant to the plaintiff, proof of breach of that duty, and proof of damage caused by the breach which is not too "remote". Is there any reason why these three elements should not be established in the case of an injury inflicted intentionally rather than unintentionally? The determination of a duty of care is an *ex post facto* process carried out by the court which considers the facts of a case in the light of the test of "reasonable foresight". If harm to the particular plaintiff was the reasonably foreseeable consequence of the plaintiff's action, does the fact that he happened to intend the consequences of his act take the case out of the sphere of the tort of negligence and into the exclusive sphere of trespass? Does the fact that the injury to the plaintiff was foreseen and not merely foreseeable exclude the tort of negligence? There would appear to be no good reason why, from a conceptual point of view, the elements of the tort of negligence should not be satisfied notwithstanding the intentional character of the act causing the damage. Liability in negligence stems from conduct which falls below the standard required to discharge the duty of care; there is no reason why such conduct cannot be intentional as well as inadvertent. As Millner has observed[90]:

> "The duty of care in negligence actions is breached by unreasonable conduct. It is enough that such breach of duty was inadvertent or reckless. *A fortiori,* the defendant is liable in negligence for intentional breach of the duty of care or intentional infliction of unlawful injury. This is not to say that the knowing violation of legally protected interests in the security of person or property is *only* actionable as negligence, but that it is *at least* actionable as negligence".

This would not mean that every consequence of an intentional act would be actionable in negligence. The test of "reasonable foresight" determines the damage for which compensation is recoverable in the tort of negligence. The

88. *Id.,* 227 *per* Bayley J.
89. (1957) 97 C.L.R. 465, 470.
90. "The Retreat of Trespass" (1965) 18 *C.L.P.* 20, 30-31.

test for recoverability of damage in trespass may be directness. So in the situation where an injured person suffers unforeseeable consequences of an intentional direct act, it would seem that could recover in trespass but not in negligence.

If there is any justification for the continued existence of the tort of trespass to the person in modern law, it may be because personal injuries inflicted intentionally should be treated differently by the law from injuries inflicted through mere inadvertence. Liability in trespass is more stringent than liability in negligence, in that the defence of contributory negligence does not apply to intentional trespasses and the test for recoverable damage may be directness rather than foreseeability. The trend of the law of torts has been to concentrate on the element of injury and the need to provide compensation for it, and the way in which the injury was inflicted has tended to be overlooked. It could nonetheless be argued that the element of wrongful intention justifies a more stringent form of liability than that for unintentionally inflicted injuries. This would admittedly be to adopt a moralistic attitude towards the law of torts, and to accept that the law of torts plays something of a penal role. The modern view is to regard the purpose of the law of torts as being solely to provide such compensation as is required. Yet even on this view, a more extensive form of liability for intentionally inflicted injuries might be justified, if intentionally inflicted injury is more of an outrage to a plaintiff's feelings and makes him suffer more than unintended injuries. This again raises the question whether trespass to the person should play any role in protecting a person's emotional interests. Trespass to the person might be justified as a separate tort existing to protect the right not to suffer intentional injuries at the hands of others. If importance is attached to he element of wrongful intent, perhaps a separate tort is needed to deal with it.

It is worth noting that an award of damages in trespass can go beyond mere compensation, since it is open to an Australian court to make an award of punitive or exemplary damages in an appropriate case. The general principle in the law of torts is that an award of damages is intended to be compensatory only. Punitive or exemplary damages are an exception to this. In England, the circumstances in which such damages can be awarded were drastically restricted by the House of Lords in *Rookes* v. *Barnard*[91]. However, *Rookes* v. *Barnard* has not been accepted in Australia. In *Uren* v. *John Fairfax Pty. Ltd.*[92], the High Court asserted that the power to award exemplary damages is more general. The principle is that such damages can be awarded whenever there is a "conscious, contumelious and calculated wrongdoing", "conduct by the defendant which could merit punishing it by awarding a greater sum to the plaintiff"[93]. It is difficult to envisage any case of negligent conduct justifying an award of exemplary damages on this principle. But a case of intentional trespass might be different, if the trespass was committed with deliberate and flagrant disregard of another's rights. Such cases will be rare, but they are possible. An example of a case of intentional trespass where exemplary damages were awarded is *Loudon* v. *Ryder*[94] which was decided in England before *Rookes* v. *Barnard*, on principles which are still applied in Australian courts. Devlin J. directed the jury that they could award exemplary damages if they wanted to impose a "fine" which made it quite clear that they

91. [1964] A.C. 1129.
92. (1967) 117 C.L.R. 118; affirmed by the Privy Council, [1969] A.C. 590.
93. *Id.*, 215 *per* Windeyer J.
94. [1953] 2 Q.B. 202.

regarded the defendant's conduct as a wanton and wilful disregard of the law or of someone else's rights. The direction of Devlin J. was upheld by the Court of Appeal[95].

Conclusion

With great respect to the contrary view expressed by the High Court in *Williams* v. *Milotin*[96] and more recently by the Full Court of the Supreme Court of South Australia in *Venning* v. *Chin*[97] it is submitted that there is no justification for the continued existence of two distinct causes of action in the area of personal injuries directly caused by negligence. If the two torts of trespass and negligence were identical, their dual existence would be superfluous. But this examination has revealed certain differences in their substance which makes their co-existence positively undesirable. As there is but a single interest to be protected—the right not to be injured by the negligent conduct of another—this single interest ought not to be accorded different degrees of protection by different torts. It is submitted that this single interest is best protected by the tort of negligence, as Lord Denning M.R. thought in *Letang* v. *Cooper*[98]. This would have the additional desirable effect of simplifying the law. Beyond the area of personal injuries directly caused by negligent conduct, the continued existence of the tort of trespass to the person is justifiable only if intentionally inflicted injuries require a special and separate degree of protection. If the element of wrongful intention demands that a more stringent liability be imposed than in the case of injuries unintentionally caused, the existence of trespass to the person may be justified.

Considering unintentional injuries, we have seen how the case of *Venning* v. *Chin* began its life as an attempt at reformulating the law on highway accidents in terms of stricter liability, but ended up as simply another case on negligence and the evidence required to prove it. The result of *Venning* v. *Chin* is that the person who cannot prove fault gets no help from the common law. The Full Court disapproved Hogarth J.'s attempt to give the plaintiff in a highway case the advantage of the burden of proof by suing in trespass. Each of the members of that court went out of his way to allow contributory negligence as a defence in a situation where the law was by no means clear. In the High Court of Australia, Gibbs J. took the trouble to stress that proof of negligence is essential to recovery in a highway case[99]. At the end of the day, liability at common law for road accidents remains strictly fault-based, whether the plaintiff chooses to sue in negligence or in trespass.

The law of torts has long been dominated by this philosophy of "no liability without fault". But is it acceptable any longer in the field of personal injuries? Modern life involves a high degree of risk in many spheres of activity, with the result that the occurrence of accidents is inevitable. This may be a justification for the introduction of strict liability; once the inevitability of accidents is accepted, it is unjust to make recovery of compensation depend on proof of fault. This is particularly true in the case of road accidents, where the degree of risk is very high, and use of the highway is an activity in which a large section of the community participates. Yet in respect of

95. *Ibid. Loudon* v. *Ryder* was expressly overruled in *Rookes* v. *Barnard*, and is no longer good law in England.
96. (1957) 97 C.L.R. 465.
97. (1975) 10 S.A.S.R. 299.
98. [1965] 1 Q.B. 232.
99. (1975) 49 A.L.J.R. 378, 379.

trespass to the person in relation to road accidents, the result produced by the common law in Australia is exactly the reverse of a move towards stricter liability. As we have seen, liability in trespass for accidents occurring on private land is stricter than liability for accidents on the highway. What is the rationale of this distinction? The Full Court in *Venning* v. *Chin* explained it on the basis of voluntary assumption of risk. Jacobs J. said:

> "I venture to suggest that the law recognizes the indisputable fact that the use of the highway has come to be fraught with risk and danger . . . To impose on a defendant to an action for personal injuries sustained on the highway the stricter liability in trespass . . . is to impose a liability which gives insufficient recognition to the inevitable dangers to which all users of the road are subjected"[100].

How sound is this explanation? All three members of the Full Court recognized the theoretical difficulties it involved. In the words of Bray C.J.:

> "I am fully conscious of the imperfections of all this from the point of view of abstract jurisprudence, and there are serious theoretical difficulties in the application of it to those who lack capacity or who are on the highway involuntarily, such as a baby in a pram or an unconscious patient in an ambulance or a prisoner in a police vehicle . . . I can offer no better reply to the criticisms . . . except to say with a great authority "that the life of the law is not logic but experience"[101].

However, quite apart from these difficulties of "abstract jurisprudence", the explanation offered seems objectionable in principle and as a matter of policy. The members of the Full Court used the fact of increased risk as an argument for less liability. But could not it more convincingly be used as an argument for more liability? The doctrine of *"volenti non fit injuria"* was a product of the school of thought which advocated a philosophy of "no liability without fault". Are such notions still valid in the modern world? If road use involves "inevitable danger" and a high degree of risk, the law should recognize the fact that large numbers of road users are going to need compensation, and set about providing it for them by the development of rules of strict liability. It is quite possible to argue that, the greater the risk, the stricter should be the liability, since more people are going to need compensation. There is an additional factor which suggests that liability for road accidents should, if anything, be stricter than liability for accidents on private land: the existence of insurance. In a road accident today, it is almost invariably the defendant's insurance company that pays the damages, not the defendant himself. Since the loss is spread over the community (or at least, the driving community) by means of the premiums charged by insurance companies, the cost involved in a stricter liability would be easily borne. What is more vital, the large number of road users who come to need compensation would receive it. Given the inevitability of risk and the existence of insurance, liability for road accidents should, if anything, be stricter than that for accidents occuring on private land, where the risk is low and the defendant is probably uninsured. Such considerations undoubtedly led to the legislative reforms in Victoria, Tasmania and elsewhere[102].

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100. (1975) 10 S.A.S.R. 299, 326.
101. *Id.*, 315.
102. See note 5, *supra.*

However, it may be undesirable to isolate the problem of road accidents and provide a solution to it without considering reform of the whole law of compensation for personal injuries.

The social problem of personal injuries stretches beyond the sphere of road accidents. Modern life involves many other forms of risk activity, and however personal injury is caused, the consequences in human terms are severe. It seems unjust that an individual should fail to recover compensation through being unable to prove fault, if inevitability of accidents is a recognized and accepted feature of modern life[103]. If strict liability is desirable in the area of personal injuries, a case might be made out for the development of trespass to the person as a tort of strict liability. But if this has ever been a real possibility, the courts have not made use of it. In fact, the result they have produced has been the exact opposite. In England, the action for trespass to the person in the context of unintentional injuries (if it exists at all) has been assimilated to a large extent to the tort of negligence, and liability is fault-based. In Australia, this assimilation has been less pronounced, but in the area of road accidents (where many would argue that strict liability is most needed) the action for trespass does not differ markedly from an action in negligence. Moreover, it is only in relation to accidents on private land that the possibility of a true strict liability is even open[104].

Now would be a late stage to develop trespass to the person as a tort of strict liability, and it could only be done at the expense of the tort of negligence. However, the courts created the tort of negligence: could they not unmake it?

The disappointing conclusion to the early promise of *Venning* v. *Chin* may indicate the impotence of the common law to undertake any general reform of the law on compensation for personal injuries. The conservatism of many of the judges makes it unlikely that they would at this stage embark on a full-scale reformulation of the principles of tortious liability. In the particular field of traffic accidents, the reality of the situation may be that the courts are inhibited from developing stricter liability by a fear of the increase in insurance premiums that would result. In this way, ironically, the existence of compulsory third party insurance in South Australia[105] inhibits change away from fault-based liability. A sudden imposition of stricter liability for road accidents would in practice be ruinous to insurance companies involved, particularly since such liability would be applied to actions in respect of accidents that have already happened at some date in the past when premiums were assessed and calculated on the assumption that liability is fault-based. A judge-made change in the basis of liability would therefore not be practicable. Changes, if they are to be made in this field, must be effected by legislation. It may be that the courts realize this, and feel able to do no more than play by the existing rules, as the fate of *Venning* v. *Chin* shows. The introduction by the

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103. For criticisms of the traditional system of fault-based tortious liability in the field of personal injuries, and suggestions for reform, see: Atiyah, *Accidents, Compensation and the Law* (1970); Ison, *The Forensic Lottery* (1967); Jolowicz, (1968) C.L.J. 50; Harris, (1974) 37 *M.L.R.* 361; *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia,* Volumes 1 & 2 (1974), Parl. Papers Nos. 100 and 135 (Cth.); National Compensation Bill, 1974; Keeler, 5 *Adelaide L.R.* 121 (1975); Senate Standing Committee *Report on the Clauses of the National Compensation Bill, 1974* (1975), Parl. Paper No. 142 (Cth.).
104. See *William's* v. *Milotin* (1957) 97 C.L.R. 465, and the discussion, *supra.*
105. Motor Vehicles Act, 1959 (S.A.), Part IV.

South Australian legislature of a no-fault compensation scheme for road accidents would be welcome, but it would be a piecemeal reform which would remedy the situation in one area only. Far more desirable would be a full-scale legislative reform of the whole field of personal injuries.

The law of torts may be an imperfect tool for providing compensation for personal injuries. Its efficacy is limited by the legalistic concepts and technicalities which the principles of liability involve. Doubts as to the validity of the existence of the tort system in this area have been responsible for the appearance of radical compensation schemes such as the one operating in New Zealand, and the National Compensation Bill which appeared in Australia in 1974. The proposed Australian scheme did not come into operation, but practitioners and academics alike must face the possibility that the days of tort law in the sphere of personal injuries may be numbered. If this is so, then the day will come when a case like *Venning* v. *Chin* will cease to be of anything more than historical interest as an example of the inability of the common law to solve the problem.