THE APPLICATION OF SYLLOGISM AS A PEDAGOGICAL TOOL IN TEACHING DUTY OF CARE*

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ABSTRACT

IRAC is an acronym for issue-law-application-conclusion, and is the conventional problem-solving format presented to students in first-year legal studies. In first-year legal studies, IRAC is usually taught as a formalistic series of steps with the headings of the acronym. There is much conceptual uncertainty in many of the milestone approaches to the duty of care in negligence, particularly in novel situations, leading to difficulties in students' understanding. This article explores the advantages of teaching legal principles relating to the duty of care in novel situations by a syllogism-based model of IRAC rather than the conventional, formalistic model currently in use, and argues that the use of syllogism as a tool to teach duty of care will greatly assist students to understand and express answers to problems involving the topic.

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I INTRODUCTION

Presenting law students with the conventional, formalistic model of IRAC (issue-law-application-conclusion) can be a useful and effective method of teaching, especially in the students' introductory years. In first-year law studies, IRAC is conventionally taught as a 'formalistic series of steps labelled with an acronym'.[1] There are numerous variants of IRAC, each known by a bespoke acronym.[2] This method can be effective in assisting students to gain a rudimentary understanding of both the method of legal problem-solving and relevant legal doctrines.

The use of problems is commonplace in the legal studies curriculum.[3] Foundation legal studies texts all contain statements that legal problem-solving requires an ability to apply the results of legal research to the facts of the problem, and to apply the law to the facts in a way that demonstrates the true extent of the students' understanding of the law.[4] One commentator laments that educators tell students they must learn to 'think like lawyers', not merely memorise discrete rules of law, but that students are then left largely to their own devices to decipher the meaning of this admonition.[5]

However, the method of IRAC introduced in most Australian foundation legal studies texts is a superficial form of IRAC and is arguably not an accurate reflection of real-world legal problem-solving.[6] Furthermore, we are familiar with the following instruction to law students: 'I want your answer to be in IRAC form'. This instruction does nothing to enhance the quality of a student's answer, because without a more nuanced understanding of the syllogistic underpinnings of IRAC, the student's answer might still comprise a series of disembodied headings, legal principles and facts, and a failure to appreciate the role of policy in the evolution of doctrine. A frequent criticism of the model of 'IRAC and its progeny'[7] conventionally introduced to first-year law students is that it is superficial, masking 'the series of complex, interrelated steps that students need to learn to analyse and write about legal problems in a

[1] 'Legal reasoning' is conventionally delivered to first-year law students 'as a formalistic series of steps labelled with an acronym such as IRAC, HIRAC, MIRAT or CREAC': Nick James, *Good Practice Guide (Bachelor of Laws): Thinking Skills (Threshold Learning Outcome 3)* (Australian Learning and Teaching Council, 2011) 11–12.
[2] Eg, HIRAC, MIRAT, CREAC: see ibid.
[3] One commentator explicitly stated: 'Why are so many questions on a law course problem based? That's what lawyers and judges do. They problem solve … It is vital that you start to develop the special skills required in problem solving as early as possible': Chris Turner and Jo Boylan-Kemp, *Unlocking Legal Learning* (Unlocking the Law Series, Routledge, 3rd ed, 2012) 133.
[4] Eg, Nickolas James, Rachael Field and Jackson Walkden-Brown, *The New Lawyer: Foundations of Law* (Wiley, 1st ed, 2018) 272.
[5] Kurt Saunders and Linda Levine, 'Learning to Think Like a Lawyer' (1994) 29(1) *University of San Francisco Law Review* 121.
[6] This superficial treatment is evident in the brief entry in most texts, taking up just a page or so. See, eg, Robin Creyke et al, *Laying Down the Law* (LexisNexis Butterworths, 10th ed, 2018) 462.
[7] Law lecturers will likely be familiar with these 'progeny', eg, FILAC (facts-issue-law-application-conclusion) and MIRAT (material facts-issue-rule-application-tentative conclusion).

sophisticated manner'.[8] Professor James Boland argues that 'the IRAC model, while helpful in providing a superficial template for legal analysis, is simply not enough'.[9] He goes on to say:

> Legal analysis and argument must be grounded in the legal syllogism, and IRAC placed within the syllogistic context. If students understand the syllogism, then all possible forms of IRAC can be placed within that context, so that the syllogism becomes a roadmap to guide the students through the analytical process.[10]

This is acknowledged by the authors of the Threshold Learning Outcome 3,[11] who argue that the strict formal technique of IRAC does not produce a correct or even a realistic answer as it takes into account only the relevant legal rules but not the various policies underlying those rules.[12] In a critique of the perceived deficiencies of the superficial IRAC model, Boland argues that legal reasoning should be grounded in an understanding of the syllogism in order to guide analysis.[13] Schnee likewise envisages a model of IRAC that 'unpack[s] … and explain[s] … to students the deductive process on which IRAC is based instead of merely labelling it', an approach that has the advantage of emphasising 'the active, evolving nature of the enquiry'.[14]

This paper presents a syllogistic model of IRAC that, we argue, represents a more accurate model of legal reasoning. The model adopted as our proposed vehicle will be a bespoke variant of the IRAC model envisaged by Boland and Schnee, one grounded in the legal syllogism, customised to illustrate the application of the principles of duty of care. There is much academic authority supporting the contention that every good legal argument is in the form of syllogism.[15] In turn, IRAC is regarded as the legal variant of the syllogism.[16] Syllogistic logic accordingly should underpin legal reasoning, the corollary being that it is inadequate to direct a student to 'use IRAC' and that the formalistic model of IRAC is inadequate to teach tort doctrine. We will argue that there are two potential benefits of using this model: first, this model has the potential to improve the ability of students to express answers to legal problems in their correct doctrinal and syllogistic form; and second, the use of this model may also assist students in the mastery of doctrine itself.

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[8] See Laura P Graham, 'Why-Rac? Revisiting the Traditional Paradigm for Writing about Legal Analysis' (2015) 63 *Kansas Law Review* 681, 682.
[9] James Boland, 'Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club' (2006) 18(3) *St Thomas Law Review* 711, 719.
[10] Ibid.
[11] James (n 1) 11.
[12] Ibid 11–12.
[13] Ibid.
[14] Anita Schnee, 'Logical Reasoning "Obviously"' (1997) 3 *Legal Writing: The Journal of the Legal Writing Institute* 105, 121.
[15] Explicitly: 'Every good legal argument is cast in the form of a syllogism': James A Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis, 2nd ed, 2007) 8. Very similarly: Boland (n 9).
[16] It suffices to note that IRAC is considered to be the legal variant of syllogism in which the syllogistic major premise corresponds to the 'rule', the minor premise to the 'application', and the 'conclusion' as being the logical consequence of applying the law (or rule) to the circumstances of the particular case: see, eg, Bradley G Clary and Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* (West Academic Publishing, 3rd ed, 2010) 84; Nadia E Nedzel, *Legal Reasoning, Research, and Writing for International Graduate Students* (Wolters Kluwer, 3rd ed, 2012) 70.

The critics of the superficial form of IRAC do not distinguish between discipline areas. As such, this paper makes an original contribution to the relevant scholarly literature in specifically considering application of this bespoke syllogistic model of IRAC to the teaching of the legal principles associated with establishing a duty of care in negligence in novel duty situations. This is an apposite area of law to consider for the purposes of demonstrating the potential benefits of this model. This is because the instability and unpredictability of the rule (or the syllogistic major premise) is almost a *sine qua non* of negligence. As such, the law of negligence arguably attracts an even more acute need to overcome the deficiencies of the formalistic IRAC model.

At a general level, the concept of a 'meta-syllogism', comprising discrete syllogisms, is particularly apt for the presentation of the law of negligence since its doctrinal content, presented as a series of elements, coheres well with the concept of a meta-syllogism — and of IRAC.[17] In turn, the doctrinal content of each mini-syllogism or mini-IRAC, of which 'duty of care' is one, is particularly well understood when presented within that syllogistic framework.

At a more specific level, this paper also argues that the shades of instability and vagueness evident in the various milestone approaches to duty of care in novel situations, including shifts in policy and how these are then expressed within the doctrine, can be best explained to first-year law students when presented as a syllogistic major premise.[18] It is argued, likewise, that the syllogistic minor premise provides a readily understood vehicle for students to understand how these various milestone approaches are applied to the facts at hand.[19]

The discussion takes place in two parts: Part II presents a syllogistic model of IRAC — a bespoke variant of the IRAC model envisaged by Boland and Schnee — that more accurately reflects real-world legal problem-solving than the superficial model of IRAC. Part III considers use of this model in relation to the teaching of the legal principles relating to establishing a duty of care in negligence in novel duty situations. It will be argued that use of the syllogistic model of IRAC presented in Part II has the potential to improve the ability of students to express answers to legal problems in their correct doctrinal and syllogistic form. It will further be argued that use of this model may also assist students in the mastery of doctrine itself, which is of particular importance in relation to the area of law considered, due to the conceptual uncertainty inherent in many of the relevant legal principles.[20]

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[17] Boland (n 9) 724.

[18] Professor James Boland, an apologist for the use of syllogism-based IRAC, argues, and we concur, that 'teaching inductive reasoning is most easily presented when placed in the context of the major premise of the syllogism': ibid 723.

[19] Boland, again, states that 'the minor premise is the best context for teaching application of the law to facts': ibid 724.

[20] We suggest that if students recognise the syllogistic form of the various milestone approaches to duty of care, they will better understand the doctrine itself and vice versa. The path towards understanding the syllogistic form of doctrine is parallel to understanding the doctrine itself.

II A SYLLOGISTIC MODEL OF IRAC

The role of syllogism in legal reasoning has long been debated. John Dewey, for example, denounced syllogism as emblematic of inflexible legal thought and argued that law is not a closed system but must respond to social change.[21] Professor Julius Stone lamented that the theory of syllogism failed to recognise that the real problem of appellate judgement lies with judicial performance in the leeways of choice and that the problem should not be 'forestalled by postulates about formal justice'.[22] Oliver Wendell Holmes famously stated that 'the life of the law has not been logic: it has been experience'.[23]

Professor Sir Neil McCormick acknowledges that syllogism would not 'wholly dispose of recourse to personal feelings' but argues that the merit of such an approach is that it would both 'postpone and narrow down appeals to intuition'.[24] American judge and commentator Ruggero Aldisert, also an apologist for syllogism, acknowledges that 'we cannot expect judicial minds to be untainted by their first impressions of a case' but nevertheless propounds that 'what we can demand is that judges employ logically sound techniques of intellectual inquiry when making value judgments and then explain both their premises and their conclusions to us in clear language evidencing impeccable logical form'.[25] In a direct riposte to Holmes, Justice Brennan of the US Supreme Court states in the foreword to Aldisert's *Logic for Lawyers* that the author does not challenge Oliver Wendell Holmes's 'classic statement that "the life of the law has not been logic"' but in the same passage states that Aldisert offers 'telling arguments that that legal reasoning or legal logic may play an equal or even more significant role in the life of the law'.[26]

Aldisert furnishes a particularly cogent explanation of the role of 'logic' in legal reasoning: he suggests that the heart of the common law tradition is the adjudication of specific cases and 'case by case evaluation', testing the ground each step so one needs to re-evaluate each rule in subsequent cases to determine if the rule produces a 'fair result' and if the rule operates unfairly to modify it.[27] Aldisert explains further that logical reasoning lies at the heart of the common law tradition, and, driven by the reasoning process, the common law is thereby able to maintain unity, yet flexibility to develop legal precepts.[28]

Aldisert describes common law reasoning as having an 'ebb and flow' like a tide, being inductive and deductive;[29] Schnee stated that '[i]nduction creates and evolves rules; deduction

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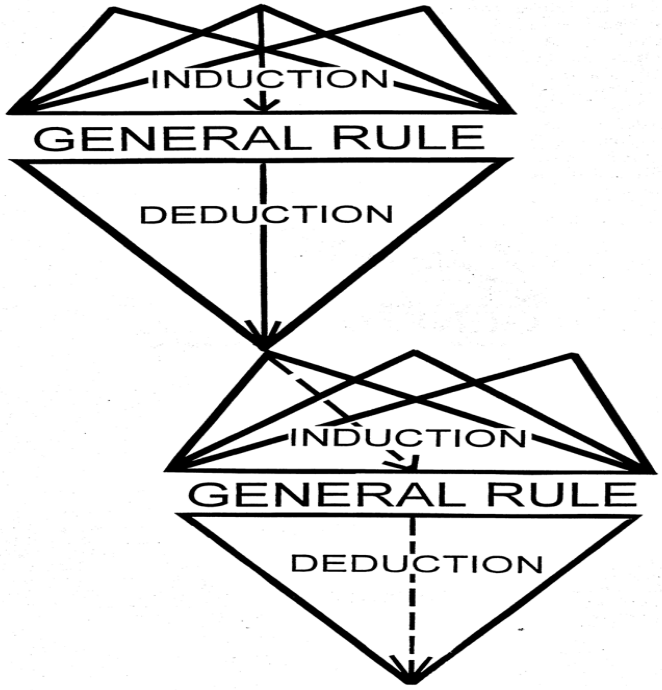
[21] John Dewey, 'Logical Method and Law' (1924) 10 *Cornell Law Review* 17, 21.
[22] Julius Stone, *Precedent and Law* (Butterworths, 1985) 4–5.
[23] Oliver Wendell Holmes (ed Mark DeWolfe Howe), *The Common Law* (Belknap Press, 1963) 5.
[24] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005).
[25] Ruggero J Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* (National Institute for Trial Advocacy, 3rd ed, 1997) 21.
[26] Ibid xix.
[27] Ibid 21.
[28] Ibid 8.
[29] Ibid 10.

applies them'.[30] The rule (major premise) must contain a sufficient explanation of the premises so the reader would know why the premises are true.[31] This should include reference to the holdings, the material or operative facts of the case law[32] and the court's reasoning or rationale.[33] Nedzel further explains: 'This reference to the factual context [in the major premise, or rule] is later developed into the analogical thinking that underlines the application portion of common law reasoning.'[34]

With duty of care concepts so strongly nuanced towards the role of policy in the evolution of doctrine, Aldisert's observations are particularly appropriate. A particularly eloquent explanation of the application and evolution of case law within common law jurisprudence, apt to show the alignment of the role of policy in the development of tort doctrine, is provided by Schnee, who observes that 'in the ever-shifting process that is judicial jurisprudence, both induction and deduction work together'.[35] In the common law process, the means by which this occurs, 'with due regard for stability, predictability and the avoidance of arbitrariness', is that 'deduction works until it doesn't anymore … [i]nduction's expansiveness is then called in to remedy rigidity'. This process she lucidly diagrammatises, illustrating the movement between induction and deduction in common law reasoning (see Diagram 1).[36]

Diagram 1: Schnee's depiction of induction and deduction in legal reasoning[37]



[30] Schnee (n 14).
[31] Gardner (n 15) 28.
[32] Nedzel (n 16) 76.
[33] Ibid 72.
[34] Ibid.
[35] Schnee (n 14) 117.
[36] Ibid 118.
[37] Ibid.

In accordance with Schnee's model of the process of legal reasoning, the 'end point' of each inductive–deductive process is the creation of 'one more case for future induction'.[38]

Within Schnee's model, the question of whether a principle in a previous case should apply to the present case becomes part of the process of argument producing the relevant law. Her diagram, showing the evolution and application of principle in the judicial process, lucidly gives visual expression to Cardozo's theory of *stare decisis*, in which he propounds that where there is a gap in the law, 'the preferred gap filler' in addressing novel questions of law is 'public policy, the good of the collective body', 'the social gain that is wrought by adherence to the standards of right conduct'.[39] The determination in that case then becomes the end point in that cycle of induction and deduction.

The reasoning in *Grant v Australian Knitting Mills* ('*Grant*')[40] and its subsequent treatment illustrate this process clearly. *Grant* actually has no particular jurisprudential significance but is selected as a case study in foundation legal texts for the lucidity of demonstrating how the court reasons if a particular principle in a previous case should apply.[41] Furthermore, *Grant* is a convenient vehicle for discussion because the case on which it focuses is none other than *Donoghue v Stevenson* ('*Donoghue*').[42]

The plaintiff in *Grant* contracted dermatitis from coming into contact with a garment contaminated with sulphides. The relevant issue, problematised, would have been: *Would the application of the principles in* Donoghue v Stevenson *apply such that the defendant would owe a duty of care to the plaintiff?* The question was answered 'yes', thereby extending the scope of the *Donoghue* duty of care to a manufacturer of a contaminated garment. Following *Grant*, the conclusion that the principles in *Donoghue* apply to a manufacturer of a garment essentially became the end point in *that* process of induction and deduction, to be applied subsequently.[43]

In a passage that will doubtless strike a chord with tort lecturers who regard policy as the driver of doctrinal change, Schnee further states: 'Induction is needed when there is no rule, or when there is a choice between rules, or when the neat categories on which deduction relies have become eroded, or when social circumstances change.'[44] The proposition that the process of the application and evolution of principle, two discrete processes, find expression in tort law is not difficult to illustrate. The following section of this article explores the various rule

[38] Ibid 118.
[39] Aldisert (n 25) 67, in which the author paraphrases and adopts those propositions advanced in Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921).
[40] [1936] AC 85.
[41] Eg, James Holland and Julian Webb, *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning* (Oxford University Press, 7th ed, 2010) 183.
[42] [1932] AC 562 ('*Donoghue*').
[43] Eg, *Suosaari v Steinhardt* [1989] 2 Qd R 477.
[44] Schnee (n 14) 117.

structures adopted in syllogistic reasoning, with a dedicated treatment of their harmony with the approaches to the duty of care in novel duty situations.

III USE OF THE SYLLOGISTIC MODEL OF IRAC IN TEACHING THE LEGAL PRINCIPLES ASSOCIATED WITH ESTABLISHING A DUTY OF CARE IN NOVEL DUTY SITUATIONS

This section considers use of this model in relation to the teaching of the legal principles relating to establishing a duty of care in negligence in novel duty situations. It will be argued that use of the syllogistic model of IRAC presented in Part II has the potential to improve the ability of students to express answers to legal problems in their correct doctrinal and syllogistic form. It will further be argued that use of this model may also assist students in the mastery of doctrine itself, which is of particular importance in relation to the area of law considered, due to the conceptual uncertainty inherent in many of the relevant legal principles.[45]

Of all the doctrinal modules taught in first year, the law of negligence is arguably the most appropriate to demonstrate the analytical deficiencies of the conventional, formalistic model of IRAC presented to first-year law students. Boland argues that negligence can be expressed as a 'meta-syllogism' and each 'element' of negligence[46] can be set out as a mini-syllogism within the negligence meta-syllogism.[47] These are the relevant 'tests' in negligence, tests being rule structures that comprise conditions and identified elements that each need to be satisfied.[48] Similarly, a 'test' may be described as a 'formulation of the law expressed as a set of discrete conditions'.[49] Importantly, this coheres well with the manner in which the various 'elements' in the law of negligence are taught in Australian law schools.

Within this general meta-syllogistic framework, students are taught to apply a process of factor-analysis in relation to each element as it is considered in the curriculum. 'Factor-analysis' has been described as a 'flexible rule structure' that emerges from the analysis of the factors considered important by the court in a particular case.[50] Gardner, explaining factor-analysis, states:

> One can almost always extract a factor-analysis from judicial opinion … the things a court discusses in its opinion, whatever they might be, are by definition the aspects of the case that the court thinks are

[45] As we suggested in n 20, if students recognise the syllogistic form of the various milestone approaches to duty of care, they will better understand the doctrine itself and vice versa. The path towards understanding the syllogistic form of doctrine is parallel to understanding the doctrine itself. This suggestion is borne steadily in mind.
[46] Namely, duty of care, breach of duty, causation, remoteness and damage.
[47] Boland (n 9) 724. These are the relevant 'tests' in negligence, tests being rule structures that comprise conditions and identified elements that each need to be satisfied: see, eg, Linda H Edwards, *Legal Writing: Process, Analysis, and Organization* (Wolters Kluwer, 6th ed, 2014) 17. Similarly, a 'test' may be described as a 'formulation of the law expressed as a set of discrete conditions': see Gardner (n 15) 43.
[48] See, eg, Edwards (n 47).
[49] See Gardner (n 15) 43.
[50] Ibid 47.

> important. It follows that you can always generate some sort of factor-analysis simply by listing the things that the court chose to discuss.[51]

In factor-analysis, 'the decision maker has the discretion to gauge the relative importance of each factor'.[52] It is in considering the factors that influence judicial decision-making in relation to each element that law students are presented with the various reasons of the court, with these reasons ideally providing rational justification for the decision ultimately reached. It is this process by which law students are exposed to the various factors considered by the courts in novel duty of care situations.

A *Teaching the Duty of Care in Novel Duty Situations: The Current Jurisprudence*

Deane J in *Jaensch v Coffey* ('*Jaensch*')[53] explained that the 'elements' of negligence are a duty of care, breach of that duty, and the suffering of injury that is reasonably foreseeable. Numerous Australian commentators have adopted Deane J's treatment in *Jaensch*.[54] Deane J's deconstruction of negligence into 'elements' thus is explicitly at harmony with the idea of a syllogistic 'test' with discrete conditions or, in other words, of a meta-syllogism comprising discrete mini-syllogisms.[55]

Gardner cautions that there is 'far more play in the joints of the law than the fiction of legal determinacy would have us believe'.[56] His view is fundamentally consistent with tort commentators who, notwithstanding the explicit attempts to deconstruct negligence into elements, describe duty of care and remoteness of damage as 'artificial concepts'.[57] Even if the statement is accurate, it is of little assistance to a neophyte tort student for whom the jurisprudential indeterminacy of the elements of negligence is not a useful consideration in a conventional problem exercise.

The presentation of negligence as a meta-syllogism comprising three mini-syllogisms, or mini-IRACs, is doctrinally aligned with the *Jaensch* framework. Furthermore, and just as relevantly from a pedagogical viewpoint, this ensures that the examiner can follow the analytic path that culminates in a meta-syllogistic 'conclusion'. Also, by performing the analysis within the parameters of its strict 'elements', the risk of conflating the content of one element with

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[51] Ibid.
[52] Edwards (n 47) 22.
[53] *Jaensch v Coffey* (1984) 155 CLR 549 ('*Jaensch*').
[54] See Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 8th ed, 2017) 99. This is a familiar framework for negligence presented in Australian torts texts: see, eg, Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (Lawbook, 10th ed, 2011) 121.
[55] Boland (n 9) 725.
[56] Gardner (n 15) 25. Sappideen and Vines similarly describe duty of care and remoteness of damage as being 'artificial' concepts: see Sappideen and Vines (n 54). Likewise, Covell, Lupton and Forder have stated that '"elements" in negligence are better described as "*guidelines*" but the choice to describe them as "*elements*" is based on the notion that a failure to satisfy any one of them will be fatal to the plaintiff's case': Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies* (LexisNexis Butterworths, 5th ed, 2012) 15 (emphasis added).
[57] Sappideen and Vines (n 54) 222.

another, or omitting an element altogether, is minimised. Using the important concept of 'foreseeability' to illustrate the point, Sappideen and Vines note:

> Foreseeability is said to be something that operates at a different level of abstraction in each state of the elements of the tort of negligence. We see it again at the breach stage and at the stage of causation of damage in the remoteness element.[58]

Thus, a tort student in addressing a relevant problem question is compelled first to identify the relevant element that is in issue. By analysing, say, foreseeability within the parameters of that element and not any other, the student is able to keep their eye on the ball and not misdirect themselves by investigating the concept of foreseeability as a component of some other element.

Adopting the characterisation of negligence as a syllogistic 'test', with 'duty of care' being the first 'element' of that test, attention now turns to the treatment of duty of care as an element *of* negligence. In so doing, focus is directed on the internal organisation of the 'duty of care' element in relation to novel duty situations.[59]

In Part II, the evolution of the principles relating to the duty of care in *Donoghue* was shown to demonstrate the process of the evolution of principle within judicial jurisprudence. Fast-forwarding to the present, the current approach taught to law students in the Australian curriculum is the one outlined by the High Court in *Sullivan v Moody*.[60] When viewed in their historical context, the same process of the evolution of principle is evident, albeit on a more sophisticated tier.

The central feature of this approach is the consideration of whether there was a duty of care owed by the defendant to someone who was in a particular, identifiable relationship with them.[61] The *Sullivan v Moody* approach is multi-factored, requiring that a range of factors be considered in order to establish a duty of care in novel situations. In the case of *Caltex Refineries (Qld) Pty Ltd v Stavar*,[62] Allsop J neatly summarised the process of imputing a duty using this approach in novel situations, stating:

> [T]he 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.[63]

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[58] Carolyn Sappideen, Prue Vines and Penelope Watson, *Torts: Commentary and Materials* (Lawbook, 12th ed, 2016) 222.
[59] Establishing a duty of care in established duty of care situations — eg, a duty from one road user to another, the duty of occupiers to invitees, the duty of doctors to their patients, etc — is a much less analytically difficult task than establishing a duty of care in novel duty situations.
[60] (2001) 207 CLR 562 ('*Sullivan v Moody*').
[61] Sappideen, Vines and Watson (n 58) 207.
[62] 2009) 75 NSWLR 649, 675 ('*Caltex v Stavar*').
[63] Ibid.

Allsop J continued by outlining the list of non-exhaustive and non-compulsory factors to be considered when applying this approach:

> These salient features include:
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> (a) the foreseeability of harm;
> (b) the nature of the harm alleged;
> (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
> (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
> (e) the degree of reliance by the plaintiff upon the defendant;
> (f) any assumption of responsibility by the defendant;
> (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
> (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
> (i) the nature of the activity undertaken by the defendant;
> (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
> (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
> (l) any potential indeterminacy of liability;
> (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
> (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
> (o) the existence of conflicting duties arising from other principles of law or statute;
> (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
> (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.[64]

The meaning of the terms identified by Allsop J each has a historical context. The factors (as he himself called them) are thereby given a specific contextual content. In turn, the examination of the context in which these factors arise fits well with the argument that with each relevant occasion on which the question of a 'duty of care' is substantially explored, the court has taken the opportunity to augment the previous doctrine on the adjudication of specific cases. Consistent with the doctrine of *stare decisis* and 'case by case evaluation', the subsequent court tests the ground each step to re-evaluate each rule in the earlier case(s) to determine if the earlier rule produces a 'fair result' and if the rule operates unfairly to modify it.[65] The previous factors are then modified to address the situation before the court. Ultimately the final decision in that process of induction and deduction is pronounced, comprising the court's reasoning concerning the veracity of the factors that hitherto had been considered and including its commentary on any modification of those factors, or the recognition of fresh ones.

Expanding on these concepts, the consideration of 'reasonable foreseeability' (factor (a) in the above list) incorporates the test of reasonable foreseeability from *Donoghue*;[66] the

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[64] Ibid.
[65] Aldisert (n 25).
[66] This test was further developed in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound No. 1)* [1961] AC 388; *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound No. 2)* [1967] AC 617; and *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

considerations of control, vulnerability, reliance, assumption of responsibility, whether the defendant had knowledge that their act would harm the plaintiff, the extent of the imposition on autonomy, and the existence of inconsistent duties or rights (factors (c), (d), (e), (f), (k), (n) and (o) in the above list) incorporate those factors identified above emanating from the 'salient features approach';[67] the consideration of the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant (factor (g) in the above list) incorporates Lord Atkin's concept of proximity from *Donoghue* (further considered by Deane J in the development of his 'proximity approach' advanced in *Jaensch*);[68] and the existence of a category of relationship between the plaintiff and the defendant (factor (h) in the above list) incorporates those factors from the 'incremental approach' advanced by Brennan J in a number of cases in the 1980s and 1990s.[69]

In truth, the incremental approach gives lie to Cardozo's theory of *stare decisis*[70] to which Schnee gave expression in her diagram (see Diagram 1), by which she explained that by a process of the evolution and application of principle, induction was called in to remedy rigidity by the creation of 'one more case' for future induction.[71] Finally, the remaining factors identified by Allsop J are matters not associated with any particular approach to the duty of care in novel duty situations, but have been considered relevant in previous cases in some form or another.[72]

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[67] See *Hill v Van Erp* (1997) 188 CLR 159 (Gummow J) ('*Hill v Van Erp*'); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (Gummow and Hayne JJ) ('*Graham Barclay Oysters*'); *Perre v Apand Pty Ltd* (1999) 198 CLR 180 ('*Perre v Apand*'). This approach requires the court to focus on the relationship between the parties and to make a determination regarding whether that relationship was sufficiently close to justify finding that the defendant owed the plaintiff a duty, with a particular focus on the 'salient features' of that relationship: see *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 (Stephen J). See also Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 4th ed, 2016) 199. This approach requires the court to engage in 'a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle'. Some of the relevant salient features are universal, whilst others apply only to particular categories of case: see Norman Katter, '"Who Then in Law Is My Neighbour?": Reverting to First Principles in the High Court of Australia' (2004) 12(2) *Tort Law Review* 85, 86.

[68] Deane J stated that his version of proximity was 'directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by the other'. This involved 'both an evaluation of the closeness of the relationship and a judgment of the legal consequences of that evaluation'. Deane J's proximity approach involves asking whether in any particular case there is sufficient physical, circumstantial, or causal proximity between the parties. Whether one of these particular considerations of proximity would be relevant in a particular case, and if so, how significant it would be to the outcome of the case, would differ from case to case, involving 'value judgments on matters of policy and degree': *Jaensch* (n 53) 580, 584, 585.

[69] This approach disregards the search for a general principle at the heart of the duty of care question, instead taking the view that 'the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by massive extension of a prima facie duty of care': see, eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[70] Cardozo (n 39).

[71] Schnee (n 14) 118.

[72] See, eg, *Harriton v Stephens* (2006) 226 CLR 52 (considering the relevance of the nature of the harm alleged on the nature of the duty owed (a)); *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (2001) 207 CLR 562 (any potential indeterminacy of liability (l)); *Graham Barclay Oysters* (n 67) (consistency with the terms, scope and purpose of any statute relevant to the existence of a duty (p)); *Sullivan v Moody* (n 60) (the desirability of coherence in the common law (q)).

B *A Pedagogical Analysis of the Use of the Proposed Syllogism-Based Model*

The current approach to duty of care in novel duty situations from *Sullivan v Moody* reprises the methodology of fundamental factor-analysis outlined in Part II of this article. This methodology provides the decision-maker with the discretion to gauge the relative importance of each factor.[73] The coherence with fundamental syllogistic reasoning is apparent: the vessel in which 'induction' (rule creation) takes place, is the syllogistic major premise or 'rule' in the IRAC framework. 'Deduction', the process of applying the rule thus synthesised to the facts of the case, takes place in the minor premise or 'application'.[74]

We recount that the major premise is the vessel in which the applicable rule is synthesised, within which must be inserted not just the relevant holding and the 'operative facts' that ground that holding, but also the judicial reasoning that underpins the finding.[75] Eschewing the formalistic superficial model of IRAC,[76] in our syllogism-based model of IRAC the rule corresponds to the syllogistic major premise,[77] and therefore is the vessel that contains the holdings in case law, together with all the operative and material facts and reasons that ground those holdings.

Presented to law students in this way, the syllogism-based model of IRAC is arguably an effective model to use when teaching the legal principles outlined in the previous section.[78] Understanding and adhering to the High Court's directive in *Sullivan v Moody* that the basis for the imputation of liability within the salient features approach was not based on *policy* but on a search for *principle* presents implicit difficulties that render the major premise particularly suitable as the vessel for the search for that principle. Presented within the major premise of a 'concrete' syllogism, the search for principle then becomes a search within case law for the facts and underpinnings for the reasons in case law.

Having then synthesised that rule from the facts, reasons and holdings of case law, the next phase in the syllogistic reasoning cycle is the application of that principle to the facts of the case — the process of deduction. Reprising what he considers to be the benefits of presenting principle within the context of the syllogistic major premise, Boland says of the process of

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[73] Edwards (n 47) 18.
[74] See, eg, Clary and Lysaght (n 16); Nedzel (n 16).
[75] Gardner (n 15) 28; Nedzel (n 16) 76.
[76] Recounting the criticisms of the superficial model of IRAC discussed above in Part I of this article: Graham (n 8); Boland (n 9).
[77] Clary and Lysaght (n 16); Nedzel (n 16).
[78] Boland (n 9) 723. Boland discusses his experiences in using this method to teach first-year students, stating: 'In first year legal writing classes, when we teach students to synthesize a number of cases to form a rule based on the issue presented, we are asking them to do a form of inductive generalization. Presented as a theoretical concept, it is very difficult to grasp. On the other hand, presented as a search for the major premise of a concrete syllogism, inductive generalisation has meaning. Students then understand that they are looking at prior court decisions based on a narrow set of facts, and from these decisions, inducing a rule, their major premise': at 723.

application: 'In the same way, the minor premise is the best context for teaching application of law to facts.'[79]

It is suggested that the final stage of the *Sullivan v Moody* approach, the judicial evaluation of the factors for and against the imposition of a duty of care in the particular case under consideration,[80] is most aptly performed within the minor premise of a concrete syllogism. The understanding that the process of 'evaluation' is a discrete 'stage' gives rise to the need to treat it as such within the structure of syllogism, and as a distinctly different process to the search for principle, the latter undertaken within the vessel of the major premise.[81] The conclusion thereby derived is congruent with the figurative end point in Schnee's diagram in which she depicts the evolution and application of principle (see Diagram 1).[82]

We argue that a specific potential benefit of using this approach to teaching relates to the teaching of legal doctrines that are conceptually uncertain, or in relation to which there may be a number of relevant underlying policy considerations. The principles associated with the area of law considered in this section provide a good example. It is of crucial importance that the premises used in a syllogism be of a sufficient level of conceptual clarity to be used effectively in a syllogism, and for students to be able to accurately identify and apply these principles to novel fact situations. Where, for example, one or more of the premises in a syllogism is conceptually ambiguous, the conclusion reached using such a premise or such premises will depend upon which interpretation of the ambiguous premise the reasoner takes. As more than one interpretation can be taken of the conceptually ambiguous premise, more than one conclusion can be reached using this form of reasoning, despite the use of the same syllogistic premises.

The following is an example of a syllogism in a non-legal context incorporating ambiguous premises:

> Major premise: Mark seeks meaning
> Minor premise: The seeking of meaning is a sign of intelligence
> Conclusion: Therefore, Mark is intelligent

As a matter of formal logic, the conclusion that Mark is intelligent seems to be correct. However, the concepts of 'meaning' and 'intelligence' are both ambiguous; as such, the conclusion that 'therefore, Mark is intelligent', whilst potentially being correct as a matter of

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[79] Ibid 724.
[80] Stickley (n 67).
[81] The suitability of performing the process of judicial evaluation as a distinct 'stage' is well explained by Boland, who states: 'In the context of the minor premise, cases with facts similar to the facts of the instant case must then lead to the same conclusion (or holding). By using the syllogistic method, it becomes much less likely that students will confuse use of case law to find and articulate a major premise with use of case law analogically to support or attack the minor premise. Students then know why they are using a case and where the case fits within their syllogistic argument': Boland (n 9) 724.
[82] Given the limited length of this article, it is beyond the scope of this work to provide particular examples of the syllogisms that may be employed using this method. This will be the focus of future work.

logic, is entirely dependent upon the meanings ascribed to these concepts by the reasoned, which may differ from person to person.

With this in mind, it is important to draw to students' attention that there is conceptual uncertainty in many of the relevant legal principles concerned with establishing a duty of care in novel duty situations. For example, the concept of reasonable foreseeability at the heart of Lord Atkin's 'neighbour principle' in *Donoghue* has caused much consternation to courts in the years since this important decision, as have the concepts of 'closeness', 'directness', 'proximity' and 'policy'.[83] Incorporating such open language, Lord Atkin's approach from *Donoghue* has often been argued to provide insufficient guidance to judges, this in turn leading to the inconsistent application of principle and a reduction in certainty and predictability in the law.[84]

The concept of proximity advanced by Lord Atkin in *Donoghue* and further considered by Deane J in *Jaensch* has also caused consternation to High Court judges and lawyers alike in its application to new factual circumstances. Whilst it is arguable that Deane J's proximity approach may not necessarily be representative of Lord Atkin's conception of proximity, it is not entirely clear whether discussion of proximity in the physical, temporal or relational sense in the Australian context will be complete without reference to Deane J's discussion of these terms in *Jaensch.* This is a further potential source of conceptual uncertainty for law students to grapple with, given that Deane J's conception of proximity has been described as 'meaningless and unworkable',[85] and a concept that is not fully articulated, which operates as a vehicle to simply provide conclusions rather than a clear process of reasoning.[86] For this reason, it has been argued that Deane J's concept of proximity is 'a hollow concept providing no guidance beyond merely indicating that something more was required other than reasonable foreseeability to raise a duty of care'.[87] A similar criticism has also been levelled at Brennan

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[83] Importantly, this model does not explicitly engage with the scholarly literature concerning standards, rules and social norms: see, eg, Eric A Posner, 'Standards, Rules, and Social Norms' (1997) 21(1) *Harvard Journal of Law & Public Policy* 101; Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557; Louis Kaplow, 'A Model of the Optimal Complexity of Legal Rules' (1995) 11(1) *Journal of Law, Economics & Organization* 150.

[84] See Jessica Randell, 'Duty of Care: Haunting Past, Uncertain Future' (2014) 2(2) *North East Law Review* 75, 77. It has been argued that this approach is 'incapable of sound analysis and possibly productive of injustice': see WW Buckland, 'The Duty to Take Care' (1935) 51(4) *Law Quarterly Review* 637, cited in Richard Kidner, 'Resiling from the Anns Principle: The Variable Nature of Proximity in Negligence' (1987) 7(3) *Legal Studies* 319, 320. Some have even argued that these factors are so conceptually wide as to be essentially meaningless: see, eg, Kidner (n 84) 319. For this reason, Smith and Burns stated in 1983 that 'the only service [*Donoghue* (n 42)] can now perform is to remain as a warning to the judges of the dangers of relying on judicial platitudes such as Lord Atkin's "neighbour principle" rather than on careful analysis and sound reasoning': JC Smith and P Burns, 'Donoghue v Stevenson: The Not So Golden Anniversary' (1983) 46(2) *Modern Law Review* 147, cited in Kidner (n 84) 322.

[85] See, eg, *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] 1 QB 350, 395 (Robert Goff LJ); *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 24, PC, cited in Martin Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9(1) *Legal Studies* 67, 68.

[86] See Katter (n 67) 89.

[87] Ibid. It was because this approach was considered to be insufficiently fixed in meaning to allow it to be used to

J's incremental approach, namely that this approach necessitates the exercise of such a broad discretion that it provides no greater certainty or predictability in determining the duty of care in novel duty situations than any other approach.[88]

If the first-year law student is confused by this point, things unfortunately do not get much better for them. The current approach from *Sullivan v Moody* incorporates each of these conceptually ambiguous concepts, thereby drawing in a wide range of potential ambiguities. Furthermore, the *Sullivan v Moody* approach has been criticised on the basis that 'it has not provided a methodology but is simply a list of potentially relevant "legal policy" factors whose priority and significance in any given circumstance depends on a value judgment'.[89] For example, Katter argues:

> No over-arching principles guide the application and importance of these salient features. The weighing of such factors involves an ad hoc response and such an approach provides no guidance or predictability as to the likely outcome of the duty issue in novel cases. Conceptually, these salient features belong to the evaluation of considerations of policy and are not anchored to legal principle. They derive from public policy and justice concerns.[90]

As such, it has been argued that the salient features approach 'is not an approach at all but merely an unfettered discretion to prioritise factors which subjectively appeal to the court as relevant in the case at hand'.[91] Thus, the salient features approach has arguably done nothing to improve the certainty and predictability of the law.[92]

In response to this concern, we argue that a carefully applied syllogistic model offers a potential solution to students who may otherwise experience issues with application of the superficial IRAC model to consideration of the duty of care in novel duty situations.[93] What this means in practice is that it is not sufficient for law students to simply consider the current approach outlined in *Sullivan v Moody* divorced from the previous cases whose principles find expression in this approach in one form or another. That is to say, when students are considering the

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provide clear guidance in subsequent cases that it was ultimately abandoned by the High Court in *Sullivan v Moody* (n 60): see, eg, Des Butler, 'Proximity as a Determinant of Duty: The Nervous Shock Litmus Test' (1995) 21(2) *Monash University Law Review* 159, 186–7; Des Butler, 'Managing Liability for Bystander Psychiatric Injury in a Post-Hill v Van Erp Environment' (1997) 13 *Queensland University of Technology Law Journal* 152, 171; Peter Handford, *Mullany & Handford's Tort Liability for Psychiatric Damage* (Thomson Reuters, 2nd ed, 2006) 117–18.

[88] See Stickley (n 67) 198.

[89] See Katter (n 67) 88.

[90] Ibid.

[91] Ibid.

[92] See Carl F Stychin, 'The Vulnerable Subject of Negligence Law' (2012) 8(3) *International Journal of Law in Context* 337, 344.

[93] Importantly, this proposed model also may serve lawyers in the age of artificial intelligence. In particular, whilst artificial intelligence platforms are increasingly able to perform many legal tasks not previously thought possible, such platforms currently do not yield predictable results, particularly in relation to the solving of complex legal problems utilising algorithms that process natural language: see Benjamin Alarie, Anthony Niblett and Albert H Yoon, 'How Artificial Intelligence Will Affect the Practice of Law' (2018) 68(1) *University of Toronto Law Journal* 106, 118. See also Eric Allen Engle, 'An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk to Model the Alien Tort Claims Act and Torture Victim Protection Act' (2004) 11(1) *Richmond Journal of Law and Technology* 53.

'elements' that form part of the applicable 'rule' as part of the syllogistic major premise, this 'rule' must be considered by reference to the many salient features mentioned in *Caltex Refineries (Qld) Pty Ltd v Stavar*. In turn, where each of the salient features refers to a legal rule or principle from a previous case or line of cases, these cases too must be taken into consideration when developing the syllogistic major premise. Importantly, each of these relevant rules must in turn be considered and applied using the syllogistic model presented.

As argued above, in our syllogism-based model of IRAC, the rule corresponds to the syllogistic major premise and therefore is the vessel that contains the holdings in case law, together with all the operative and material facts and reasons that ground those holdings. As such, although there is some analytical uncertainty regarding whether *Sullivan v Moody* is an approach at all or simply a list of factors to be considered without any guiding principle, our syllogistic model of IRAC requires that each of the relevant case law holdings be taken into careful consideration when generating the relevant rule or syllogistic major premise.[94] Once all of these salient features have been systematically considered in turn, the law student should then follow the approach suggested in *Sullivan v Moody*, engaging in an 'evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle'.[95]

IV CONCLUSION

This article has considered the teaching of the legal principles relating to the duty of care in novel duty situations in negligence to law students in the form of a syllogism-based model of IRAC, attempting to lay the pedagogical foundations for further work of a more practical nature that will employ this model. It has been argued that close attention to a syllogism-based model of IRAC can assist law students to express their answers to problems concerning duty of care in novel duty situations in the correct doctrinal and syllogistic form, as well as improve students' mastery of doctrine. Finally, it has been contended that a syllogism-based model of IRAC may be of particular benefit when teaching and learning the relevant legal principles concerning the duty of care in novel duty situations, particularly in light of the lack of conceptual clarity inherent in many of these legal principles.

[94] These include the consideration of reasonable foreseeability outlined by Lord Atkin in *Donoghue* (n 42), which includes consideration of the concepts of 'closeness', 'directness', 'proximity' and 'policy'; the consideration of the concept of proximity advanced by Deane J in *Jaensch* (n 53); the consideration of Brennan J's incremental approach; and the consideration of the many salient features outlined in *Hill v Van Erp* (n 67), *Graham Barclay Oysters* (n 67), *Perre v Apand* (n 67) and *Caltex v Stavar* (n 62).

[95] See *Sullivan v Moody* (n 60) 580. As stated above at n 82, the syllogism-based model of IRAC presented in this article provides the pedagogical framework for future work of a more practical nature, which will provide examples of the type of syllogisms that may be employed using this model.