DUTY OF CARE, ARISTOTLE AND THE BRITISH RAJ: A RE-ASSESSMENT

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[In this article, the author analyses duty of care cases from Australia and England using principles of logical theory. After identifying a number of errors which frequently occur in the area, it is argued that there is a correlation between the presence of these errrors and inadequate policy discussion. Finally, an approach compatible with current Australian authority is suggested and applied to the facts of a recent High Court decision.]

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There is an old story about a Foreign Office civil servant who was posted to a politically sensitive position in India. His appointment required him to settle disputes on controversial matters between the Indian locals and — somewhat apprehensive about this — he sought the advice of an experienced friend. He was told to use his common sense and to announce his decisions firmly ... his instinct as to what was fair would usually suffice. But his friend admonished him never to give his *reasons*; for *they*, he said, would inevitably be wrong.

The common law judge does not enjoy the luxury of such administrative officers, and must give the reasons for his or her decisions. Full exposition of judicial reasons is essential to the rule of law. It enables proper scrutiny of judgments, thereby minimising the risk of arbitrary decisions and lessening the impact of individual prejudices on the law's development. In this way it underpins the doctrine of precedent by facilitating principled development of the law in novel situations. Full reasoning provides what Professor Dewey has described as 'stability and regularity of expectation'[1] — although it would never be possible to predict the results of any given case in practice, society as a whole has an interest in the law developing with *theoretical* certainty. This is so that individuals are aware of the liabilities which society may attach to their activities and know that these are not subject to arbitrary change.[2]

When explaining their reasons, judges were once loath to acknowledge the full extent of their own role in the development of the law. For example, in *Willis & Co v Baddeley*, Lord Esher MR said:

> This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.[3]

This view, once described by Lord Reid as a 'fairy tale',[4] is clearly unsustainable today. In Australia, modern-day High Court judges have readily acknowledged the active role they perform in shaping the common law.[5]

In line with this more open approach has been an equally important admission that when making the law, the courts may be cognizant of policies which are not to be found wholly within the law reports. In *Whittingham v Commissioner for Railways (Western Australia)*,[6] the plaintiff, an employee of the defendant, was making his way to a cricket field during his lunch hour when he was struck by a

1 John Dewey, 'Logical Method and Law' (1924) 10 *Cornell Law Quarterly* 17, 24–5.
2 Ibid.
3 [1892] 2 QB 324, 326.
4 Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of the Law* 22, 22.
5 See, eg, Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1994) 3 *Journal of Judicial Administration* 156, 163–5; Michael McHugh, 'The Law Making Function and Judicial Process' (1988) 62 *Australian Law Journal* 15; *Gala v Preston* (1991) 172 CLR 243, 262 (Brennan J).
6 (1931) 46 CLR 22.

cricket ball. The cricket field was adjacent to the defendant's workshop, yet the High Court held that the injury occurred outside the course of the plaintiff's employment. Subsequently, in *Commonwealth v Oliver,*[7] the opposite result was reached on virtually identical facts. Justice Menzies justified this conclusion by referring to the changed social conditions, namely, the 'widely-accepted and sensible present-day practice of employers encouraging workers to spend intervals between working hours, which must often be spent upon the employers' premises, in recreational activities'.[8]

Notwithstanding these developments, Professor Fleming has argued that there has been a 'pervasive failure to give reasons' in the law of negligence, a failure which 'has its roots in the embarrassment with which the British conservative tradition has generally treated the role of policy in judicial decision-making'.[9] This article will examine the extent to which reasons are explained in cases dealing with the duty of care.

The analysis will be assisted by the use of some basic ideas of logical theory. In Part I, the extent to which formal logic can be used to evaluate judicial reasoning is discussed, both in relation to judicial reasoning generally, and in the context of duty of care specifically. This discussion sheds light, to a certain degree, on the extent to which policy considerations are involved in duty of care cases. The section also seeks to identify a number of logical errors which could arise in this field. Such errors can create the impression that legal conclusions are solely the result of the application of value-neutral tests, thereby serving to hide policy issues.

Part II examines whether these errors are manifested in the case law, with particular reference to two decisions: that of the High Court of Australia in *Gala v Preston,*[10] and that of the House of Lords in *White v Jones.*[11] This analysis attempts to show the way in which the law can become both arbitrary and unpredictable where relevant policy considerations are left unexplained.

In Part III an approach is suggested which may help avoid any identified errors and is applied to the recent High Court decision in *Bryan v Maloney.*[12]

I THEORETICAL FRAMEWORK FOR ANALYSIS

A *The Place of Logic in the Law*

It is convenient to distinguish at the outset between the classical science of *formal* logic and what could be called *symbolic* or *instrumental* logic. The traditional, narrower view treats logic as being concerned with 'valid infer-

[7] (1962) 107 CLR 353.
[8] Ibid 364–5.
[9] John Fleming, *The Law of Torts* (8th ed, 1992) 138.
[10] (1991) 172 CLR 243.
[11] [1995] 2 AC 207.
[12] (1995) 182 CLR 609.

ence[s] that hold between various kinds of propositions considered merely with respect to their form'.[13] The principal conceptual tool of formal logic is the deductive syllogism, the classic example being:

(*Major premise:*) All men are mortal.

(*Minor premise:*) Aristotle is a man.

(*Conclusion:*) Aristotle is mortal.[14]

The syllogism is concerned with the *formal* rather than the *substantive* truth of our assumptions and conclusions: whether the stated assumptions actually lead inexorably to the conclusions made. Consider the following:

(*Major premise:*) All men are penguins.

(*Minor premise:*) Gandhi is a man.

(*Conclusion:*) Gandhi is a penguin.

From the perspective of formal logic, this conclusion is legitimate. The valid syllogism is nothing more than a tautologous restatement of that which is already known — or thought to be known. The soundness of its conclusion depends upon the soundness of the premises, or the way in which the premises have been interpreted. One might analyse a legal decision as a syllogism in the following way:[15]

(*Major premise:*) A corporation which engages in conduct that is misleading or deceptive or is likely to mislead or deceive is liable to pay damages.

(*Minor premise:*) Smith Pty Ltd engaged in conduct that was likely to mislead or deceive.

[13] Ralph Eaton, *General Logic* (1931) 8.

[14] Grammatically, a premise includes two terms, a 'subject' and a 'predicate', which are related to each other through a verb, known as a 'copula'. In the major premise given above, the subject is 'all men', the predicate is 'mortal' and the copula is the verb 'to be'. The minor premise and the conclusion can be analysed in the same way. A logician will analyse the syllogism further by noting that the conclusion contains a 'major term' ('mortal') which is related to a 'minor term' ('Aristotle') through an absent common third term, 'man'. This common term is known as the 'middle term'. The major term is the predicate of the major premise, the minor term is the subject of the minor premise, while the common term is both the subject of the major premise and the predicate of the minor premise.

[15] Treusch states that '[l]egal rules, findings of fact, and decisions may be stated in the form of propositions' and he analyses both judicial decisions and pleadings in the form of the Aristotelian syllogism: Paul Treusch, 'The Syllogism' in Jerome Hall (ed), *Readings in Jurisprudence* (1938) 539, 542–4. Whilst Patterson recognises that it is artificial to ask whether judges actually 'think' in syllogisms, he believes that reasoned judicial argument is intuitively informed by logical principles, rendering it amenable to logical analysis: Edwin Patterson, 'Logic in the Law' (1942) 90 *University of Pennsylvania Law Review* 875, 895. See also Dewey, above n 1, 23. There is evidence that judges are aware of this process: *Lupton v F A & A B Ltd* [1972] AC 634, 658–9 (Lord Simon of Glaisdale).

(*Conclusion:*) Smith Pty Ltd is liable to pay damages.[16]

Again, in formal logic this conclusion is unassailable. However, substantively, the conclusion may be unsatisfactory because the terms contained in the premises are capable of a number of credible interpretations (that is, they are not 'univocal'[17]). Can Smith Pty Ltd be properly said to have 'engaged in conduct' by omitting to correct another's misapprehension[18] rather than performing a positive act? Is the conduct 'likely to mislead or deceive' if it would only mislead 'an extraordinarily stupid person'[19] or must it be likely to mislead or deceive 'reasonable members' of the relevant class of people?[20] It is the answers to these questions and not the syllogism which provide the true yardstick with which to measure judicial decisions.

The need for such answers led to considerable criticism of the use of formal logic as an analytical tool. Early logicians often presumed that premises existed in pre-determined and identifiable forms,[21] but the view that all the principles of the law are reducible to a 'Euclidean system of axioms, postulates and theorems'[22] is clearly not sustainable today.While it is true that the premises themselves can often be deduced and expressed in syllogistic form, a wider view of logic is required, such as that developed by Charles Peirce, whose essay 'How to Make Our Ideas Clear' was first published in 1878.[23] Peirce's 'instrumental' logic concerns itself with the entire reasoning process and with substantive correctness. This more robust attitude to logical inquiry fits more easily with the true nature of judicial reasoning by asking whether the premises themselves are warranted. After determining which premises are, it is then necessary to find the dominant or paramount premises and to give effect to those.[24]

How does one decide whether a given premise is justified? The lawyer's first answer to this question is the doctrine of precedent, which involves the use of induction rather than deduction. Induction is the process of reasoning from particular facts or instances to generalisation and as such relies on intuitive perception and insight — qualities that do not find a place in formal logic. While few would question the legitimacy of such an approach, it is important to remember that judges in the leading cases on duty of care have not been able to rely on an abundance of decided cases to guide them. For example, the first English case to recognise the recoverability of pure economic loss was decided

16 Traditionally the legal proposition is stated as the major premise, and the factual circumstances are summarised in the minor premise. As is evident here, this is both artificial and simplistic. The minor premise expresses a conclusion on an (earlier) inquiry into a matter of mixed law and fact. Nevertheless, this form will continue to be used here for the sake of exposition.

17 Richard McKeon (ed), *Basic Works of Aristotle* (1941) xvi.

18 See, eg, *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83.

19 See, eg, *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 181.

20 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.

21 The similarities between such presumptions and the declaratory theory of law are significant.

22 Patterson, above n 15, 893.

23 Ibid 889.

24 Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (1962) 336–7.

less than forty years ago,[25] whilst the earliest Australian cases are younger than thirty years.[26]

Where precedents are equivocal, or even non-existent, the judge must look elsewhere. In this regard, the observations of the American jurist Benjamin Cardozo are particularly apposite. In his Storrs Lectures at Yale University, Cardozo identified several extra-legal factors which influence judicial decisions. He contended that these factors were relevant because the decision must be given 'directive force' with respect to the law's future development. He said:

> The directive force of a principle may be exerted along the line of logical progression; this I will call ... the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; this I will call the method of sociology. [27]

This appeal to philosophy, history, custom and (in particular) sociology was revolutionary in the days of strict legalism and declaratory theory. Indeed, the proper role for many of these factors has been hotly disputed by jurisprudential writers, whose conclusions are beyond the scope of this essay.[28] Whether or not reliance on custom, justice or social welfare is appropriate, if reliance is placed on these factors by judges, it must be done openly, with explicit and comprehensive reasons.

B *Formal Logic and the Duty of Care*

Although the utility of formal logic is limited in the legal context, it does raise important questions when its rules have been transgressed: the syllogism cannot say definitively when conclusions are *correct*, but it can identify when they have not been *justified.*

In his *Treatise of Human Nature*, first published in 1739, the Scottish philosopher David Hume identified errors of the following nature:

(*Major premise:*) All female animals raise their young.

(*Minor premise:*) A woman is a female animal.

(*Conclusion:*) Women *ought* to raise their young.

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

[26] *Mutual Life & Assurance Co v Evatt* [1971] AC 793 (PC); *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529.

[27] Benjamin Cardozo, *The Nature of the Judicial Process* (1921) 30–1 (emphasis in original).

[28] See, eg, H L A Hart, *The Concept of Law* (2nd ed, 1994); Robert Summers, 'The *New* Analytical Jurists' (1966) 41 *New York University Law Review* 861 regarding 'legal positivism'; Geoffrey Sawer (ed), *Studies in the Sociology of Law* (1961) regarding 'sociological jurisprudence'; see also Ronald Dworkin, *Taking Rights Seriously* (1978); Hans Kelsen, *Pure Theory of Law* (translation of 2nd revised edition, 1967).

The conclusion does not follow in logic because it introduces a copula, *ought*, which is not contained in the premises.[29] The English philosopher G E Moore coined the term 'the naturalistic fallacy', which today refers to 'any account of ethical terms or utterances which identifies them in meaning with any terms or utterances of a factual or descriptive kind, and in particular any inference which purports to derive a normative conclusion from purely factual premises'.[30] It is often said that one cannot derive an *ought* from an *is*. A moral or normative conclusion can only be inferred from a normative premise:

(*Major premise:*) It is wrong to injure your neighbour.

(*Minor premise:*) Mr Stevenson injured his neighbour.

(*Conclusion:*) Mr Stevenson ought not[31] have injured his neighbour.

When duty of care is in issue, the plaintiff is required to prove that the defendant was under an 'obligation' or a 'duty' to avoid negligent infliction of harm. If we begin with the fact that A injures B in a car collision, it does not necessarily follow that he or she 'ought' not have done so. A normative (major) premise, such as Lord Atkin's 'you must not injure your neighbour'[32], is required. Frequently normative premises are uncontroversial, but the important point is that *they are always present*. When judges go in search of a duty of care, armed with a set of facts, it is impossible to find one without making certain moral or ethical assumptions. It has been the shortcoming of our law of negligence that '[f]requently, judges are content to give the impression that "duties" emanate mysteriously out of the situation itself.'[33] Whenever they do so, it follows that policy — the most important part of the reasoning — is left unarticulated. Only two thirds of the syllogism have been explained.

The duty of care question may be fundamentally flawed as it leads judges and lawyers alike into formal logical errors. Invalid inferences from facts, which constitute the naturalistic fallacy, can occur in a number of different ways in the duty of care context:

[29] 'In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence.': David Hume, *Treatise of Human Nature* (1739) quoted in J Harris, *Legal Philosophies* (1980) 12.

[30] Alan Bullock, Oliver Stallybrass and Stephen Trombley, *The Fontana Dictionary of Modern Thought* (2nd ed, 1988) 563.

[31] Although 'ought not' does not appear literally in the major premise, its presence is implied by the subject of the proposition, ie 'wrong'. Also note that the imposition of a duty of care involves an 'ought not' rather than an 'ought' conclusion. Logically, negative prescriptive rules are still not justifiable by factual premises; one cannot derive an 'ought not' from an 'is'. For clarity however, the terms 'is' and 'ought' will continue to be used.

[32] *Donoghue v Stevenson* [1932] AC 562, 580.

[33] David Howarth, 'Negligence After *Murphy*: Time to Re-Think' (1991) 50 *Cambridge Law Journal* 58, 69–70.

1. A judge could make a bald statement that the facts of the case before him or her imply or justify a duty of care.
2. The judge could make a factual comparison with another case without venturing further explanation, and then make his or her findings. Any such findings are logically invalid without this explanation.
3. A judge could imply that it is unnecessary to resort to policy considerations in deciding the issue, or state that policy is only partly relevant to it. For example, in *Home Office v Dorset Yacht Co Ltd*,[34] Lord Morris of Borth-y-Gest doubted 'in cases where the court is asked whether ... a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way.'[35]
4. A judge could substitute policy assumptions with value-neutral terms which masquerade as normative premises.

The fourth error alludes to concepts such as reasonable foreseeability and proximity. These are not only broad enough to obscure inconvenient policy premises, but are also flexible enough to incorporate widely disparate judicial attitudes. There is nothing new in this. In 1942, Professor Patterson discerned the 'inveterate practices of judges in trying to tuck an innovation into some accepted formula — a process which is all the easier because the legal mansion contains many non-Procrustean beds'.[36] The extent to which policy issues are obscured by the naturalistic fallacy is explored in Part II.

II PROXIMITY AND INCREMENTAL REASONING FROM ANALOGY: DUTY OF CARE'S NON-PROCRUSTEAN BEDS

A *Proximity*

In *Jaensch v Coffey*,[37] Deane J emphasised the importance of proximity as 'a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care'.[38] He emphasised that mere reasonable foreseeability does not necessarily lead to the imposition of a duty of care, especially where damage other than physical injury has been caused.[39] The preceding analysis of the syllogism shows that proximity cannot logically fulfil the function of a normative premise because of the simple fact that it is amoral, or empty. Conveniently, its moral content is co-extensive with the values of the

[34] [1970] AC 1004.

[35] Ibid 1039. See also the reference to 'common sense and reason' in *Minories Finance Ltd v Arthur Young (a firm)* [1989] 2 All ER 105, 110.

[36] Patterson, above n 15, 892. In Greek legend, Procrustes was a robber who dwelt in the neighbourhood of Eleusis. He had an iron bed on which he compelled his victims to lie, stretching or cutting off their legs to make them fit its length. Today his name stands for any attempt to produce conformity through the use of ruthless methods.

[37] (1984) 155 CLR 549.

[38] Ibid 584.

[39] Ibid 579.

judge applying it, and this has been the reason for many of its criticisms.[40] A judge who, by analysing the facts before him or her, concludes that no duty of care arises by merely asserting that there is no 'proximity' has succeeded in obscuring the essential policy assumptions and — through a subtle sleight of hand — given the impression that the result was reached through the application of a mechanical, legal test.

Well aware of these criticisms, Deane J has asserted that proximity is not 'some rigid formula which could be automatically applied as part of the syllogism of formal logic to determine whether a duty of care arises'.[41] Furthermore, he has argued that:

> [t]o dismiss that general conception on the ground that it does not provide a 'criterion for liability' or on the ground that it lacks 'ascertainable meaning' is ... to ignore its importance as the unifying rationale of particular propositions of law which might otherwise appear to be disparate.[42]

In this sense, proximity's virtue lies in retrospect; it is not a town map used to point the way, but one made by an explorer which merely prevents us forgetting where we've been. In terms of the syllogism, proximity's function is seen as *de*scriptive rather than *pre*scriptive. It provides clarity by grouping relevant policy considerations under one 'umbrella'[43] without itself usurping the function of a normative premise.

Nevertheless, judges have not always been correct from the perspective of formal logic when referring to the proximity requirement. For example, in *Cook v Cook*[44] it was held that 'a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity ... is satisfied'.[45] This statement begs the question unless proximity is given practical utility in the prescriptive sense.

When used in practice, proximity can and has been used to create the impression that a duty of care can arise out of a factual situation alone. Justice Deane has asserted that proximity:

> embraces *physical* proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial* proximity such as an overriding relationship of employer and employee or of a professional man and his client [*sic*] and *causal* proximity in the

[40] 'Deane J has expended some thousands of words attempting to explain the content of the requirement of proximity but his efforts seem doomed to failure': John Smillie, 'The Foundation of the Duty of Care in Negligence' (1989) 15 *Monash University Law Review* 302, 311.

[41] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 52.

[42] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 543; *Bryan v Maloney* (1995) 182 CLR 609, 619.

[43] *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021, 1152; (1992) 91 DLR (4th) 289, 369.

[44] (1986) 162 CLR 376.

[45] Ibid 381.

> sense of closeness or directness of the relationship between the particular act or cause of action and the injury sustained.[46]

The terminology employed is clearly descriptive of different factual circumstances where duties of care have been and will be found to exist, but the categorisation is tantamount to suggesting that it is the closeness in space, time and so on which itself gives rise to the duty of care. If this were the case it would be difficult to see why there is 'causal' proximity between the builder of a house and a remote purchaser, but not between the manufacturer of a car and a remote purchaser,[47] or why there is sometimes no 'physical' proximity between a driver and a passenger of a car who are both injured in an accident.[48]

The classification into physical, circumstantial and causal proximity tempts lawyers and judges alike into making the erroneous leap from 'is' to 'ought'. In the recent High Court case of *Bryan v Maloney*,[49] where the liability of a negligent builder to a remote purchaser was in issue, counsel for the respondent home-owner argued that 'there was causal proximity in the sense of closeness and directness between the allegedly negligent act and the loss and injuries sustained'.[50] In the judgment of Mason CJ, Deane and Gaudron JJ, it was asserted that '[w]hen such ... loss is eventually sustained and there is no intervening negligence or other causative event, the causal proximity between the loss and the builder's lack of reasonable care is unextinguished by either lapse of time or change of ownership.'[51] There is an implicit assertion here that the (factual) causal link between the negligence and the loss gave rise to the finding of the duty of care in this case: this is the first error outlined in Part I. The explicit reliance on facts rather than policies which is involved in the naturalistic fallacy means that reasons have not been fully explained.

Proximity serves to obscure policies in other ways. In *Gala v Preston*,[52] the High Court considered whether a duty of care could arise in circumstances where the plaintiff and the defendant were participating in a joint illegal enterprise. The teenage defendant had consumed approximately 40 scotches over several hours in a drinking binge with the plaintiff and two companions (all of whom consumed copious amounts). They decided to steal a motor vehicle. As

46 *Jaensch v Coffey* (1984) 155 CLR 549, 584–5 (emphasis added). See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497–8.

47 See, eg, *Bryan v Maloney* (1995) 182 CLR 609, 630.

48 See, eg, *Cook v Cook* (1986) 162 CLR 376 (due to the 'special relationship' of learner-instructor); *Gala v Preston* (1991) 172 CLR 243 (due to participation in a 'joint illegal enterprise').

49 (1995) 182 CLR 609.

50 Ibid 613–4.

51 Ibid 625. There is clear confusion here between the duty and causation issues. See also *Cook v Cook* (1986) 162 CLR 376 (confusion between duty and standard of care issues). The confusion of these concepts lends weight to the argument that the duty of care is tautologous with the other elements of negligence: see, eg, Howarth, above n 33, 72–81; W Buckland, 'The Duty to Take Care' (1935) 51 *Law Quarterly Review* 637, 639 (describing duty of care as 'the fifth wheel on the coach'); W Morrison, 'A Re-Examination of the Duty of Care' (1948) 11 *Modern Law Review* 9; Julius Stone, *Province and Function of Law: Law as Logic, Justice & Social Control* (1950) 181–2.

52 (1991) 172 CLR 243.

they were driving along the Bruce Highway, the vehicle left the road and struck a tree, injuring the plaintiff. At the time of the accident the teenagers were engaged in the unlawful use of a motor vehicle, contrary to s 408A of the Criminal Code of Queensland. The High Court concluded unanimously that no duty of care arose between the parties.

In a joint judgment, Mason CJ, Deane, Gaudron and McHugh JJ asserted that the nature of the illegality was relevant to the duty of care: it would be 'grotesque' for the courts to define the relevant standard of care between two bank robbers who would blow up a safe, but 'unjust and wrong' not to do so between persons who had illegally driven a car in an express lane.[53] After observing that the theft of the motor vehicle 'constituted the whole context of the accident', and that the parties had consumed 'massive amounts' of alcohol, the majority held that the plaintiff 'could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care'.[54] Thus, it was said, there was no relationship of proximity. It is submitted that this reasoning is unsatisfactory because there is no explanation of how one determines whether the illegality constitutes the 'whole context' of the transaction. When will it be 'grotesque' for the courts to define a duty of care in some instances, and 'unjust and wrong' for them not to do so in others? The reference to the amount of alcohol consumed leaves the court open to the criticism that the illegality will prevent a duty of care from arising where it is of particular distaste to the judge. One feels that the concluding reference to proximity served to maintain an air of detached authority and replaced what could have been a more complete analysis of these questions.

On the other hand, Brennan J, who did not rely upon any notion of proximity, asked specifically, '[W]hat is the legal principle which sterilizes a duty of care that would arise on the facts were it not for the joint participation in the commission of an offence?'[55] He argued that s 408A created an offence akin to theft, and was intended to prevent conduct that frequently results in serious injury or damage. The 'normative influence' of the section would be destroyed by admitting a duty of care because this assures conspirators of compensation when that injury in fact arose.[56]

Although it is clear from the above discussion that proximity is being used in its prescriptive 'criterion of liability' sense, the insufficiency of the reasoning which it produces is not the necessary result. There is nothing inherent in the proximity framework which prevents normative issues from being fully discussed. The more complete reasoning given in the judgment of Brennan J could have been incorporated in the judgment of Mason CJ, Deane, Gaudron and McHugh JJ. It is also important to note that the conclusion reached by those

[53] Ibid 253.
[54] Ibid 254.
[55] Ibid 263.
[56] Ibid 273.

judges was in agreement with that of Brennan J. In this regard the words of Patterson seem appropriate:

> The demonstration that a man's explicit logical inference is faulty may lead to the desirable result of persuading him to enunciate the 'real' reasons for believing in the conclusion. Even if the attack on a man's logical inference merely leads him to re-formulate one or both of his premises, or to re-define his terms, so that the same conclusion logically follows, ... the change may reveal his ultimate beliefs on which issue can be joined, or modes of adjustment can be found.[57]

However, the continual resort to proximity as a normative-substitute by judges who have expressly warned against doing so is perhaps caused by the very word itself. As Mullany has observed, '[t]he language of proximity connotes more mechanistic notions of causation than duty language making it inappropriate doctrinal housing for policy based considerations'.[58] The very use of the word 'proximity' requires judges and lawyers to be doubly vigilant to avoid 'is/ought' errors. To date, they have not succeeded. Perhaps the word should be discarded altogether.

B *Incremental Reasoning by Analogy*

The approach favoured by Brennan J raises problems of a different nature. In *Sutherland Shire Council v Heyman*, he held:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed'.[59]

This *dictum* has often been cited with approval by the House of Lords.[60] The approach, with its emphasis on precedent rather than general principle, is more in keeping with the traditional mode of judicial reasoning and represents a tentative return to the approach prevailing before *Donoghue v Stevenson*,[61] whereby it is necessary to assimilate the facts at hand to a recognised category of cases.

As stated earlier, one consequence of incomplete explanation of reasons is the unprincipled or illogical development of the law. The naturalistic fallacy involves the assumption that factual circumstances can generate moral or legal outcomes, and this is precisely what is done when one focuses attention on the *facts* of past cases rather than their underlying policies. In this way, the approach

[57] Patterson, above n 15, 903 (gender-specific language in original).

[58] Nicholas Mullany, 'Proximity, Policy and Procrastination' (1992) 9 *Australian Bar Review* 80, 82.

[59] (1985) 157 CLR 424, 481.

[60] See, eg, *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge), 628 (Lord Roskill), 633–4 (Lord Oliver); *Murphy v Brentwood District Council* [1991] 1 AC 398, 461.

[61] [1932] AC 562.

'can become a process akin to the tail wagging the dog, because the selection of the "relevant" pocket can, at the outset, preclude consideration of factors or "policies" which would provide a more coherent overall approach'.[62] For example, one well-established category of cases is the liability for pure economic loss arising from negligent misstatements under the principles in *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*[63] In England, a negligent surveyor whose report induces the purchase of a defective home is liable under the *Hedley Byrne* reasoning,[64] but the builder is not.[65] It seems strange that the builder who was responsible for the initial damage should be immune from action where the surveyor is not: the builder escapes liability because he or she caused the plaintiff's loss by *building* the structure rather than making a negligent statement about it. The explicit reliance on facts rather than policies which is involved in the naturalistic fallacy has the consequence of producing anomalies in the case law.

The initial selection of the relevant 'pocket', based on the factual similarity of the cases, can preclude resort to policy premises from factually dissimilar cases which are nevertheless relevant. The source of a policy premise is irrelevant if the policy is applicable to the situation at hand. Judges have rightly applied Cardozo J's much sounded caution against imposing liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'[66] to a wide variety of circumstances. It has been cited in economic loss cases of all types, including those between solicitors and beneficiaries under the wills of client-testators,[67] auditors and investors,[68] and builders and remote purchasers of houses.[69] However, the incremental approach tends to place 'blinkers' over the judges' eyes and appeals to policy in this way are rare.

Another main shortcoming of the incremental approach becomes evident on closer examination of the process of reasoning by analogy itself. Reasoning by analogy is an inductive process whereby a similarity between two concepts in one respect is inferred from a known similarity in other respects. It is not necessary to bring the facts of a later case completely within the earlier one, as long as they have 'sufficient' similarity for an analogy to be drawn. But this method is startlingly flexible. An analogy can always be drawn between two cases if the judge is willing to view them at a high level of abstraction. Depending upon the degree of abstraction with which one is willing to view the concepts, an analogy can be drawn between an orange and a lemon (because they

[62] Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *Law Quarterly Review* 249, 284.
[63] [1964] AC 465 ('*Hedley Byrne*').
[64] *Smith v Eric S Bush* [1990] 1 AC 831.
[65] *D & F Estates v Church Commissioners for England* [1989] 1 AC 177.
[66] *Ultramares Corporation v Touche,* 174 NE 441, 444 (NY Ct App, 1931).
[67] See, eg, *Ross v Caunters* [1980] 1 Ch 297, 309.
[68] See, eg, *Caparo Industries plc v Dickman* [1990] 2 AC 605, 621; *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 183.
[69] See, eg, *Bryan v Maloney* (1995) 182 CLR 609, 618.

are both citrus fruit); an orange and an apple (because they are both fruit); an orange and a steak (because they are both food); or an orange and water (because they are both consumed by people).[70] It follows that a judge's willingness to draw an analogy will be determined by factors which remain hidden[71] whilst discussion is focused on the compelling nature or otherwise of the analogy. As a normative judgment can only be justified by an appeal to normative premises, over-emphasis of the highly accommodating tool of reasoning by analogy means that the judge's attention has been misdirected and insufficient time is spent expounding policy premises.[72]

This point can be illustrated by examining judgments which have used the incremental approach in novel cases. In the recent case of *White v Jones* the question of a solicitor's duty of care to beneficiaries under the wills of client-testators was considered by the Court of Appeal[73] and the House of Lords.[74] Such a duty of care was first recognised by the decision of Megarry V-C in *Ross v Caunters*.[75] In that case the gift to a beneficiary under a will was void under s 15 of the Wills Act 1837 as it was witnessed by the beneficiary's spouse. The beneficiary successfully sued the negligent solicitors for damages representing her inability to receive certain chattels and a share in the residuary estate. In *White v Jones*, the testator executed a will cutting both of his daughters out of his estate. The family was later reconciled, and the testator's solicitors received a letter giving instructions that a new will should be prepared which would leave £9,000 to each of them. Due to the firm's negligence, a new will was not finalised before the testator's death some two months later.

At first instance, Turner J reluctantly refused to impose a duty of care as there was a 'great *factual divide* between the position of the plaintiff in *Ross v Caunters* from [*sic*] that of the plaintiffs in the present':[76] *Ross v Caunters* was a case where the will was drawn up negligently, whereas in *White v Jones* the testators simply failed to draw up the will at all. This exemplifies the second error listed in Part I. The Court of Appeal unanimously reversed Turner J's

[70] For this reason, the incremental approach does not justify seminal cases convincingly. This is a serious criticism in an area of law where legislative intervention has been notably sparse, and judicial innovation is consequently more important. *Hedley Byrne* [1964] AC 465 could only be said to be analogous to *Donoghue v Stevenson* [1932] AC 562 if one views the earlier case at such a high level of abstraction that the comparison is uncompelling to say the least.

[71] The appeals by judges to intuition in this context are particularly telling. In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1054, Lord Pearson said '[t]o some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just. It seems to me that this case ought to, and does, come within the *Donoghue v Stevenson* principle unless there is some sufficient reason for not applying the principle to it'.

[72] In *Ross v Caunters* [1980] 1 Ch 297, 313–5, 318, Megarry V-C declared his intention to impose liability and then engaged in lengthy discussion as to whether liability should be extended under the principle in *Donoghue v Stevenson* [1932] AC 562 or that in *Hedley Byrne* [1964] AC 465. Academics also engage in this exercise: see, eg, Robyn Martin, 'Categories of Negligence and Duties of Care: *Caparo* in the House of Lords' (1990) 53 *Modern Law Review* 824, 826–7.

[73] [1993] 3 All ER 481.

[74] [1995] 2 AC 207.

[75] [1980] 1 Ch 297.

[76] Quoted in *White v Jones* [1993] 3 All ER 481, 496 (emphasis added).

decision and the House of Lords also agreed (by majority) that a duty of care was owed by the solicitors.

In a short dissenting speech Lord Keith declared that 'there is, in my opinion, no decided case the grounds of decision in which are capable of being extended incrementally and by way of analogy so as to admit of a remedy in tort being made available to the plaintiffs'.[77] If one accepts the naturalistic fallacy and that the imposition of a legal obligation can only be justified by policy premises, why should it matter that a plaintiff with a deserving claim is denied recovery merely because there is no factually similar case in the reports? Where there is a refusal to impose a duty of care in a novel case, on the basis that there is not a sufficient analogy with a recognised category of case, this can only be described as arbitrary. The absence of further elaboration is an endorsement of the restrictive policy premises by default because the chasm between *is* and *ought* is as wide as that between *is* and *ought not*. The incremental approach used in this way justifies judicial conservatism without requiring clear enunciation of the factors which underlie the decision to leave the plaintiff to his or her own devices.[78]

The question remains: given that the argument from authority is nugatory when framed in this manner, did Lord Keith forward any other arguments in support of his refusal to impose a duty of care? Although he agreed with Lord Brandon, his own speech of some 600 words contained little of logical substance. Lord Keith drew attention to *Hedley Byrne*[79] but distinguished it by saying '[i]n that case there was a direct relationship between the parties creating such proximity as to give rise to a duty of care'[80] (an example of the fourth error from Part I). Furthermore, *Henderson v Merrett Syndicates Ltd*[81] was distinguished by noting a factual difference between the two cases[82] (the second error from Part I). With respect, this speech amounts to little more than sophistry. His Lordship concentrated on high-sounding principles such as the 'incremental approach' and 'proximity' at the expense of articulating policy values.

Where judges favour the imposition of liability, they are more inclined to view cases at a high level of abstraction. This allows them to tuck innovations within past decisions — possibly without complete articulation of factors which justify their intuitive stance. Reference to the smallness of the increment either assists in diverting attention away from thin reasoning or is merely extraneous to the reasons given. To declare — as did Farquharson LJ when *White v Jones* was before the Court of Appeal — that '[t]o find a duty of care in these circum-

[77] *White v Jones* [1995] 2 AC 207, 251.

[78] Very similar reasoning is advanced by Lord Abinger CB when denying recovery to the driver of the carriage as against its owner in *Winterbottom v Wright* (1842) 10 M & W 109, 114; 152 ER 402, 404: 'If there had been any ground for such an action, there certainly would have been some precedent of it ... That is a strong circumstance, and is of itself a great authority against its maintenance.'

[79] [1964] AC 465.

[80] *White v Jones* [1995] 2 AC 207, 251.

[81] [1995] 2 AC 145.

[82] *White v Jones* [1995] 2 AC 207, 251–2.

stances involves no very dramatic extension of the law'[83] is to claim diminished responsibility for developments of the law by implying that the conclusion was part of its natural development.

Although Lord Goff (majority) and Lord Mustill (dissenting) also relied upon the incremental approach in their judgments,[84] it is much less central to their reasoning, and there is consequently a more complete discussion of policy issues. Lord Goff declared his 'impulse to do practical justice'[85] and then outlined four reasons for imposing a duty of care. First, he stated:

> [I]f such a duty is not recognised, the only persons who might have a valid claim (ie, the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie, the disappointed beneficiary) has no claim ... It can therefore be said that, if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in the law which needs to be filled.[86]

Secondly, the importance of wills to both testators and beneficiaries requires that wills be executed competently. Legacies often provide 'the only opportunity for a citizen to acquire a significant capital sum; or to inherit a house, so providing a secure roof over the heads of himself and his family [*sic*]; or to make special provision for his or her old age'.[87] Thirdly, the solicitors were assumed to be negligent and it would not be unjust to impose liability upon them. Finally, Lord Goff quoted from Cooke J in *Gartside v Sheffield, Young & Ellis*:

> To deny an effective remedy in a plain case would seem to imply a refusal to acknowledge the solicitor's professional role in the community. In practice the public relies on solicitors (or statutory officers with similar functions) to prepare effective wills.[88]

The dissenting speech of Lord Mustill began in the opposite fashion: 'I do not of course ascribe to those who support the plaintiffs' claim the contemporary perception that all financial and other misfortunes suffered by one person should be put right at the expense of somebody else.'[89] Further, it is up to the profession to punish solicitors guilty of negligence because '[t]he purpose of the courts when recognising tortious acts and their consequences is to compensate those plaintiffs who suffer actionable breaches of duty, not to act as second line disciplinary tribunals imposing punishment in the shape of damages.'[90] Finally, Lord Mustill characterised the injustice as arising from the testamentary laws which are sometimes an unfortunate fact of life, and '[u]nless those who took under the old will were prepared to be magnanimous, the intended beneficiaries

83 *White v Jones* [1993] 3 All ER 481, 498.
84 *White v Jones* [1995] 2 AC 207, 268 (Lord Goff), 290 (Lord Mustill).
85 Ibid 259.
86 Ibid 259–60.
87 Ibid 260.
88 [1983] NZLR 37, 43; quoted in *White v Jones* [1995] 2 AC 207, 260.
89 *White v Jones* [1995] 2 AC 207, 277.
90 Ibid 278.

would have nothing to do except complain that the technicalities of the law had done them a disservice.'[91]

C *Where To From Here?*

The use of proximity and the incremental approach are fraught with difficulty for two main reasons. First, they encourage the inference of 'ought' from 'is' by enticing judges to make observations about the factual circumstances of cases without spelling out the policy assumptions which truly justify their decisions.

Secondly, both methods encourage specious arguments about the degree to which the decision is justified by the approach rather than policy premises. With respect to analogies, such arguments are specious because they can be drawn at will — analogical reasoning is a non-Procrustean bed which is effortlessly enlarged to accommodate the desired policies. Any demonstration by a judge of how well the result is accommodated by this bed leaves unspoken the reasons for its expansion. As regards proximity, there is some justification behind Brennan J's criticism that it is a 'Delphic criterion' which claims 'an infallible correspondence [with the] existence of a duty of care, but not saying whether both exist in particular circumstances'.[92]

The result of both shortcomings is that where they feature prominently in a judgment, it is at the expense of policy discussion. As argued earlier, inadequate discussion of reasons means a greater risk of arbitrary judgments and a loss of certainty in the development of the law. However, it is clear that inadequate discussion of reasons does not result where little emphasis is placed on the utility of the respective approaches in judgments. The reasons of Brennan J in *Gala v Preston*[93] and Lords Goff and Mustill in *White v Jones*[94] contained a full and frank policy discussion and demonstrate that the errors identified in this article are by no means inevitable consequences when the languages of proximity or analogical reasoning are used. Mere heightened awareness of the dangers of each approach is sufficient to eradicate the errors identified. Nevertheless, the prevalence of those errors suggest that a fresh method may help to elicit policy considerations more effectively, and this is the subject of Part III.

III A Suggestion for Reform

Policy: a concept inextricably linked to duty of care cases and one which (to paraphrase Professor Fleming) the judiciary continues to view with embarrassment.[95] How are we to treat policy in a legitimate and open fashion in duty of care cases? From their first days at law school, lawyers are told of the convention that in our democracy Parliament makes the law and judges interpret and

[91] Ibid.
[92] *Hawkins v Clayton* (1988) 164 CLR 539, 555–6.
[93] (1991) 172 CLR 243.
[94] [1995] 2 AC 207.
[95] Fleming, above n 9, 138.

apply it. Parliament has the constitutional authority to survey the field and forge solutions to problems with desirable social, economic or political norms in mind. Judges, on the other hand, are only asked to decide the issues between the parties before them. They are not asked to engineer social reform on a global scale, or to decide questions using idiosyncratic notions of justice.

When policy does play a part in the judicial process, it must be within the context of the common law tradition. Those arguing for the incremental approach over proximity recognise this necessity, but tend to confuse the debate by implying that resort must be had to 'principle' rather than 'policy'.[96] As discussed, duty of care questions *are* policy questions, so the issue of policy cannot be avoided by reliance on 'principle'. There is often an assumption that policy is anathema to the common law, yet there is a massive corpus of evolving judicial policy woven into the tradition — a corpus constantly changing to meet the demands of contemporary society. Thus the judge is almost never left to make policy decisions unfettered; even where a case presents a completely novel factual matrix, relevant policies are often apparent in factually dissimilar precedents. The plethora of cases found in the law reports provides a comprehensive guide as to which normative premises are justifiable, and which of those should be dominant or paramount.

In this Part, an approach which emphasises the process of eliciting policy from the common law is suggested as an alternative. This suggestion is then applied to the facts of the recent High Court case of *Bryan v Maloney*.[97] Any alternative must have a number of attributes which can be summarised fairly briefly; the approach must be one which does not purport to replace the need for policy premises; it must be one which does not limit the identification of policy premises to cases which are factually similar; it must be one which does not tempt judges to engage in the illusory process of explaining why their results are the inevitable consequences of the formula used, rather than of the policies favoured. Above all, the approach must be one which tends to focus attention on the relevance of the reasons given to the question of liability.

Before continuing, it is first helpful to analyse the nature of policy in duty of care cases and the way in which different policy considerations arise.

A *The Nature of Policy in the Law of Negligence*

A negligence action is not founded upon a pre-existing legal framework — the foundation of any action for negligence is the negligent conduct itself. For this reason, negligence actions can arise in any sphere of human conduct or activity, where rights and obligations are often tacit. By contrast, the law of contract rests upon a pre-determined legal structure within which the parties operate, and this structure — based on the real or perceived intentions of the parties — is accom-

[96] For a comprehensive review of these arguments, see John Smillie, 'Principle, Policy and Negligence' (1984) 11 *New Zealand Universities Law Review* 111.

[97] (1995) 182 CLR 609.

panied by accepted policy guides, such as commercial practice and expectation, to which the law refers. Similarly, the law of property rests upon the legal construct of ownership and is generally concerned with protection of, and certainty in, title. Sometimes negligence actions do arise in well-regulated environments where the respective obligations and protected interests are clearly established — motor vehicle accidents are one obvious example. However, the law of negligence is filled with diverse claims where the parties are related only through the allegedly negligent conduct and had previously been pursuing their own legitimate interests outside of any recognised legal framework.[98] More than any other area of law, negligence requires complex ideas of justice, law and morality to be meshed with the fabric of the real world. This is one reason for the bewildering scope and nature of policy considerations which have confronted the courts in this area.

In other areas where there are no discrete legal structures to regulate the parties — such as trespass or the criminal law — the law is required only to protect undisputed rights and interests such as bodily integrity and property. The torts of assault and nuisance have not raised policy dilemmas in the same way as their cousin negligence, for this reason. Negligence ties justice and morality to everyday life, but, in a doctrinal sense, the fit is not comfortable. It is an attempt to regulate people who are often acting legitimately in their own interests, usually at cross-purposes, and in relationships which have no obvious pre-ordained outcomes to promote.

However, one must never forget that any negligence claim is an appeal by a plaintiff for compensation by a defendant. The plaintiff's case for protection by the law is naturally weaker if he or she could have protected his or her own interests easily. Could the plaintiff have entered into a contract which specifically allocated risk between him or her and the defendant? Should the plaintiff have sought an expert opinion (from an auditor or a building surveyor, for example) before relying on the defendant? Is it the usual practice for plaintiffs to insure themselves in the relevant field? The plaintiff's case is fortified where he or she has an interest deserving of the law's protection. Is the plaintiff seeking to protect a physical or proprietary interest, or an economic interest such as an investment in company shares?

Regardless of assertions that the law of negligence is concerned with *compensation* of the plaintiff rather than with *punishment* of the defendant, where the defendant pays, there is always a punitive element in the award of damages. In this way, attention is drawn to the moral culpability of defendants, as well as the dangers of exposing them to indeterminate liability.

[98] See, eg, *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 where the Sydney City Council allegedly represented to developers that certain plans would be carried into operation, and where land bought on the strength of the alleged representations was sold at a loss. See also *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 where several 'Borstal boys' escaped custody and damaged the plaintiff's yacht. In neither of these cases was there an agreed or imposed set of rules to govern the parties' conduct.

While this is all central, the duty of care concept has been used to embrace broader issues than these. The doctrine of precedent means that the decision in the case at hand will have wider societal ramifications and to this end the court must be aware of issues such as deterrence or national security. Judges must also consider the proper ambit of the law of negligence. When one moves away from the basic model of two individuals acting in their private capacity, how far should the law of negligence go? Should it be extended equally to public institutions such as local government, or to persons acting as rescuers? Should it be extended to protect embryos who are injured while in their mothers' wombs?

B *The Suggested Approach*

Although negligence actions frequently throw up bewilderingly complex policy issues, it can be seen that the policies will be related to the plaintiff's case for recovery, the defendant's case against imposition of liability, or the public interest. A viable approach to duty of care questions will assist judges and lawyers to bring out these considerations. Although many writers have suggested alternative approaches to this question,[99] the proposal forwarded by Professor Smillie in his article 'The Foundation of Duty of Care in Negligence'[100] has proved most useful. Many — though not all — of his suggestions have been incorporated in the proposed model, [101] which attempts to focus attention on the accepted and developing policy of the law, rather than the facts of past cases.

C *The Facts of* Bryan v Maloney[102]

In 1979 the defendant, Mr Bryan, agreed to build a house for his sister-in-law (Mrs Manion) on land which she owned. Mrs Manion sold the house to a Mr and Mrs Quittenden who in turn sold it to the plaintiff, Mrs Maloney. Before buying the property, Mrs Maloney inspected the house three times, but did not notice any cracks or other defects even though she had specifically looked for them. She neither knew nor inquired as to the identity of the builder, and in her evidence she stated that she had believed 'it was a good solid house' and had 'thought it would be built properly'. Six months after the purchase, cracks caused by inadequate footings began to appear in the walls. Mrs Maloney sued the builder, Mr Bryan, in negligence, and was awarded damages of $34,464.68

[99] See, eg, Howarth, above n 33; Richard Abel, 'A Critique of Torts' (1990) 37 *University of California at Los Angeles Law Review* 785.

[100] Smillie, 'The Foundation of the Duty of Care in Negligence', above n 40, 322–34. Smillie's model comprises a two stage approach which involves comparing the 'moral' claims of the plaintiff and defendant at the first stage. If the plaintiff's case outweighs that of the defendant, there is a finding of a *prima facie* duty of care. The second stage involves assessing factors which relate to the public interest.

[101] Smillie's 'prima facie duty' suggestion has not been adopted because it would involve a radical departure from the case law. Furthermore, it is unclear why a plaintiff who cannot raise a prima facie duty of care at the first stage should not be able to rely on the policy factors covered by the second stage to raise a duty of care.

[102] (1995) 182 CLR 609.

by Wright J of the Tasmanian Supreme Court. This sum represented the cost of remedying the inadequate footings and the consequential damage to the fabric of the house. The defendant's appeal was unanimously dismissed by Cox, Underwood and Crawford JJ of the Full Court. He then appealed to the High Court.

D *The Application of the Suggested Approach*

1 *The Plaintiff's Case for Relief*

(a) The Extent to Which the Plaintiff was Likely to Rely on the Defendant

The more likely the plaintiff is to rely on the defendant, the stronger is the plaintiff's claim to compensation when the defendant acts negligently. Reliance has been much vaunted as a concept to limit liability,[103] however it is submitted that as with proximity and incremental reasoning, it is one which adjusts to suit almost any desired result. Stapleton has observed that it is a 'concept across a continuum' as it is always possible to say that one has relied upon persons to act predictably and reasonably; 'when I buy or use a new product, I expect it to have undergone basic quality control — I do not sieve tinned tomato soup before eating it.'[104]

In this respect it is important to note that reliance can always be exaggerated or underplayed, depending on whether one is pre-disposed to provide relief or not. Judges who reach opposite conclusions in the same cases invariably emphasise the degree of reliance placed upon the defendant.[105] Therefore it is important, when dealing with this factor, to be honest about where the plaintiff lies on the spectrum.

There is a strong degree of reliance where the parties agree to provide reciprocal benefits in a relationship akin to contract. This often occurs where they are actually linked through a chain of contracts. For example, where the defendant is a sub-contractor employed to work on the plaintiff's land by a builder, the plaintiff could be said to have relied heavily on the defendant.[106] The same could be said for a plaintiff who purchases a house in reliance on a surveyor's report commissioned by a mortgagee building society.[107]

On the other hand, there is also a strong degree of reliance in the *Hedley Byrne*-type[108] case where, although the defendant receives no reciprocal benefit from his or her relationship with the plaintiff, there has been 'mutuality' of

[103] Judy Allen and Marion Dixon, 'Foreseeability Sinks and Duty of Care Drifts: The High Court Visits Rottnest' (1993) 23 *University of Western Australia Law Review* 320, 324–5.

[104] Stapleton, above n 62, 284.

[105] Compare the opposing views of the majority judgment in *Bryan v Maloney* (1995) 182 CLR 609, 624 with that of Brennan J at 645. Also compare the speech of Lord Browne-Wilkinson in *White v Jones* [1995] 2 AC 207, 270–5 with that of Lord Mustill at 283–9.

[106] See, eg, *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

[107] See, eg, *Smith v Eric S Bush* [1990] 1 AC 829.

[108] [1964] AC 465.

dealing. In *Hedley Byrne*, where the concepts of reliance and 'voluntary acceptance of responsibility' were heavily emphasised, the parties were related via a request for information about the credit-worthiness of a bank's customer, and the subsequent provision of a letter of comfort for this purpose. The plaintiff had agreed to confer a benefit on the defendant at the defendant's request.

A further example of a (still lesser) form of reliance occurs where this mutuality of dealing is absent such as in the *White v Jones* solicitor-beneficiary relationship. In these situations the beneficiary may not know the defendant solicitor (or even of the existence of the will) but is nevertheless completely reliant upon the competence of the solicitor — often being powerless to avoid the risk of negligence.

In the immediate case, the plaintiff's degree of reliance was clearly at the lowest end of the spectrum. There was neither reciprocity of benefits nor mutuality of dealings. Mrs Maloney's reliance on the builder was much more akin to Stapleton's sieve, in that it only amounted to a general hope or assumption that Mr Bryan had performed his duties competently. For this reason house purchasers could be said to place 'general' rather than 'specific' reliance on builders and councils.[109] It should therefore be acknowledged that the plaintiff's level of reliance on the defendant was relatively minimal, but this need not be determinative of her case if she can point to other factors which favour protection.

(b) The Interest Sought to be Protected

Clearly, where the defendant's negligence has harmed an important interest of the plaintiff, the case for protection is augmented. Where the plaintiff's bodily integrity has been violated, or property has been damaged, the courts will impose a duty of care even though the alleged breach was an omission rather than a positive act.[110] Alternatively, protection is less likely where the plaintiff is seeking to protect a commercial investment in a company.[111] Mrs Maloney's property was not damaged after its acquisition. She had merely acquired a structure which was less valuable than she anticipated due to (not yet apparent) faulty construction. Although the High Court recognised in *Sutherland Shire Council v Heyman* that the result should not turn on the nomenclature used,[112] Mrs Maloney's loss is better characterised as purely economic rather than physical. Nevertheless, courts in Australia and New Zealand have shown a

[109] See, eg, *Invercargill City Council v Hamlin* [1996] 1 All ER 756, 761; see also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 463.

[110] See, eg, *Hehir v Harvie* [1949] SASR 77 (plaintiff hit by car after defendant failed to warn); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (plaintiff's yacht damaged after prison officers negligently allowed several prisoners to escape).

[111] See, eg, *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175.

[112] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 505. See also *D & F Estates v Church Commissioners for England* [1989] AC 177. Cf *Anns v Merton London Borough Council* [1978] AC 728, 759.

willingness to protect a home-buyer's investment, which is usually the most important of their lives and fundamental to the way of life in those countries.[113]

(c) The Ease with Which the Plaintiff could have Protected her Own Interests

In a society which places a premium on freedom of action and personal autonomy, the courts will be reluctant to protect plaintiffs who could have easily avoided their losses through greater foresight. Indeed, it has been argued that a plaintiff's inability to find protection elsewhere should be a necessary but not sufficient pre-condition of relief being provided by the courts.[114] In the present circumstances it is necessary to consider whether it would have been reasonable for Mrs Maloney to arrange her own protection by taking out first party insurance, commissioning a surveyor, or resorting to contract.

(i) First Party Insurance

Insurance arguments are being referred to more frequently than before by appeal courts in these circumstances. In *Murphy v Brentwood District Council*,[115] which focused on the duty of a council to a subsequent purchaser, Lord Keith observed '[i]t is perhaps of some significance that most litigation involving the decision [*Anns v Merton London Borough Council*[116]] consists in contests between insurance companies, as is largely the position in the present case.'[117] If first party insurance against latent defects is readily obtainable and widely present in Australia, the imposition of liability is undesirable for two main reasons. First, if the plaintiff is uninsured, the court will be providing relief to a person who failed — contrary to the majority of the population — to take precautionary measures. Secondly, if the plaintiff is insured, the laws of subrogation mean that the *insurer* is given a right to recover its losses. The desirability of this is questionable in light of the fact that the insurer has received contractual premiums for accepting such risks.

The question of first party insurance was not raised in *Bryan v Maloney*. However, even where it is readily available, there is still a case that its effects could be ignored in non-commercial situations. Commercial concerns are more likely to be in a position to estimate risk, assess the probable effectiveness of their policies and influence the terms of their contracts.[118] In *Murphy v Bren-*

[113] Note Richardson J's comment in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 524 that in the 1970s and 1980s '[h]ome ownership by people in all walks of life was the goal and to a large extent the reality' in New Zealand. In *Bryan v Maloney* (1995) 182 CLR 609, 625, Mason CJ, Deane and Gaudron JJ recognised that 'in this country [the home] is likely to represent one of the most significant, and possibly *the* most significant, investments which the subsequent owner will make during his or her lifetime'. See also *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 419.

[114] Stapleton, above n 62, 257.

[115] [1991] 1 AC 398.

[116] [1978] AC 728.

[117] [1991] 1 AC 398, 472.

[118] See, eg, *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021, 1122–3; (1992) 91 DLR (4th) 289, 349. See also Basil Markesinis and Simon Deakin, *Tort Law* (3rd ed, 1994) 115 for further discussion on the implications of insurance in commercial and non-commercial situations.

twood District Council,[119] damage to the plaintiff's neighbour's house was caused by the concrete raft foundation on which they were both built. Although the plaintiff was able to recover under his policy, his neighbour's insurers refused to allow recovery, leaving him uncompensated.[120]

Where the insurance is provided by a statutory scheme rather than privately, such problems are more likely to be addressed by courts. In New South Wales, the House Purchaser's Insurance Scheme, established under the Builders Licensing Act 1971 (NSW), compensates owners of houses built by licensed builders by deeming them to have entered into an insurance contract with the Building Service Corporation. The Scheme is designed to provide broad coverage and maximum payments.[121] In England, the existence of the National House-Building Council, which provides a 10 year warranty in respect of new houses built by registered builders, arguably justifies the refusal of the House of Lords to impose a duty of care for latent building defects.[122]

The fact that Mrs Maloney does not have insurance should therefore probably not preclude her claim unless a statutory insurance scheme existed in Tasmania where the claim originated.

(ii) Employing a Surveyor

The relevance of intermediate inspection of products can be traced back to *Donoghue v Stevenson*,[123] and the fact that Mrs Maloney did not commission an expert survey, which would probably have averted her loss (either by prompting a re-negotiation of the price, or by convincing her not to buy the house), stands against her. A distinction should be drawn between new and old realty, because, as Richmond P recognised in *Bowen v Paramount Builders (Hamilton) Ltd*, it is less reasonable to expect the purchasers of new realty to rely on expert surveys rather than on the builder's competence.[124] Purchasers of old realty can reasonably be expected to have a survey completed, especially where (as in this case) the purchaser was aware of the possibility of cracks in the house, which was then seven years old. Other pertinent factors include the comparatively small cost of an expert survey and the extent to which the advisability of having one commissioned is known to the wider community.

(iii) Contract

The existence or non-existence of a contract is often a determinative factor in duty of care cases. In the typically unhelpful language associated with proximity, Mason CJ, Deane and Gaudron JJ have stated:

119 [1991] 1 AC 398.

120 Ibid 458.

121 See generally Peter Merity, 'The House Purchaser's Insurance Scheme: Claiming for Clients' (1988) 26 (July) *Law Society of New South Wales Journal* 56.

122 John Smillie, 'Compensation for Latent Building Defects' [1990] *New Zealand Law Journal* 310, 314. Smillie also recommends that owners of residential premises should be protected in negligence as there is presently no such scheme in New Zealand.

123 [1932] AC 562.

124 [1977] 1 NZLR 394, 412–3. See also Smillie, 'The Foundation of the Duty of Care in Negligence', above n 40, 325; Stapleton, above n 62, 275–6.

> In some circumstances, the existence of a contract will provide the occasion for, and constitute a factor favouring the recognition of, a relationship of proximity ... [while in others] the contents of a contract may militate against recognition of a relationship of proximity[125]

Under what circumstances will the existence of a contract prevent the finding of a duty of care? Atiyah has observed that 'the essence of a capitalist society is that businessmen [*sic*] pit their wits against each other in assessing ... risks'.[126] For this reason, where a business contract is silent as to a loss incurred by one of the parties, it is not unjust to treat this silence as a positive allocation of the risk — a decision to let any loss lie where it falls. However, where either of the parties lack commercial sophistication, such an assumption can be unjustified.[127]

Where, as in this case, no contract exists between the plaintiff and the defendant, further objections can be raised. In *Bryan v Maloney*, Brennan J stated that the imposition of tortious liability 'would be tantamount to the imposition on the builder of a transmissible warranty of quality'.[128] As Stapleton points out, the weakness of this argument is that *any* obligation imposed by negligence can be characterised thus due to the absence of consideration.[129] In response to such criticisms, Brennan J distinguishes between product quality cases causing physical injury such as *Grant v Australian Knitting Mills Ltd*,[130] and those pure economic loss claims relating solely to the quality of the product. He argues that only the latter 'are appropriately to be governed by the law of contract'.[131] The difficulty with such an analysis is that it relies on two questionable ideas: the troublesome distinction between 'physical' and 'purely economic' loss, and tenuous assumptions about the proper province of the law of contract and tort. The second problem has dogged the law of tort for well over 150 years. Stapleton suggests that a more principled objection was adverted to by Lord Brandon in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd*: that, where a plaintiff could have avoided his or her loss by altering the terms of a contract, a duty of care will not be imposed.[132]

Certainly Mrs Maloney could have varied her contract with the vendor to take into account the possibility of latent building defects, which would suggest that recovery should be barred. However, once again, regard must be paid to the realities of non-commercial relationships. Private home-buyers, who are not

125 *Bryan v Maloney* (1995) 182 CLR 609, 621.

126 P Atiyah, *Accidents, Compensation and the Law* (2nd ed, 1975) 86.

127 In England, courts have often been insensitive to the reality of different economic relationships. In *Van Oppen v Clerk to the Bedford Charity Trustees* [1990] 1 WLR 235, a rugby accident left a school-boy disabled, yet the court found there was no duty upon the school to extend its insurance for the boy in the absence of an express contractual undertaking. In Australia the High Court has not insisted on such a rigid demarcation between contract and tort: *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 84, cited approvingly in *Hawkins v Clayton* (1988) 164 CLR 539, 575 and *Bryan v Maloney* (1995) 182 CLR 609, 620.

128 (1995) 182 CLR 609, 644.

129 Stapleton, above n 62, 269.

130 [1936] AC 85.

131 (1995) 182 CLR 609, 643.

132 [1986] 1 AC 785, 819.

primarily seeking commercial gain, should not be subjected to the same hazards for failing to account for every possible contingency in their contractual negotiations. It would have been possible for Mrs Maloney to raise the issue of latent building defects with the vendor and subsequently re-negotiate the contract price (including a reduction for the cost of first party insurance cover) or to secure a collateral warranty. However, it must be remembered that the average home buyer has very limited experience with contracts involving substantial sums, and that the usual practice is for offers to be made by buyers on standard form real estate contracts.

Courts do sometimes take these considerations into account. In *Morgan Crucible Co plc v Hill Samuel & Co Ltd*,[133] Hoffman J justified the difference between the results of the House of Lords decisions in *Smith v Eric S Bush*[134] and *Caparo Industries plc v Dickman*[135] by reference to 'the different economic relationships between the parties and the nature of the markets in which they were operating'.[136] In cases like *Smith v Eric S Bush*, the home buyer is typically 'a person of modest means and making the most expensive purchase of his or her life', whereas the take-over bidder in *Caparo Industries plc v Dickman* was 'an entrepreneur taking high risks for high rewards'.[137] It is therefore submitted that while Mrs Maloney's failure to protect herself in contract is a relevant consideration, it should not be determinative.

2 *The Defendant's Case against Imposition of Liability*

The fact that the obligation to make the compensation falls on the defendant renders Mr Bryan's culpability relevant in three main ways. First, defendants are not required to pay where they could not have foreseen the harm created by their negligence. Secondly, the moral obligation on any defendant is greater if he or she could have prevented the plaintiff's loss with little inconvenience. The law is less likely to impose an onerous obligation on a defendant in the absence of compelling arguments in favour of liability because this involves a greater restriction on the defendant's freedom of action. Finally, the culpability of the defendant is also relevant because the extent of the liability should not exceed his or her blameworthiness. As Rabin has argued, '[t]he Anglo-American judicial tradition maintains a deep abhorrence to the notion of disproportionate penalties for wrongful behavior.'[138] These issues will be dealt with in turn.

133 [1991] Ch 295.
134 [1990] 1 AC 831.
135 [1990] 2 AC 605.
136 [1991] Ch 295, 302.
137 Ibid.
138 Robert Rabin, 'Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment' (1985) 37 *Stanford Law Review* 1513, 1534.

(a) Reasonable Foreseeability

It is well settled that defendants who could not have reasonably foreseen that loss would result from negligence are under no duty of care.[139] Defendants' moral culpability is minimal in such circumstances. Reasonable foreseeability was not an issue in *Bryan v Maloney*.

(b) The Burden of Taking Precautions

Where the defendant is obliged under a contract to a third party to perform duties inconsistent with possible tortious obligations owed to the plaintiff, it may not be just to impose a duty of care. It would be harsh to expect the defendant to fulfil conflicting obligations both to the plaintiff and a third party. Alternatively where the tortious liability would be co-extensive with that in contract it can be argued that the burden of taking precautions against negligence is small, because the defendant is only being asked to do what he or she had intended to do anyway.

In *Bryan v Maloney*, Brennan J argued that a duty of care owed to a remote purchaser 'would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building'.[140] Indeed, it could be argued that the builder would have adjusted the contract price with the immediate purchaser to reflect such factors as the quality of construction and the extent of liability foreseen. If the law of tort imposed liabilities beyond those agreed upon by the builder and the original owner, it would be undermining the freedom of action which underlines the law of contract. However, there was little evidence that such a process occurred in *Bryan v Maloney*. The house which was the subject of the dispute was built by Mr Bryan for his sister-in-law on a 'do and charge' basis, in that he was paid for the work he actually did and for the materials he actually supplied. The fact that the initial building contract 'was non-detailed and contained no exclusion or limitation of liability' did not preclude the existence of a duty of care in this instance, according to the majority.[141]

(c) The Burden of Potential Liability

(i) Floodgates

The burden of liability extending 'in an indeterminate amount for an indeterminate time to an indeterminate class'[142] has been the main factor precluding the imposition of a duty of care in many pure economic loss cases. Many commentators have pointed out that a duty of care will only be imposed where sensible

[139] *Chapman v Hearse* (1961) 106 CLR 112; *Palsgraf v Long Island Railroad Co*, 162 NE 99 (NY Ct App, 1928).
[140] (1995) 182 CLR 609, 644.
[141] Ibid 622.
[142] *Ultramares Corporation v Touche*, 174 NE 441, 444 (NY Ct App, 1931).

(if arbitrary) limits can be placed on liability, such as where the loss is related to the damage of property.[143]

No attention is given to the New Zealand Court of Appeal's decision in *Mount Albert Borough Council v Johnson*, which held that the cause of action arises when the defect becomes 'apparent or manifest'.[144] This potentially exposes builders to liability over a very long time. In England, where the House of Lords reached the opposite conclusion in *Pirelli General Cable Workers Ltd v Faber & Partners*[145] (that the cause of action arises when the structure is *built*), Parliament passed the Latent Damage Act 1984 (UK) to reverse its effects. The majority in *Bryan v Maloney* observed that liability could be for 'an indeterminate time', but were quick to dismiss this as an objection.[146] However, in *Hawkins v Clayton*[147] Deane J thought limitation periods should be construed so as to exclude any period during which the wrongful act itself effectively precluded the institution of proceedings.[148]

(ii) Third Party Insurance

Where the defendant is able to secure third party insurance easily, the potential burden of liability could — by definition — have been reduced. Any evidence which Mrs Maloney could adduce relating to the availability of builder's liability insurance would strengthen her case for compensation. In New Zealand, the imposition of builder's liability has been justified by reference to the availability of third party insurance.[149] However, Smillie has argued that in that country it is not readily available to builders, and hence this reliance is unjustified.[150] This is because the standard insurance contracts in New Zealand tend to cover work only while it is under construction, or to cover damage to property other than that constructed by the insured. These objections may be applicable in England as well. In *Warner v Basildon Development Corp*, counsel argued that 'it is difficult for builders to obtain insurance cover in respect of liability for defective parts of a structure because of the difficulty in assessing the nature and extent of the risk and the appropriate premium'.[151] These issues are appropriate to the question of Mr Bryan's liability in Australia and require further exploration in our courts.

[143] See, eg, Stapleton above n 62, 253–9, 285; Rabin, above n 138, 1534–8; Smillie, 'The Foundation of the Duty of Care in Negligence', above n 40, 328.
[144] [1979] 2 NZLR 234, 239.
[145] [1983] 2 AC 1.
[146] (1995) 182 CLR 609, 626.
[147] (1988) 164 CLR 559.
[148] Ibid 590.
[149] *Bowen v Paramount Builders* [1977] 1 NZLR 394, 419.
[150] Smillie, 'Compensation for Latent Building Defects', above n 122, 311–2.
[151] (Court of Appeal (Civil Division) (England), Purchas, Ralph Gibson and Taylor LJJ, July 25 1990) (1991) as noted in 7 *Construction Law Journal* 146, 154.

3 *Wider Societal Factors*

Negligence claims frequently involve 'public interest' factors which do not relate specifically to the parties. For example, neither judges[152] nor lawyers[153] can be sued by disappointed litigants, and persons engaged in a joint illegal enterprise generally have no right of recovery against co-conspirators.[154] In 'defective building' cases a common question is whether local authorities should be liable for damages for negligent inspections.[155] No such issues arise here.

E *Summary*

As will be evident, the result in this analysis of *Bryan v Maloney* depends upon the resolution of a number of conflicting policy considerations. Indications as to how this resolution should be effected abound in the case law. Cases such as *Junior Books Ltd v Veitchi Co Ltd*,[156] *Hedley Byrne*[157] and *Invercargill City Council v Hamlin*[158] provide examples of the common law's policy in relation to varying degrees of reliance in duty of care cases. Yet the orthodox approach tends to limit consideration of policies in these cases to those concerning sub-contractors, letters of comfort and building respectively. Similarly, cases such as *Smith v Eric S Bush*[159] and *Caparo Industries plc v Dickman*[160] provide examples of the law's policy regarding the ability of plaintiffs to protect their interests in contract-like situations. They should not be limited to cases about take-over bids or surveyors.

Is there scope for such an approach being applied generally to duty of care cases in Australia? At present the highest authority requires both reasonable foreseeability of harm and a relationship of proximity before a duty of care may be imposed. The three categories of policy considerations used in this part (those relating to the plaintiff, the defendant or public interest) can easily be discussed under this overall heading of 'proximity'. In fact, such an approach would give effect to the *dicta* underlining proximity's function as a unifying rationale of disparate propositions of law.[161] Proximity's very flexibility ensures that the approach advocated in this part could be incorporated within the prevailing orthodoxy.

152 *Nakla v McCarthy* [1978] 1 NZLR 291.
153 *Giannarelli v Wraith* (1988) 165 CLR 543.
154 *Gala v Preston* (1991) 172 CLR 243.
155 See, eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Anns v Merton London Borough Council* [1978] AC 728; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513; [1996] 1 All ER 756.
156 [1983] 1 AC 520.
157 [1964] AC 465.
158 [1994] 3 NZLR 513; [1996] 1 All ER 756.
159 [1990] 1 AC 829.
160 [1990] 2 AC 605.
161 See above Part II(A).

IV CONCLUSION

As seen in Part I, an understanding of logic shows that one cannot justify a normative judgment by reference to a factual circumstance or a value-neutral criterion. This involves an invalid inference from 'is' to 'ought'. However, as Part II attempted to show, close scrutiny of decisions in the duty of care field reveals that such inferences are frequently made. 'Tools' such as proximity, rather than the inescapable policy considerations, are invoked to justify decisions. Similarly, observations are often made about the facts of cases in an attempt to justify the finding of a duty of care. The infinitely flexible, mechanical-sounding tests cloak policy issues rather than assist in their elucidation.

When policies are not discussed, the dangers associated with failing to give *any* reasons re-surface. The effect of giving invalid reasons is almost the same as giving none at all: in the old story from the British Raj, the friend's advice would have been equally useful if he had told the civil servant to cite the *Iliad* in ancient Greek. If we are to minimise the apparent uncertainty and arbitrariness which has dogged this area of law in recent times, the focus of the courts must be shifted from facts of cases to their underlying rationales.