Vulnerability, Insurance And Policy: The Learner Driver's Standard of Care

Tracey Carver*

In *Cook v Cook* the Australian High Court held that the standard of reasonable care owed by a learner driver to an instructor, conscious of the driver's lack of experience, was lower than that owed to other passengers and road users. Recently, in *Imbree v McNeilly*, the High Court declined to follow this principle, concluding that the driver's status or relationship with the claimant should no longer influence or alter the standard of care owed. The decision therefore provides an opportunity to re-examine the rationale and policy behind current jurisprudence governing the standard of care owed by learner drivers. In doing so, this article considers the principles relevant to determining the standard and Imbree's implications for other areas of tort law and claimant v defendant relationships. It argues that Imbree was influenced by changing judicial perceptions concerning the vulnerability of driving instructors and the relevance of insurance to tortious liability.

1. Introduction

Negligence liability occurs when a claimant suffers damage caused by a defendant's act or omission that falls below a legally determined standard of care and therefore breaches a duty of care owed by the defendant to the claimant. The standard of care required is one of "reasonableness", or an objective standard[1] of what might have been expected from a reasonable person in the position of the defendant.[2] As such, it is 'independent of the idiosyncrasies of the *particular* person whose conduct is in question'.[3]

Thus, in relation to the driver of a motor vehicle, 'the standard of care required, being objective and impersonal, is not modified or extended by the personal driving history, ability or idiosyncrasy of the particular driver'.[4] Rather, the standard owed is ordinarily measured by the 'degree of care and skill which could reasonably be expected of an experienced and competent driver'.[5] Consequently, in respect of damage to person or property caused to the public and other road users, inexperience is no excuse – the general rule applies, and a learner driver will owe a duty to drive with the care and skill of a reasonably experienced driver:[6]

> The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgement, has good eyesight and hearing, and is free from any infirmity.[7]

* BBus(Accy)(Dist), LLB(Hons) *(QUT);* LLM *(Cantab)*. Lecturer, Queensland University of Technology, 2 George Street, Brisbane QLD 4001. t.carver@qut.edu.au

[1] *Cook v Cook* (1986) 161 CLR 376 at 382, 391 ('*Cook*').

[2] *Glasgow Corporation v Muir* [1943] AC 448 at 457 ('*Glasgow Corp'*); *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 89. See also *Civil Law (Wrongs) Act 2002* (ACT) s 42; *Civil Liability Act 1936* (SA) s 31: In determining whether a person is negligent 'the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose'.

[3] *Glasgow Corp* [1943] AC 448 at 457 (Lord Macmillan) (emphasis added). See also *Imbree v McNeilly* (2008) 248 ALR 647 at 661 (Gummow, Hayne and Kiefel JJ) ('*Imbree*'): 'The standard to be applied is objective. It does not vary with the particular aptitude or temperament of the individual'.

[4] *Cook* (1986) 161 CLR 376 at 383. See also 387 (Mason, Wilson, Deane and Dawson JJ); *Nettleship v Weston* [1971] QB 691 at 699, 703 ('*Nettleship*'); *Imbree* (2008) 248 ALR 647 at 651.

[5] *Cook* (1986) 161 CLR 376 at 383 (Mason, Wilson, Deane and Dawson JJ).

[6] *Cook* (1986) 161 CLR 376 at 384; *Nettleship* [1971] QB 691 at 699, 703, 709; *Imbree* (2008) 248 ALR 647 at 652-3, 661.

[7] *Nettleship* [1971] QB 691 at 699 (Lord Denning MR). See also 703-4 (Salmon LJ).

There are exceptions where a defendant's characteristics are taken into account in assessing the standard owed. In these instances, whilst the standard of care remains to be assessed by the objective standard of the reasonable person, it is subjectively adjusted or framed to fit the relationship or circumstances under which it arises.[8] For example, a defendant professing a particular skill, such as a specialist medical practitioner, will owe a higher standard of care when compared to the reasonable care owed by a non-specialist.[9] Conversely, a lower standard of care generally applies to judge the conduct of a child when compared to the standard applied to an adult in relation to the same activity.[10] However, a child will remain subject to the standard ordinarily owed by a reasonably competent adult if they engage in an adult activity, such as driving a motor vehicle.[11]

It was against this background, that the Australian High Court in *Imbree v McNeilly*[12] was required to consider whether the standard of care owed by a learner driver to an instructor or supervising passenger (conscious of the driver's lack of experience), should be adjusted on account of the parties' relationship and expressed as a lower standard than that owed to other road users. This article examines the High Court's decision in *Imbree*, the principles and policy underpinning the learner driver's standard of care, and the implications of the decision for other areas of tort law and claimant v defendant relationships. However, as the issue raised in *Imbree* required a consideration of the principle previously formulated by the High Court in *Cook v Cook*,[13] it is first necessary to reconsider the basis of that decision.

2. Cook v Cook

In *Cook*, the Australian High Court first considered the issue of whether; a learner driver should owe a supervising passenger a reduced standard of care. The Court held that because the relationship between a defendant and different claimants may vary,[14] a learner driver might owe a different standard of care depending upon whether the claimant was categorised as a "supervising" passenger or an "ordinary" passenger / road user.

Accordingly, in the ordinary case, in relation to passengers[15] and other highway users,[16] the Court considered that every driver owed a duty to exhibit the degree of care and skill

[8] *McHale v Watson* (1966) 115 CLR 199 at 222 ('*McHale*').

[9] The 'reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill': *Rogers v Whitaker* (1992) 175 CLR 479 at 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) (In that case 'an ophthalmic surgeon specialising in corneal and anterior segment surgery'). See also 487. Cf *Philips v William Whiteley Ltd* [1938] 1 All ER 566: the standard of care expected of a jeweller piercing ears is less than that expected from a surgeon.

[10] The standard of care required is that expected from a child of the same age and experience, or maturity, as the defendant. 'The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal': *McHale* (1966) 115 CLR 199 at 213 (Kitto J) (concerning the throwing of a metal dart by a minor). See also 215.

[11] See above n 5 and accompanying text. Also *Tucker v Tucker* [1956] SASR 297 ('*Tucker*'); *McHale* (1966) 115 CLR 199 at 205, 208, 234.

[12] (2008) 248 ALR 647.

[13] (1986) 161 CLR 376.

[14] *Cook* (1986) 161 CLR 376 at 382. See also *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 56 ('*Joyce*').

[15] *Cook* (1986) 161 CLR 376 at 382-3. See also *Wills v Bell* [2004] 1 Qd R 296 at 304 ('*Wills*'); *Radford v Ward* (1990) 11 MVR 509 at 514 ('*Radford*'); *Joyce* (1948) 77 CLR 39 at 55.

reasonably expected of an experienced and competent driver. However, whilst a driver's individual skill or characteristics are 'not directly relevant to a determination of the content or standard of the duty of care owed to a passenger',[17] rarely:[18]

> special and exceptional facts may so transform the relationship between driver and passenger that it would be unreal to regard the relevant relationship as being simply the ordinary one of driver and passenger and unreasonable to measure the standard of skill and care required of the driver by reference to the skill and care that are reasonably to be expected of an experienced and competent driver.[19]

It was therefore recognised that the case of a passenger might differ from that of other road users, in that exceptionally 'the former [may] come into a more particular relation with the driver'[20] such that they are aware that the standard of care of the ordinary reasonable driver cannot be achieved. In these circumstances, the content of the standard of care owed, whilst remaining objective,[21] should be adjusted according to 'the exigencies of the relevant relationship.'[22]

Consequently, the Court held that because the absence of skill, or experience, was the known reason for the instruction or supervision undertaken, the nature of the relationship between a learner driver and their supervising passenger necessitated a departure from the ordinary standard of a reasonably experienced motorist.[23] Instead, the standard of care owed was the lower standard of reasonable care expected from an 'unqualified and inexperienced driver'[24] or an 'inexperienced driver of ordinary prudence'.[25]

Critical therefore to the reduced standard of care owed by the learner driver to the non-professional instructor in *Cook*, was the claimant's actual[26] knowledge of the driver's particular 'incapacity',[27] or 'incompetence and inexperience',[28] in driving motor vehicles.[29] For example, Mason, Wilson, Deane and Dawson JJ stated that:

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[16] *Cook* (1986) 161 CLR 376 at 384, 393. See also *Ricketts v Laws* (1988) 14 NSWLR 311 at 322 ('*Ricketts*').
[17] *Cook* (1986) 161 CLR 376 at 383. See also 387(Mason, Wilson, Deane and Dawson JJ).
[18] *Cook* (1986) 161 CLR 376 at 386; *Wills* [2004] 1 Qd R 296 at 313, 321; *Radford* (1990) 11 MVR 509 at 514, 526.
[19] *Cook* (1986) 161 CLR 376 at 383. See also 387 (Mason, Wilson, Deane and Dawson JJ), 392-3 (Brennan J).
[20] See, eg, *Joyce* (1948) 77 CLR 39 at 56 (Dixon J).
[21] *Cook* (1986) 161 CLR 376 at 382-4, 386-7, 391, 393.
[22] *Cook* (1986) 161 CLR 376 at 383 (Mason, Wilson, Deane and Dawson JJ). See also *Radford* (1990) 11 MVR 509 at 521; *MacMorran v MacMorran* (1989) 10 MVR 343 at 347 ('*MacMorran*').
[23] *Cook* (1986) 161 CLR 376 at 378-9, 387-8, 392-4. See also *Radford* (1990) 11 MVR 509 at 514.
[24] *Cook* (1986) 161 CLR 376 at 384, 388 (Mason, Wilson, Deane and Dawson JJ).
[25] *Cook* (1986) 161 CLR 376 at 394 (Brennan J). In *Cook*, an accident happened in circumstances where the claimant, an experienced driver, persuaded the defendant to drive the vehicle in which they were travelling. The defendant, although having some knowledge of various motor vehicle controls, was unlicensed and unpractised at driving. In applying the reduced standard of care, the Court held that the defendant was liable for accelerating to avoid a parked car and thereby colliding with a concrete electricity post. The claimant (the supervising passenger) was 70 percent contributory negligent: at 379-81, 388-9 (Mason, Wilson, Deane and Dawson JJ), 394 (Brennan J).
[26] *Joyce* (1948) 77 CLR 39 at 57 (Dixon J): 'It is not easy to see how the principle can be applied when no higher finding can be made than [the passenger] ought to have known'. Knowledge of the incapacity must also be either 'common ground or established by evidence': *Radford* (1990) 11 MVR 509 at 518 (Murphy J). See also *Morton v Knight* [1987] 2 Qd R 419 at 421 ('*Morton*'); *Wills* [2004] 1 Qd R 296 at 313; *Imbree* (2008) 248 ALR 647 at 668.
[27] *Radford* (1990) 11 MVR 509 at 518 (Murphy J).
[28] *Cook* (1986) 161 CLR 376 at 388 (Mason, Wilson, Deane and Dawson JJ); *George v Erickson* (1998) 27 MVR 323 at 327 ('*George*'); *MacMorran* (1989) 10 MVR 343 at 346.

> the appellant's known incompetence and inexperience as a driver was a controlling element of the relationship of proximity between the parties. That special element of the relationship took it out of the *ordinary relationship* between a driver and passenger into a *special category* of relationship between a driver who is known to be quite unskilled and inexperienced and a passenger who has voluntarily undertaken to supervise his or her driving efforts.[30]

In forming this view, the High Court in *Cook*[31] applied the dicta of Dixon J and Latham CJ in *Insurance Commissioner v Joyce* that:

> in a car intended as a conveyance, the gratuitous passenger may expect prima facie the same care and skill on the part of the driver as is ordinarily demanded in the management of a car. Unusual conditions may [however] exist which are apparent to him or of which he may be informed and they may affect the application of the standard of care that is due.[32]

Consequently, 'the circumstances in which the defendant accepts the plaintiff as a passenger and in which the plaintiff accepts the accommodation in the conveyance should determine the measure of duty.'[33] Prior to *Cook*, the New South Wales Court of Appeal applied this reasoning in *Chang v Chang*[34] to justify a decrease in the standard of care owed by a completely inexperienced learner to her instructing father. In holding the daughter liable for applying the accelerator instead of the brake, contrary to instruction, the Court confirmed that her duty was 'not to exhibit the ordinary skill and care of a trained driver.' However to exhibit the skill and care required in the circumstances 'she had to follow the instructions given to her.'[35]

2.1 Subsequent Application

Subsequent application of the principle enunciated in *Cook* was not limited to "supervising" passengers. Indeed *Cook* recognised that the relationship, between a driver and a passenger generally, was not 'completely standardised.'[36] Consequently, *Walker v Turton-Sainsbury* implied that any passenger, who voluntarily rode in a car with a known 'beginner', was only 'legally entitled to insist' upon a reasonable beginner's degree of skill:

> The general duty to exercise due care is superseded by a specific contract which enlarges, diminishes or excludes it. In that event the specific contract becomes the only measure of the duty between the parties.[37]

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[29] As the parties in *Cook* were relations, the claimant was aware of the defendant's inability to drive, which had been the subject of family teasing. See also *Radford* (1990) 11 MVR 509 at 513-6, 518-9; *Wills* [2004] 1 Qd R 296 at 321; *Imbree* (2008) 248 ALR 647 at 649, 659-60; *Nettleship* [1971] QB 691 at 704-5 (Salmon LJ).

[30] *Cook* (1986) 161 CLR 376 at 388 (emphasis added). Brennan J held that 'though it is right to say that a driver's disabling condition does not itself affect the standard of care which is expected ... a passenger's acceptance of carriage with knowledge of the driver's disabling condition is ... material': at 391-2.

[31] *Cook* (1986) 161 CLR 376 at 384-5, 391-3. See also *Wills* [2004] 1 Qd R 296 at 320; *Radford* (1990) 11 MVR 509 at 524.

[32] (1948) 77 CLR 39 at 56. See also 56-7, 59-60 (Dixon J), 45-6 (Latham CJ); aff'd *Roggenkamp v Bennett* (1950) 80 CLR 292 at 303; *Nettleship* [1971] QB 691 at 703-4.

[33] *Joyce* (1948) 77 CLR 39 at 59 (Dixon J).

[34] [1973] 1 NSWLR 708 ('*Chang*').

[35] *Chang* [1973] 1 NSWLR 708 at 713 (Hutley JA).

[36] (1986) 161 CLR 376 at 383. See also 386 (Mason, Wilson, Deane and Dawson JJ), 392-3 (Brennan J); *Imbree* (2008) 248 ALR 647 at 649.

[37] [1952] SASR 159 at 162 (Napier CJ) ('*Walker*'). Although the particular claimant, an expert racing driver, was generally defined as being merely a 'passenger', at one point they were also described as being an 'expert tutoring a novice.' Consequently, it is unclear what, if any, weight was attributed to this fact: at 163.

However, a learner who acted in deliberate disregard of instruction did not owe a reduced standard of care. Presumably this was because such circumstances were akin to the instructing passenger accepting the risks only to the extent that they pertained to the instructor's knowledge of the driver's particular incapacity (namely, that due to the learner's "inexperience" it would be unreasonable to expect the ordinary standard of an experienced driver), and not otherwise. Therefore, in *Syczew v Szewc*, the Supreme Court of South Australia held that 'the appellant, having driven the car in the disregard of express instructions not to do so, assumed a duty to exercise towards the respondent the standard of care and skill which [was] required of an ordinarily careful and skilful driver'.[38]

The standard espoused by *Cook* was also interpreted as envisaging a 'variable' or ''sliding scale' of duties of care (and corresponding standards of care) depending on the existence of any special circumstances of the case'.[39] Consequently, being objective, whilst the standard was not ostensibly adjusted by reference to the physical characteristics, expertise, or usual carefulness of the "particular" learner,[40] as the known level of "general" experience was relevant to defining the exigencies of the parties' relationship, it was taken into account. Ensuing judicial consideration of the standard required, whilst falling short of requiring the skill of an experienced or fully licensed motorist, therefore extended from the standard reasonably expected of an 'almost totally inexperienced driver',[41] to the higher obligation of a driver who, in presenting for a driving examination, regarded themself as 'ready to hold a motor driver's licence'.[42] For example, *MacMorran v MacMorran* considered the position of a learner who, having had 30 to 50 lessons, was not in the early stages of instruction. The Supreme Court of Tasmania applied the standard of 'an unqualified but reasonably experienced learner-driver ... competent to perform all routine driving movements', according to the 'objective standard of a reasonable person with similar skills or lack of them'.[43]

Such a general consideration of a defendant's subjective characteristics, when framing the standard of care owed, was consistent with other areas of negligence law. For example, as mentioned in Part 1, the reasonable care and skill required from a minor is similarly determined with respect to that level of care expected from a child of the defendant's age, experience, or maturity.[44] Nevertheless the application of such an approach to form the learner driver's variable standard, dependent as it was upon the general context of the relationship between the learner and the instructor, and the passenger's knowledge or appreciation of the driver's capacity to drive, was criticised. In *Radford v Ward*,[45] Murphy J expressed concern in the following terms:

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[38] (1989) 10 MVR 506 at 509 (King CJ). Here the instructor told the driver that 'his lesson on that day was to be confined to learning about the controls in the vehicle and how to operate the clutch and the brake and to start the vehicle, but that was as far as his instruction was to go': at 507.

[39] *George* (1998) 27 MVR 323 at 328 (Malcolm CJ).

[40] *Imbree* (2008) 248 ALR 647 at 660.

[41] *George* (1998) 27 MVR 323 at 326 (Malcolm CJ) (referring to the standard owed on *Cook's* facts). However, the High Court in *Cook* expressed the standard, on the facts before them, differently as – that degree of skill and care 'which could reasonably be expected of an unqualified and inexperienced driver (but with some knowledge of the controls of a motor vehicle)': at 388. See also above n 25.

[42] *George* (1998) 27 MVR 323 at 327-8 (Malcolm CJ). See also *Fettke v Bogovic* [1964] SASR 119 at 121-3 ('*Fettke*').

[43] (1989) 10 MVR 343 at 347 (Neasey J). The driver was negligent in depressing the accelerator instead of the brake, causing the car to accelerate into a wall.

[44] *McHale* (1966) 115 CLR 199 at 213. See also above n 8-11 and accompanying text.

[45] This case concerned the application of *Cook's* principle to the standard of care owed to a passenger by an intoxicated driver. Part 4 considers this issue further.

> I find a certain lack of satisfaction in the court's determination that the impugned conduct in *Cook* ... breached the lesser or reduced standard of care applicable in the "special and exceptional" circumstances ... From a practical point of view, the measurement of the degree to which the driver was seen to be so affected, and the parameters of the standard ... as well as the difficulties of an objective judgement whether or not the conduct causing the accident in the circumstances breached that lesser standard, would appear to me to introduce an air of complete unreality that should be avoided.[46]

Indeed, despite assurances that *Cook's* standard remained objective, given the extent in practice that the individual learner's experience was considered in adjusting the standard of care owed, it seems a fine line that the courts were drawing between assessing liability according to an objective, as opposed to a subjective, test.

In *Nettleship v Weston*, similar criticism[47] persuaded a majority of the English Court of Appeal to conclude that the standard of care owed by a learner driver to a supervising passenger should not be altered. Instead, the Court held that learners should be judged by the same objective standard of reasonable care as owed by other drivers to passengers and road users generally – namely, 'the care to be expected of an experienced, skilled, and careful driver'.[48] The Australian High Court in *Imbree*, although not bound by precedent to do so,[49] upheld this decision.[50]

3. Imbree v McNeilly

Judicial decision-making should not only do justice as between disputants but should also, especially where the content of legal doctrine is in issue, seek to balance the legal certainty achieved through a strict adherence to precedent against the need to maintain the law's contemporary social relevance[51] and 'connection with more fundamental doctrines and principles'.[52] Consequently, where the assumptions upon which previous statements of the law are based have changed, appellate courts have a duty to 'restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible'.[53] Accordingly, in *Imbree*, a 6:1 majority of the High Court concluded that the Court's previous decision in *Cook*, advocating a learner driver's lower standard of care,

[46] (1990) 11 MVR 509 at 517. See also 514-5; *Wills* [2004] 1 Qd R 296 at 320. Nevertheless, Salmon LJ has argued that '[e]qually difficult questions of fact and degree are, however, being assessed and decided in our courts every day': *Nettleship* [1971] QB 691 at 705.

[47] [1971] QB 691 at 700-1 (Lord Denning MR), 707-10 (Megaw LJ) (Salmon LJ dissenting). Such criticism included: the unpredictability and uncertainty of the same learner driver owing different standards of care depending upon, for example, whether the claimant was a supervising passenger or another road user; the inherent difficulty in measuring the variable standard; and the inability to confine the standard to learner drivers of motor vehicles. Consequently, Megaw LJ was concerned that the recognition of a lower standard would cut the law adrift from the objective standard of reasonable care – which until then the law had required to be measured 'without regard to the particular personal skill, experience, physical characteristics or temperament of the individual ... and without regard to a third party's knowledge or assessment of those qualities or characteristics': at 708.

[48] *Nettleship* [1971] QB 691 at 702. See also 701 (Lord Denning MR), 709 (Megaw LJ – standard of the 'competent and experienced driver').

[49] See, eg, *Cook* (1986) 161 CLR 376 at 390.

[50] Indeed, Kirby J affirmed the considerations referred to by Megaw LJ in *Nettleship* briefly listed at above n 47: *Imbree* (2008) 248 ALR 647 at 672, 679-80, 682, 690. See also 651 (Gleeson CJ), 661 (Gummow, Hayne and Kiefel JJ).

[51] J Stone, *Precedent and Law* (Sydney: Butterworths, 1985) 110-1; Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 158; *Gala v Preston* (1991) 172 CLR 243 at 262 ('*Gala*').

[52] *Imbree* (2008) 248 ALR 647 at 659 (Gummow, Hayne and Kiefel JJ).

[53] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 429 (Kirby J).

should be overturned[54] as 'basic considerations of principle require[d] a contrary conclusion'.[55] Heydon J however dissented. Because, on the issue of liability before them, the defendant had been careless over the mere inexperience of a learner, their duty of care had been breached on either view of the standard of care owed.[56] His Honour therefore held that the case could be decided without overruling *Cook*.[57] In *Wheeler v Macdonald*,[58] the New South Wales Supreme Court similarly concluded that, where a negligence finding was inevitable, it was unnecessary to consider the appropriateness of *Cook's* revised standard.

Imbree sustained severe spinal injuries after McNeilly overturned the four-wheel drive station wagon in which they were travelling. The accident occurred when McNeilly lost control of the vehicle after swerving off a gravel road to avoid some tyre debris, rather than straddling and driving over it. McNeilly, although known not to hold a learner's permit and to have little driving experience, was permitted to drive whilst Imbree sat beside him in the front passenger seat. This required the Court to re-examine whether the standard of care owed by McNeilly was

> diminished, or even eliminated, because the appellant was aware of the exceptional circumstances that made it unreasonable for him to expect a learner driver to be able to meet the standards of an ordinary, reasonable driver engaged in driving a vehicle in such demanding and potentially dangerous conditions.[59]

In concluding that a reduced standard of care is no longer to be applied in determining whether a passenger supervising a learner driver has suffered damage resulting from the driver's breach of a duty of care, the Court held on the facts that a breach of the ordinary standard, of the hypothetical "reasonable driver", could be shown.[60] The joint judgement of Gummow, Hayne and Kiefel JJ (with which Gleeson CJ, Crennan and Kirby JJ individually agreed)[61] considered that the translation of an instructor's knowledge of a driver's inexperience 'into the identification of a separate category or class of relationship governed by a distinct and different duty [or standard] of care'[62] could no longer be sustained.

[54] (2008) 248 ALR 647 at 652 (Gleeson CJ), 655, 665 (Gummow, Hayne and Kiefel JJ), 672, 690 (Kirby J), 692 (Crennan J).
[55] (2008) 248 ALR 647 at 661 (Gummow, Hayne and Kiefel JJ). *Henderson v Henry E Jenkins & Sons* acknowledged that a standard of care required might change over time: [1970] AC 282 at 298.
[56] Whether it was the standard of an 'unqualified and inexperienced' driver or the higher standard of an 'experienced and competent' driver.
[57] *Imbree* (2008) 248 ALR 647 at 691-2. Additionally, according to Heydon J, it was not submitted that the trial judge's acceptance of *Cook* 'had led him to select too high a percentage for contributory negligence': at 691. Cf 670 (Gummow, Hayne and Kiefel JJ).
[58] [2008] NSWSC 567 at [43]-[44]. This case concerned *Cook's* potential application to an intoxicated learner driver.
[59] *Imbree* (2008) 248 ALR 647 at 675. See also 671-2, 677 (Kirby J), 657 (Gummow, Hayne and Kiefel JJ).
[60] *Imbree* (2008) 248 ALR 647 at 654 (Gleeson CJ), 655, 661, 665, 669 (Gummow, Hayne and Kiefel JJ), 672, 690-1 (Kirby J), 692 (Crennan J). Heydon J held that as McNeilly had been negligent over and above the mere inexperience of a learner, he was liable on either view of the standard of care owed: at 691-2. However Imbree was 30 percent contributory negligent in failing to: instruct McNeilly to straddle the tyre debris; and offer 'basic advice to a learner driver to make no sudden change of direction or speed on a dirt road': at 670. See also 699-70 (Gummow, Hayne and Kiefel JJ), 672, 690-1 (Kirby J).
[61] *Imbree* (2008) 248 ALR 647 at 648 (Gleeson CJ), 692 (Crennan J), 672, 690 (Kirby J).
[62] *Imbree* (2008) 248 ALR 647 at 661.

3.1 Factors Necessitating a Contrary Conclusion

The following principles and policy factors[63] necessitated their Honours' departure from *Cook*:

3.1.1 Coherency

Although *Cook's* reasoning has been applied to non-supervising passengers,[64] in *Imbree* it was not argued that a learner driver generally owes other road users and passengers an attenuated standard of care, even though that claimant may also know of the learner's inexperience due to the presence of "L-plates" or otherwise.[65] Gummow, Hayne and Kiefel JJ therefore concluded that, as 'a learner driver owes all other road users a duty of care that requires the learner to meet the same standard of care as any other driver on the road',[66] there was no reason why the relevant legal relationship between a learner and a supervising passenger should be regarded as any more "special and exceptional" in the sense referred to in *Cook*. Gleeson CJ similarly held that '[t]o describe a case as special, or exceptional, implies existence of a principle by which it can be recognised, and distinguished from the ordinary'.[67] However, 'there is nothing rare about a passenger knowing that a driver is inexperienced'.[68] Consequently, knowledge of inexperience could not provide any:

> sufficient foundation for applying different standards of care in deciding whether a learner driver is liable to one passenger rather than another, or in deciding whether that learner driver is liable to a person on the outside of the car rather than one who was seated in the car.[69]

The notion that the imposition of negligence liability should be consistent with other legal principles and bodies of law has received particular attention in Australian jurisprudence in recent years.[70] *Cook* recognised that, due to their more particular relationship with the driver, the case of a passenger "does" differ from that of other road users. Despite this, *Imbree* concluded, consistent with maintaining the coherency of legal principle,[71] that a learner should owe the same objective standard, of the reasonably experienced driver, irrespective of whether the claimant is an "ordinary" passenger, a "supervising" passenger, or another road user.[72] Incidentally, a learner driver's known inexperience and incompetence is also irrelevant to the standard of the duty of care owed to a passenger in criminal law.[73]

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[63] *Imbree* (2008) 248 ALR 647 at 681, 690.
[64] See, eg, *Walker* [1952] SASR 159 (discussed at above n 37 and accompanying text).
[65] (2008) 248 ALR 647 at 653 (Gleeson CJ), 661-2 (Gummow, Hayne and Kiefel JJ). Cf Kirby J who states that '[e]ven the display of "L" plates on a vehicle, driven by a learner driver, will generally give third parties little or no opportunity to avoid damage, assuming that they are conscious of the plates at all': at 681. Similarly, Allen concludes that whilst *Cook's* 'reasoning is equally applicable to other passengers travelling with a learner', 'a distinction can be drawn for other road users, even if they see an L plate, because in that case there is no consensual relationship established on the basis of the driver's known incompetence': Judy Allen, 'Variable Standards of Care in Negligence' (2009) 17 *Tort Law Review* 5, 7.
[66] *Imbree* (2008) 248 ALR 647 at 661.
[67] *Imbree* (2008) 248 ALR 647 at 651. See also 661 (Gummow, Hayne and Kiefel JJ).
[68] *Imbree* (2008) 248 ALR 647 at 649 (Gleeson CJ).
[69] *Imbree* (2008) 248 ALR 647 at 661-2 (Gummow, Hayne and Kiefel JJ). See also 649, 653 (Gleeson CJ).
[70] See *Hill v Van Erp* (1997) 188 CLR 159 at 179-83, 223-4, 231-4; *Sullivan v Moody* (2001) 207 CLR 562 at 580-2 ('*Sullivan*'); *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317 at 335, 342, 361-2, 425 ('*Tame*'); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 555 ('*Woolcock*').
[71] (2008) 248 ALR 647 at 652.
[72] A majority of the English Court of Appeal in *Nettleship* reached the same conclusion after examining a learner driver's responsibility (or standard of care owed): in criminal law; to other road users; and to ordinary

3.1.2 The Unpredictability and Uncertainty of the Same Driver Owing Varying Standards of Care

Whilst, as discussed in Part 1,[74] there are other areas of negligence liability where the law similarly considers a defendant's general characteristics in setting the standard of care, the different level of care in these cases is applied uniformly. For instance, the reduced standard of care recognised in *McHale v Watson*[75] as being owed by a minor, would apply to all of the child's negligent acts or omissions. Even when the child engages in an adult activity and is therefore arguably[76] subjected to the standard ordinarily owed by a reasonably competent adult, there is no suggestion that the standard should vary according to the nature of the child's relationship with the claimant and whether the claimant, for instance, knows that the defendant is a child. In *McHale* (a case decided before *Cook* but after *Joyce*[77]), McTiernan ACJ referenced that 'a minor who engages in dangerous adult activities, such as driving a car or handling industrial equipment, must conform to the standard of the reasonably prudent adult; his position being analogous to that of beginners who as we have seen, are held to the objective standard'.[78]

Gummow, Hayne and Kiefel JJ distinguished this position from the principle established in *Cook*, which required:

> [T]he application of a different standard of care to the one defendant in respect of the one incident yielding the same kind of damage to two different persons, according to whether the plaintiff was supervising the defendant's driving or not.[79]

Kirby J also refers to '[t]he unpredictability and uncertainty of having differing standards of care owed by the same driver to passengers compared to those owed to other motorists and pedestrians'.[80] Indeed, even between passengers, such a situation may arguably lead to injustice. For example, one passenger 'may know that the learner driver is a mere novice. Another passenger may believe him to be entirely competent ... Is the one passenger to recover and the other not?'[81]

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passengers, and concluding that in each instance the law demanded from a learner the same standard as from any other driver: [1971] QB 691 at 698-702 (Lord Denning MR), 709-10 (Megaw LJ). Cf Salmon LJ who stated that '[i]t does not appear to me to be incongruous that a learner is responsible for acts or omissions in criminal law and indeed to the public at large in civil law and yet is not necessarily responsible for such acts or omissions to his instructor': at 705.

[73] '*Cook* ... was a case about the civil law of negligence and has very little relevance to the criminal law': *R v Ettles* (1999) 27 MVR 265 at 267 (Cox J). Concerned two charges of 'driving in a manner dangerous to the public' pursuant to the *Criminal Law Consolidation Act 1935* (SA) s 19a(1),(3).

[74] See also above n 44 and accompanying text.

[75] (1966) 115 CLR 199.

[76] See, eg, *Tucker* [1956] SASR 297; *McHale* (1966) 115 CLR 199 at 205, 208, 234.

[77] (1948) 77 CLR 39.

[78] (1966) 115 CLR 199 at 205-206. Referring to statements made in J G Fleming, *The Law of Torts* (9th ed, Sydney: LBC Information Services, 1998) 126. Here 'beginner' is used to refer to newly licensed rather than 'learner' drivers: at 123.

[79] *Imbree* (2008) 248 ALR 647 at 665. See also 664 (Gummow, Hayne and Kiefel JJ).

[80] *Imbree* (2008) 248 ALR 647 at 680.

[81] *Nettleship* [1971] QB 691 at 700 (Lord Denning MR).

3.1.3 Difficulty in Measuring the Standard

In *Joslyn v Berryman*, McHugh J acknowledged that 'the notion of a standard of care that fluctuates ... is one that tribunals of fact must have great difficulty in applying'.[82] The Court in *Imbree* similarly criticised the notion of the learner driver's reduced and variable standard of care. Gummow, Hayne and Kiefel JJ referred to the difficulty in implementing the standard flowing from the fact that:

> describing the relevant comparator as the reasonable "inexperienced" driver does not sufficiently identify the content of the standard that is intended to be conveyed by the use of the word "inexperienced." In particular it leaves undefined what level of competence is to be assumed in such a driver.[83]

Kirby J also considered the difficulty in determining 'the precise knowledge and extent of experience of the learner driver' and '[t]he desirability in "our legal process" of avoiding "varying standards depending on such complex and elusive factors"'.[84] Gleeson CJ concluded that 'given the wide variability in degrees of inexperience; ... it is not irrational to impose an objective standard of care rather than to attempt to adjust the standard of care to the level of experience of an individual driver'.[85]

3.1.4 Other Factors

By rejecting a driving instructor's knowledge of a learner driver's inexperience as a sufficient basis upon which to found a lower standard of care in *Cook*, the High Court in *Imbree* was concerned that 'the principle adopted in *Cook v Cook* departed from fundamental principle and had achieved no useful result'.[86] In particular, Gummow, Hayne and Kiefel JJ concluded that the 'rejection of knowledge as a basis for applying a different standard of care' was mandated 'by the essential requirement that the standard of care be objective and impersonal'.[87] Gleeson CJ also stated that:

> Many other factors may cause impairment of driving skills, in varying degrees. The question is whether, as a matter of legal principle, there is sufficient reason to single out inexperience, or to treat the relationship between an inexperienced driver and a supervisor as modifying the ordinary, objectively expressed, standard of care.[88]

Consequently, their Honours appeared concerned that the continued recognition of a "special" standard of care in the case of learner drivers would detract from the objective standard traditionally required by negligence law – particularly given the standard's variable or subjective nature of adjusting according to individual driving experience.[89]

Nevertheless, in the context of the standard of care that a learner driver ought to owe their supervising passenger, notions of vulnerability and the relevance of insurance to tortious liability also influenced the High Court's decision.

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[82] (2003) 214 CLR 552 at 564 ('*Joslyn*'). See also *Radford* (1990) 11 MVR 509 (discussed at above n 46 and accompanying text).
[83] (2008) 248 ALR 647 at 662. See also 651 (Gleeson CJ).
[84] *Imbree* (2008) 248 ALR 647 at 680 (citations omitted).
[85] *Imbree* (2008) 248 ALR 647 at 651.
[86] (2008) 248 ALR 647 at 665 (Gummow, Hayne and Kiefel JJ).
[87] *Imbree* (2008) 248 ALR 647 at 662. See also 661 (Gummow, Hayne and Kiefel JJ), 671-2 (Kirby J).
[88] *Imbree* (2008) 248 ALR 647 at 650.
[89] Megaw LJ expressed similar concerns in *Nettleship* [1971] QB 691 at 708 (discussed at above n 47). See also above n 39-43 and accompanying text.

3.2 Vulnerability

In determining negligence liability the standard of care required is not one of strict liability, or elimination of risk, but 'reasonableness'.[90] What is reasonable is not solely a matter of legal prescription, but rather also compels a normative judgement based upon prevailing community standards.[91] Previously, reasonableness was informed by the concept of proximity,[92] which required, in this way, both an assessment of the degree of closeness of the parties' relationship and a judgement of the legal consequences of that evaluation as a matter of policy.[93] In *Cook*, it was the closeness of the relationship between the parties,[94] in terms of the defendant's known incompetence and inexperience, which modified the content, or standard,[95] of the duty of care that the learner driver was required to discharge.[96] Mason, Wilson, Deane and Dawson JJ also held that

> [i]t would be contrary to common sense and the concept of what is reasonable in the circumstances (considerations which are basic to the common law of negligence) to measure the content of the duty of ... [a learner] by the standard to be expected of an ordinary experienced, skilled and careful driver.[97]

However, proximity is no longer the conceptual test for liability,[98] due to criticism that it only expressed the result of a process of reasoning and did not afford any practical guidance as to the circumstances that would found liability. Therefore, *Cook's* reliance upon the superseded notion of proximity was another factor influencing the High Court's decision in *Imbree*.[99] However, in *Cook*, Mason, Wilson, Dean and Dawson JJ's joint judgement was also influenced by dicta in *Joyce*[100] (a case decided before proximity), whilst Brennan J's similar conclusion, as to the learner driver's lower standard of care, additionally expressly disclaimed reliance upon proximity.[101] Accordingly, the Court in *Imbree* concluded

> that simply to point to the frequency of reference to proximity in the plurality reasons in *Cook v Cook*, and couple that with the subsequent discarding of proximity as a tool for determining whether a

[90] *Walker* [1952] SASR 159 at 162 (Napier CJ).
[91] '[D]evelopment in the common law resulted in a generalised standard of care, described as what a reasonable person would, in the circumstances, do by way of response to a foreseeable risk ... The expression "reasonable response in the circumstances" raises a question of normative judgement ... It is a matter upon which different views are legitimately open. When courts refer to "community values", they may create an impression that such values are reasonably clear, and readily discernible ... Reasonableness, however, is not a matter of legal prescription': *Neindorf v Junkovic* (2005) 222 ALR 631 at 633-4 (Gleeson CJ) ('*Neindorf*'). See also 653, 655-6, 659-60; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 425, 454 ('*Vairy*'); *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 489 ('*Romeo*'); *McPherson v Whitfield* [1996] 1 Qd R 474 at 483.
[92] *Vairy* (2005) 223 CLR 422 at 433.
[93] *Jaensch v Coffey* (1984) 155 CLR 549 at 580, 584-5 ('*Jaensch*'); *Gala* (1990) 172 CLR 243 at 252-3, 260.
[94] Exhibiting either: 'physical' proximity (in the sense of the closeness of space and time between the person of the claimant and the defendant in the car): *Preston v Dowell* (1987) 45 SASR 111 at 121 ('*Preston*'); or 'circumstantial' proximity (in the sense of the overriding relationship between the parties). See also *Jaensch* (1984) 155 CLR 549 at 584.
[95] (1986) 161 CLR 376 at 383.
[96] (1986) 161 CLR 376 at 381-2, 388; *Wills* [2004] 1 Qd R 296 at 320; *Preston* (1987) 45 SASR 111 at 121.
[97] *Cook* (1986) 161 CLR 376 at 383. See also 387 (Mason, Wilson, Deane and Dawson JJ); *Morton* [1987] 2 Qd R 419 at 429.
[98] *Sullivan* (2001) 207 CLR 562 at 578-9; *Woolcock* (2004) 216 CLR 515 at 528-9, 546-7, 568. See also *Bryan v Maloney* (1995) 182 CLR 609 at 652-5; *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520 at 543; *Gala* (1990) 172 CLR 243 at 259-62, 276-7.
[99] (2008) 248 ALR 647 at 658-60 (Gummow, Hayne and Kiefel JJ), 690 (Kirby J).
[100] (1948) 77 CLR 39. See above n 31 and accompanying text.
[101] *Cook* (1986) 161 CLR 376 at 393-4.

> defendant owes a duty of care, provides no sufficient basis for rejecting the principle that it established.[102]

3.2.1 Vulnerability Generally

With the abandonment of proximity, a claimant's vulnerability, whilst not determinative of liability,[103] has emerged as an important policy consideration[104] relevant to what reasonableness requires[105] in the context of ascertaining the scope and content of negligence liability.[106] Defined as a claimant's inability to protect themself from the consequences of a defendant's want of reasonable care,[107] the notion has had a long-standing influence on the standard of care expected in relationships involving care and control, such as between prisoner and prison authority, or pupil and school. For example, the High Court has stated that:

> In determining the probability of an occurrence, the vulnerability of the person at risk is a critical factor ... Hence, negligence doctrine will generally impose a higher standard of care on a person who creates or is responsible for a risk of injury to an employee, a prisoner or a school child than it will impose in respect of many persons falling outside those categories ... The restrictions on freedom imposed on the prisoner take away his or her autonomy and lessen the prisoner's capacity to guard against danger. The immaturity of a child – especially a young child – makes the child insensitive to danger.[108]

Since vulnerability refers to a claimant's incapacity to take reasonable steps[109] of self-protection, the degree of a defendant's control over a claimant's right, interest, or expectation[110] is an important test. Accordingly, vulnerability on the part of a claimant is often a 'corollary of the control that the defendant has over the act which is negligently performed'.[111]

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[102] (2008) 248 ALR 647 at 660 (Gummow, Hayne and Kiefel JJ). See also 681 (Kirby J).

[103] See, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 227-8, 285 ('*Perre*'); *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540 at 597-8, 664 ('*Graham Barclay Oysters*'); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 80 ('*Crimmins*'); *Woolcock* (2004) 216 CLR 515 at 547, 592; *Stuart v Kirkland-Veenstra* (2009) 254 ALR 432 at 465 ('*Stuart*').

[104] *Perre* (1999) 198 CLR 180 at 285; *Crimmins* (1999) 200 CLR 1 at 85.

[105] *Fortuna Seafoods Pty Ltd v The Ship 'Eternal Wind'* [2008] 1 Qd R 429 at 457-8.

[106] Although traditionally used to describe the circumstances in which a duty of care should be found to exist, as the elements of the negligence action are interrelated (see, eg, *Graham Barclay Oysters* (2002) 211 CLR 540 at 622; *Tame* (2002) 211 CLR 317 at 349; *Neindorf* (2005) 222 ALR 631 at 644) notions of vulnerability pervade across the action. See, eg, *Koehler v Cerebos (Australia) Limited* (2005) 222 CLR 44 at 55, 57-59; *Modbury Triangle Shopping Centre Pty Limited v Anzil* (2000) 205 CLR 254 at 287 (considered in breach).

[107] See, eg, *Perre* (1999) 198 CLR 180 at 220, 225-6; *Woolcock* (2004) 216 CLR 515 at 530, 549, 575; *Sullivan* (2001) 207 CLR 562 at 575; *Crimmins* (1999) 200 CLR 1 at 39-40; *Allen v Tweed Shire Council* [2008] NSWSC 937 at [20]; Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 1, 8.

[108] *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* [2005] HCA 31 at [44] (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ) (citation omitted). See also *New South Wales v Bujdoso* (2005) 227 CLR 1 at 13-5. The special dependence or vulnerability of prisoners or children as a class (including the claimant) upon the prison authority or school alleged to owe a duty of care, has also been held to give rise to a non-delegable duty. See, eg, *State of New South Wales v Lepore; Samin v State of Queensland; Rich v State of Queensland* (2003) 212 CLR 511 at 534, 551, 563-4 (pupil and school); *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 252 at 295-6, 304-5 (prisoner/detainee and prison authority). See also *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 64-5, 74-5.

[109] *Woolcock* (2004) 216 CLR 515 at 559, 575-7; *Crimmins* (1999) 200 CLR 1 at 39-40.

[110] *Perre* (1999) 198 CLR 180 at 229. See also *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55 at 66 (Maxwell P): 'the element of control is part of the same vulnerability analysis.'

[111] Helen Anderson, 'Implications for Auditors of the High Court Decision in Perre v Apand' (2000) 4 *Macquarie Law Review* 37, 57. See also *Crimmins* (1999) 200 CLR 1 at 24.

Relevant jurisprudence also suggests that an assessment of claimant vulnerability might occur at two levels.[112] Firstly, in some instances it is the vulnerability of the "particular claimant" as an individual, in the circumstances of their relationship with the defendant, which has been considered. For example, in *Northern Sandblasting Pty Limited v Harris*,[113] in considering whether a landlord owed a non-delegable duty of care to a nine-year-old girl, who was electrocuted due to the defective wiring of the house in which she lived, McHugh J regarded the vulnerability of the particular claimant, being a child, to be the focus:

> The landlord had undertaken the repair of a defective household electrical appliance ... The safety of the residents of the premises was utterly dependent on the proper performance of that work. The plaintiff as a child was in a position of special dependence and vulnerability.[114]

Where steps might have been taken to secure protection against the consequences of a defendant's negligence, there is, however, tension between: the extent to which an individual claimant's failure to act will be considered towards establishing an absence of vulnerability relevant to a defendant's negligence liability (in terms of the scope or standard of the duty of care owed), and the extent to which a claim for contributory negligence should instead be made. This is because contributory negligence similarly considers the reasonable precautions open to an individual claimant to 'avoid the consequences or risks which the defendant's negligence sets up'.[115] Whilst, as discussed below,[116] this tension was avoided in *Imbree*, in *Moorabool Shire Council v Taitapanui*[117] the Supreme Court of Victoria commented, in obiter, that to deny liability on the basis of a lack of vulnerability would serve to reintroduce the 'last opportunity rule'[118] contrary to a claimant's legislative right[119] to pursue damages claims notwithstanding their own negligence.

Secondly, however, an assessment of vulnerability has not always been confined to considerations relevant to the particular claimant. Rather, it has also been viewed in the context of the general "class of persons" to whom the claimant belongs - or whether the claimant, in the broad context of their relationship with the defendant, would "ordinarily" be considered vulnerable. For example, in *Northern Sandblasting*, Kirby J stated:

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[112] See further Tracey Carver, 'Beyond Bryan: Builders' Liability and Pure Economic Loss' (2005) 29(1) *Melbourne University Law Review* 270, 291-6..

[113] (1997) 118 CLR 313 ('*Northern Sandblasting*').

[114] (1997) 118 CLR 313 at 368-9. The vulnerability of the particular claimant, due to the casual and hazardous nature of their employment, was also considered by McHugh and Gaudron JJ in *Crimmins* (1999) 200 CLR 1 at 24, 40, 44. Similarly, the ability of the injured party to take steps to protect himself was significant to the Court's conclusion, that there was no reason to impose on a lender a duty to protect a borrower from making unwise decisions about the use of the money borrowed, in *Politarhis v Westpac Banking Corporation* [2009] SASC 96 at [118], [130].

[115] *Joyce* (1948) 77 CLR 39 at 58 (Dixon J).

[116] See below n 137-143 and accompanying text.

[117] [2004] VSC 239 at [85]-[86], [129]. See also (2006) 14 VR 55 at 65-6 (Court of Appeal).

[118] *Davies v Mann* (1842) 152 ER 588. The rule denied a plaintiff's claim where, having the last opportunity to avoid an accident, they negligently failed to avail themself of it.

[119] *Wrongs Act 1958* (Vic) s 26(1)(a); *Law Reform Act 1995* (Qld) s 10(1)(a); *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9(1)(a); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 7(1); *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA) s 4(1); *Wrongs Act 1954* (Tas) s 4(1); *Civil Law (Wrongs) Act 2002* (ACT) s 41(1)(a); *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 16(1)(a).

> It is true that the respondent herself, as a young child, was vulnerable. She was in need of protection. But ... [t]he "vulnerability" to which the legal test is addressed, in this context, relates to the relationship and not to particular individuals within it.[120]

When vulnerability is assessed in this way, (for example, in the context of whether tenants are a generally vulnerable group),[121] the issue of whether 'particular plaintiffs' could have protected themselves is relevant to the defence of contributory negligence only.[122]

3.2.2 Vulnerability in Imbree

In *Imbree*, Gleeson CJ stated that '[i]n the *ordinary case*, the central feature of the relationship between the driver of a car and all the passengers, including the supervisor, is the[ir] vulnerability.'[123] Gummow, Hayne and Kiefel JJ similarly infer that categorising the claimant as the defendant learner driver's 'instructor' or 'supervisor' did not mean that the claimant was in a position of control, in the sense of being able to take reasonable steps in their own self-protection. Rather:

> there are limits to what supervision or instruction can achieve. There are limits because no amount of supervision or instruction can alter two facts. First, unless the vehicle has been specifically modified to permit dual control, it is the learner driver, not the supervisor or instructor, who operates the vehicle. Second, the skill that is applied in operating the vehicle depends entirely upon the attitude and experience of the learner driver … If the conclusion were to be based upon how the supervisor could influence (even direct) the learner driver, it would be based upon considerations that are more appropriately considered in connection with contributory negligence. If the supervisor *could* have influenced the outcome it may be that the supervisor failed to take reasonable care for his or her own safety ... And if the supervisor could *not* have influenced the outcome, what is the relevance of the supervisory role to the standard of care the learner should exercise in operating the vehicle?[124]

Accordingly, whilst proximity, in terms of the driver's known inexperience, was relevant to the lower standard of care owed by a learner driver to their instructor in *Cook*, *Imbree* was influenced by the learner's ultimate control over the driving and the corresponding vulnerability, not of the particular claimant (such considerations being more relevant to contributory negligence), but of the particular class of persons within which the claimant fell (being instructing or supervising passengers generally). The standard of care is similarly assessed, not from an individual perspective, but in terms of the ordinary, or reasonable, person of the class to which the defendant belongs.[125] Therefore, 'having regard to the capacity of a motor vehicle to cause harm, and the vulnerability of others on or near the highway',[126] it was considered that a supervising passenger was ordinarily not in a greater

[120] (1997) 118 CLR 313 at 401. Incidentally, whilst the imposition of a non-delegable duty 'would protect tenants, as a generally vulnerable group, from inadequate or negligent performance by contractors of their duties' (at 398), his Honour concluded that other reasons of legal policy or principle supported a contrary conclusion. See also *Woolcock* (2004) 216 CLR 515 at 553, 558-9, 586, 590 (consideration of the vulnerability of the claimant as a member of a class of subsequent owners of commercial premises); *Crimmins* (1999) 200 CLR 1 at 42-4 (McHugh J), 85 (Kirby J) (consideration of the vulnerability of the class of persons (waterside workers) to which the claimant belonged); *Stuart* (2009) 254 ALR 432 at 465 (consideration, in the context of the failure of police officers to apprehend pursuant to the *Mental Health Act 1986* (Vic) s 10, of a class of persons, which included the plaintiff's husband, who might be described as "especially vulnerable") .

[121] *Northern Sandblasting* (1997) 118 CLR 313 at 398 (Kirby J).

[122] *Moorabool Shire Council v Taitapanui* [2004] VSC 239 at [85].

[123] (2008) 248 ALR 647 at 649 (emphasis added).

[124] *Imbree* (2008) 248 ALR 647 at 664. See also 662-3 (Gummow, Hayne and Kiefel JJ).

[125] *Imbree* (2008) 248 ALR 647 at 660, 664-5; *Cook* (1986) 161 CLR 376 at 387. See also above n 1-11 and accompanying text.

[126] *Imbree* (2008) 248 ALR 647 at 653. See also 651 (Gleeson CJ).

position of control *vis-a-vis* a learner driver (when compared with other passengers or road users), such as to warrant a lower standard of care being owed to them.[127] Similar to other relationships of care and control,[128] English courts have consistently imposed upon motorists a high standard of care reflective of the fact that cars are very dangerous weapons to which others are particularly vulnerable.[129]

Imbree's apparent reference, in this manner, to claimant vulnerability raises the following issues for consideration:

3.2.2.1 Professional Instructors

Whilst *Cook* and *Imbree* both concerned non-professional driving instructors, *Cook* expressly provided for the application of a learner's reduced standard of care in respect of professional instructors also.[130] Therefore, in *George v Erickson*, the standard of an inexperienced driver 'who regarded himself as ready to hold a motor driver's licence' was owed to a police driver's licence examining officer.[131]

In the context of claimant vulnerability, one might argue that professional instructors, through the presence of dual vehicle controls, or otherwise, have more command over the driving process, or have a greater capacity to take reasonable steps in their own self-protection, than lay instructors. However, in *George*, whilst acknowledging that the 'passenger had some direction over the exercise in which the defendant was involved',[132] in terms of telling them where to drive and what manoeuvre to undertake, Malcolm CJ rejected an argument that the 'defendant and the plaintiff were, in effect, in a master and servant relationship with the defendant's driving being under the ... [plaintiff's] control'.[133] His Honour held that the absence of any real sense of control on the professional instructor's part meant that argument, independent of the Court's reasoning in *Cook*, did not operate to reduce 'the degree of skill owed by the defendant to the plaintiff in his driving'.[134]

Imbree's similar conclusion, as to the ordinary lack of control, and therefore vulnerability, of the "general class" of instructing or supervising passengers, did not appear to distinguish according to professional status. It is therefore likely that learners will in the future; owe the normal standard of the reasonably competent driver to professional driving instructors also. This is certainly the position in England.[135] This conclusion is further supported by the fact

[127] Other cases have confirmed that a 'defendant's' degree of control is proportionate to the 'strength' of the standard of care owed: see eg, *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 at 605. *Romeo* (1998) 192 CLR 431 at 488-9.
[128] See above n 108 and accompanying text.
[129] *Eagle v Chambers* [2003] EWCA Civ 1107 at [16] (Hale J); *Lunt v Khelifa* [2002] EWCA Civ 801 at [20] (Latham LJ); Richard Lewis, 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85, 103.
[130] *Cook* (1986) 161 CLR 376 at 383-4 (Mason, Wilson, Deane and Dawson JJ).
[131] (1998) 27 MVR 323 at 328 (Malcolm CJ. Ipp and Steytler JJ concurring).
[132] (1998) 27 MVR 323 at 328 (Malcolm CJ).
[133] (1998) 27 MVR 323 at 327. See also, *Fettke* [1964] SASR 119 at 125-6 (Chamberlain J): In relation to a police officer conducting a driving test: 'the driving is not being done for his purpose, and only in a limited sense is he in control of it. Such control as he has is derived from his right to refuse to furnish the desired certificate unless his orders are complied with.'
[134] *George* (1998) 27 MVR 323 at 327.
[135] *Hambling v Manga* (Unreported, High Court (Queen's Bench Division), Comyn J, 5 June 1981); *Rawson v Clark* (Unreported, Court of Appeal (Civil Division), Cumming-Bruce, Brandon and O'Connor LJJ, 16 October 1980): Ordinary standard of reasonable care owed to a Department of Transport driving examiner and a Crown traffic examiner, respectively.

that the continuation of a lower standard of care in respect of professional instructors would run contrary to *Imbree's* expressed preference[136] for coherency and a uniform application of any modified standard of care, such that one defendant does not owe different standards to different claimants in relation to the same activity.

Nevertheless, although the standard of care owed to a professional instructor is argued to be the same as that owed to other supervisors, the professional may be more likely to be affected by contributory negligence.

3.2.2.2 Contributory Negligence

As noted above, in focusing upon the vulnerability of driving instructors as a general class, rather than upon the particular claimant's individual ability to protect themself, Gummow, Hayne and Kiefel JJ refer to the latter's overlap with contributory negligence. Their Honours conclude that whilst irrelevant to the standard of care,[137] a particular claimant's ability to supervise, or instruct, the defendant is 'of great importance in deciding whether the [claimant] was contributory negligent'.[138] A supervising passenger may therefore be contributory negligent by: providing inadequate instruction;[139] letting a learner engage in manoeuvres outside their capacity;[140] distracting the driver;[141] or failing to take reasonable steps in intervention should the learner driver's inexperience lead to danger.[142]

The requisite standard of care more appropriately involves a consideration of what the reasonable defendant should do.[143] Therefore, when setting the standard of care against which a defendant's liability is to be judged, adopting an approach to vulnerability that focuses upon the general class of persons within which the claimant fell, and leaving considerations of individual claimant vulnerability to the realm of contributory negligence, achieves a more just and reasonable outcome. An otherwise deserving claimant is not denied compensation on the basis that their individual lack of vulnerability resulted in a lower standard of care, which consequently was not breached by the defendant. Instead, they are contributory negligent, and the personal responsibility of both the claimant and the defendant is more appropriately balanced.

3.2.2.3 Reluctant Drivers

Notwithstanding the above, whilst 'ordinarily' a learner driver's supervising passenger will be vulnerable, Gleeson CJ infers that there may be an 'extraordinary case', or exception, where a particular supervising passenger is in a greater position of control *vis-a-vis* a learner driver (and when compared with other passengers or road users), such as to warrant a lower

[136] Discussed at above n 64-80 and accompanying text.
[137] *Imbree* (2008) 248 ALR 647 at 664-5. See also 649 (Gleeson CJ).
[138] *Imbree* (2008) 248 ALR 647 at 665. See also 649 (Gleeson CJ).
[139] *Imbree* (2008) 248 ALR 647 at 670 (Gummow, Hayne and Kiefel JJ): failure to advise a learner driver to straddle road debris and to 'make no sudden change of direction or speed on a dirt road'.
[140] *Nettleship* [1971] QB 691 at 701; *George* (1998) 27 MVR 323 at 329; *MacMorran* (1989) 10 MVR 343 at 347-8.
[141] *Ricketts* (1988) 14 NSWLR 311 at 322-3: supervising passenger flicked a cigarette through an open car window causing ash to blow back into the car.
[142] *Chang v Chang* [1974] 48 ALJR 362 at 364-5; *Nettleship* [1971] QB 691 at 706-7, 702-3: failure to apply the handbrake quick enough to avoid an accident.
[143] See, eg, Mandy Shircore, 'Standardising the Standard of the Learner Driver: Imbree v McNeilly' (2008) 15 *James Cook University Law Review* 234, 248.

standard of care being owed to the passenger on the grounds that they, as an individual, are no longer vulnerable. This occurs where 'the driver is driving under the legal or practical compulsion of the passenger'.[144] No further elaboration is provided, however, Mason, Wilson, Deane and Dawson JJ in *Cook* gave a similarly extreme example in relation to the standard that 'a mentally retarded and completely unqualified and inexperienced person' might owe to 'a professional pilot who had persuaded him or her to attempt to pilot an aircraft in which they were both travelling'.[145] Incidentally, the relationship between the parties in *Cook* has been described as being 'between a driver who was very inexperienced, and a passenger who knew of that inexperience, but still urged [or pressured] the other to drive'.[146] Indeed, at the time of the accident the defendant was attempting to pull over, as she did not wish to drive.[147] Therefore, the ultimate decision in that case might now be explained on this new "duress type" basis.

Consequently, whilst *Imbree* considered a driving instructor's individual capacity for control, or ability to take reasonable steps in their own self-protection, as being more appropriate to the question of contributory negligence, Gleeson CJ arguably recognises that exceptionally, in determining the appropriate standard of care, claimant vulnerability may still need to be considered at two levels:

1. the claimant belongs to a class of persons (namely instructing or supervising passengers generally) who, as a whole, the court considers "ordinarily" vulnerable; and
2. the particular claimant, in the circumstances of the relationship between the parties, is in fact vulnerable.

3.2.2.4 Changing Judicial Perceptions

Changing judicial perceptions concerning the vulnerability of driving instructors also influenced the High Court's decision in *Imbree*. Whilst the Court's emphasis upon claimant vulnerability was new in the context of learner drivers, notions of vulnerability (and its corollary in defendant control) were implicit in previous cases. In terms of a passenger's vulnerability, or ability to protect against a risk of injury, when viewed in light of a driver's control over that risk, Dixon J in *Joyce* confirmed that it is the driver of a moving vehicle who is in control 'because the safety of the occupants of the vehicle, as well as others, depends upon his skill and care'.[148] However, the New South Wales Court of Appeal in *Chang* stated that where

> a person sits by a learner as the licensed driver (whom the learner has to have to accompany him) ... he is a person who is really in control, and it is the assumption underlying their relationship that he at any

[144] *Imbree* (2008) 248 ALR 647 at 649 (Gleeson CJ).
[145] (1986) 161 CLR 376 at 383.
[146] *Radford* (1990) 11 MVR 509 at 524 (Teague J). The passenger knew 'full well of the driver's inexperience and unwillingness to drive, and of her apprehension, nervousness and tentative making of decisions associated with driving': at 514 (Murphy J). See also *George* (1998) 27 MVR 323 at 325.
[147] *Cook* (1986) 161 CLR 376 at 379-80 (Mason, Wilson, Deane and Dawson JJ): 'The respondent stopped the car, got out, went around to the passenger's side and said to the appellant: "If you are going to drive you may as well start now." The appellant, not wishing to drive without a permit, replied: "I should wait, I think." The respondent told her not to be "stupid" and commenced to get in the passenger's side. The appellant then slid across the front seat into the driver's position and nervously commenced to drive ... The appellant drove the car along the street, through three intersections. She then said to the respondent that she was "pulling over when we get past this next corner"'. See also 388.
[148] (1948) 77 CLR 39 at 55. See also *Miller v Miller* [2008] WADC 46 at [113] ('*Miller*').

> time, if he considers it necessary in the interests of his or any other person's safety, can assume control of the vehicle. The licensed driver is the dominant party in the joint enterprise.[149]

Similarly, in *Preston v Dowell*, in considering a claim that a supervising passenger owed no duty of care to an injured learner 'as the defendant did not stand in a position of "dominance" over the plaintiff, such that he could exercise control as to her manner of driving',[150] von Doussa J concluded:

> It may be accepted that an ordinary passenger bears no responsibility for his driver's operation of the car, even if he fails to draw the driver's attention to a traffic risk of which he becomes aware. But the defendant was not an ordinary passenger. He was the owner ... The plaintiff's own inquiry when she came up behind the other car whether she should pass, indicated that she was seeking guidance. The defendant clearly had the legal right to control, and the de facto power to control, the ... driving.[151]

These statements can be compared to those of Malcolm CJ, above, in *George*,[152] and the opinion of Gummow, Hayne and Kiefel JJ in *Imbree*, that whilst: 'Words like "instructor" or "supervisor" carry overtones of command or control. Those overtones may jar if they are heard in the context of a parent who has allowed a 16 year old child who holds a learner's permit to drive the family car'.[153]

The Court's conclusion in *Imbree* – that instructing or supervising passengers, in the context of their relationship with a learner driver, should ordinary be considered to be vulnerable with no real control or means of protecting themself against the risk of injury associated with the learner's driving – therefore represents a departure from some previous jurisprudence. Accordingly, it also illustrates that whilst judicial perceptions of notions of vulnerability, like the law itself, may change over time, care should be taken in its application lest it, like its predecessor proximity,[154] deteriorates into little more than a catchphrase or value judgement with shifting meanings so fluid that it provides no real guidance as to when liability will, or should, be owed.

The final policy consideration[155] relevant to *Imbree's* decision, which shall be considered briefly,[156] concerns the relevance of insurance to negligence liability.

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[149] [1973] 1 NSWLR 708 at 711 (Hutley JA. Hardie and Bowen JJA concurring). Aff'd *Ricketts* (1988) 14 NSWLR 311 at 319-20, 324.
[150] (1987) 45 SASR 111 at 119.
[151] (1987) 45 SASR 111 at 119-20.
[152] (1998) 27 MVR 323. See also *Fettke* [1964] SASR 119 at 125-6 and above n 132-134 and accompanying text.
[153] *Imbree* (2008) 248 ALR 647 at 663.
[154] See above n 98 and accompanying text.
[155] Lewis, above n 129, 95-6; *Northern Sandblasting* (1997) 118 CLR 313 at 401; *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 580 ('*Caltex*'); *Robertson v Swincer* (1989) 52 SASR 356 at 360-2 ('*Robertson*').
[156] It is not possible within the confines of this article to examine in detail the academic and jurisprudential argument concerning the relevance, or otherwise, of insurance to the development of tortious liability. For further consideration of this issue see, eg, Jane Stapleton, 'Tort, Insurance and Ideology' (1995) *Modern Law Review* 820; Michael Jones, *A Textbook on Torts* (London: Financial Training Publications, 1986) 6-9; Lewis, above n 129; Simon Deakin, Angus Johnston and Basil Markesinis, *Tort Law* (6th ed, Oxford: Clarendon Press, 2008) 14; Harold Luntz et al, *Torts: Cases and Commentary* (6th ed, Sydney: LexisNexis Butterworths, 2009) 23; Peter Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed, London: Butterworths, 1999) 202-8; Prue Vines, 'Tort Reform, Insurance and Responsibility' (2002) 8(2) *University of New South Wales Law Journal Forum* 22; Michael Mills, 'Insurance and Professional Liability – The Trend of Uncertainty Or: Negligence and the High Court – A Practitioner's Perspective' (2000) 12 *Insurance Law Journal* 25; *Imbree* (2008) 248 ALR 647 at 672-4, 678-90 (Kirby J).

3.3 Insurance

There are two broad views regarding the normative weight that ought to be afforded to the existence of liability insurance in the development of legal rules or tortious standards of care. The traditional position is that incidents of insurance do not affect the imposition of negligence liability.[157] Rather, as questions of indemnity arise only after a tortfeasor's liability has been determined, the presence of insurance is irrelevant to the formulation of legal obligation and 'should not be permitted to distort it'.[158] For example, in *Smith v Jenkins*, Windeyer J concluded that:

> If his Honour meant that the policy and purpose of statutory obligations of insurance against motor vehicle accidents can determine common law liabilities, I agree that this would have been a mistake ... the indemnity given by insurance is against a legal liability: and liability still depends on fault.[159]

However as acknowledged by Fleming, 'while in theory insurance follows liability, in experience insurance often paves the way to liability'.[160] Consequently, particularly in today's social climate, whilst not always expressly acknowledged in courts' reasons for a decision,[161] there are those who consider that the presence, availability, or affordability of insurance is relevant to developing or shaping legal principle.[162] As such, outside the context of a learner driver's liability, Kirby J has stated that '[t]he danger of unexpectedly burdening uninsured occupiers may sometimes, subconsciously, influence judicial expositions of the standard of care which occupiers are required to achieve'.[163] Both views are apparent in *Imbree*.

3.3.1 Insurance in Imbree

In *Imbree*, whilst Gleeson CJ (with whom Crennan J agreed) [164] adopted the traditional view, Kirby J held that the presence of an obligation to hold third party motor vehicle insurance

[157] See, eg, *Caltex* (1976) 136 CLR 529 at 580-1; *Vairy* (2005) 223 CLR 422 at 441; *Perre* (1999) 198 CLR 180 at 230; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576-7; Lord Diplock, 'Judicial Development of Law in the Commonwealth' in *Proceedings and Papers of the Fifth Commonwealth Law Conference* (1977) 493, 499.

[158] *Kars v Kars* (1996) 187 CLR 354 at 378 (Toohey, McHugh, Gummow and Kirby JJ) ('*Kars*'). See also 379; *Lamb v Cotogno* (1987) 164 CLR 1 at 6, 11-2; *Ricketts* (1988) 14 NSWLR 311 at 315 (Kirby P) (in the context of compulsory third party motor vehicle insurance).

[159] (1970) 119 CLR 397 at 409 ('*Smith*'). See also *Jackson v Harrison* (1978) 138 CLR 438 at 464 ('*Jackson*').

[160] Fleming, above n 78, 13.

[161] *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 518; Justice Carmel McLure, 'Risk and Responsibility: The Interplay Between Insurance and Tort Law' (2002) 29(9) *Brief* 7, 10; Mills, above n 156, 26.

[162] See, eg, *Lynch v Lynch* (1991) 25 NSWLR 411 at 420 ('*Lynch*') (compulsory motor vehicle insurance relevant to finding that a care-giver's status as the tortfeasor should not exclude the claimant's need for such care, or a *Griffiths v Kerkemeyer* (1977) 139 CLR 161 damages assessment, on grounds that the tortfeasor would then pay twice); *Avram v Gusakoski* (2006) 31 WAR 400 at [67] ('*Avram*') (complete defences, in cases arising out of the use of a motor vehicle, are 'less attractive conceptually' where compulsory third party insurance is universal); *Neindorf* (2005) 222 ALR 631, 648 at 651 (insurance relevant to an occupier's standard of care and breach); *Pyrenees Shire Council v Day* (1997) 192 CLR 330 at 425 ('*Pyrenees*'); *Northern Sandblasting* (1997) 118 CLR 313 at 398, 402; *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 251-2; *Robertson* (1989) 52 SASR 356 at 361; *Smith v Bush* [1990] 1 AC 831 at 858-9 (claimant's or defendant's ability to protect themself via insurance relevant to the existence, or otherwise, of a duty of care).

[163] *Neindorf* (2005) 222 ALR 631 at 648 (Kirby J).

[164] (2008) 248 ALR 647 at 692.

was such a universal feature of Australian statute law that it informed 'the content of substantive law'.[165]

3.3.1.1 Kirby J

In overruling *Cook's* principle, and the attribution of a lower standard of care to learners in relation to their instructors, Kirby J's reasoning focused upon the presence of a compulsory scheme of third party motor vehicle insurance across Australia.[166] Describing such insurance as a consideration of 'the greatest practicality and importance'[167] and 'material to defining the content and standard of the duty of care owed in the circumstances',[168] his Honour stated that: 'its existence encourages my acceptance of a single universal, objective standard of care owed by all drivers'.[169]

Consequently, Kirby J discerned, in the compulsory insurance scheme, a policy of compensating accident victims[170] which provided a reason for the imposition, in the supervising passenger's favour, of the higher standard of the ordinary 'reasonable driver'.[171]

> [I]t is essential to have regard to the important practical feature of the universal existence of compulsory third party motor vehicle insurance in this country. For me, that is the ingredient that tips the balance in favour of a re-expression of the common law of Australia. It renders an elimination, or qualification, of a duty of care in such circumstances unrealistic ... In short, the principle in *Cook* tends to defeat the large social purposes that lay behind the enactment of compulsory third party motor vehicle insurance.[172]

Imposing upon a learner the higher standard of a fully qualified driver, instead of a standard reduced due to an instructor's knowledge of the driver's inexperience, increased the likelihood of the imposition of negligence liability. Therefore, it was justified as fulfilling the policy behind the compulsory insurance mechanism – namely, 'that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund'.[173]

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[165] (2008) 248 ALR 647 at 678.
[166] *Imbree* (2008) 248 ALR 647 at 672-4, 687-8, 690.
[167] *Imbree* (2008) 248 ALR 647 at 681.
[168] *Imbree* (2008) 248 ALR 647 at 673.
[169] *Imbree* (2008) 248 ALR 647 at 673. See also 674, 682, 690.
[170] *Imbree* (2008) 248 ALR 647 at 688, 690. See also *Lynch* (1991) 25 NSWLR 411, 415-6 (Clarke JA).
[171] *Imbree* (2008) 248 ALR 647 at 690. In making this argument to advocate a unified standard of care, Kirby J refers to an argument acknowledged by Stapleton in 'Tort, Insurance and Ideology', above n 156, 841-2, that in motor vehicle cases an equivalence could be seen between a compulsory system of third party liability insurance and actual first party insurance. This argument is predicated upon an 'atypical mutuality of risk' or a belief that an individual's chance of being injured in a road accident is no different to their chance of causing injury to others. However this mutuality of risk is not present in the case of learner drivers (an instance not addressed by Stapleton), who as a class do pose more risk to other drivers than their more experienced counterparts do to them. See, eg, Alan Drummond, An Overview of Novice Driver Performance Issues (1989) iii, 4-5 Monash University Accident Research Centre <http://www.monash.edu.au/muarc/reports/muarc009.pdf> at 23 June 2009 which confirms that the over-involvement of inexperienced drivers in road accidents is a well established phenomenon, with risk of accident involvement decreasing with experience.
[172] *Imbree* (2008) 248 ALR 647 at 682 (Kirby J).
[173] *Nettleship* [1971] QB 691 at 699 (Lord Denning MR). The availability of compulsory third-party motor vehicle insurance also influenced his Lordship's finding in *Nettleship* that a learner driver owed an equivalent standard of care: at 699-700, 702-3 Cf Salmon LJ who stated that civil law duties are not 'affected by whether or not the driver is insured': at 703. See also *Cook* (1986) 161 CLR 376 at 385 (Mason, Wilson, Deane and Dawson JJ): The approach depicted by Lord Denning MR 'is not one which should be adopted'.

Kirby J similarly acknowledged the relevance of insurance to 'defining the content of legal liability',[174] and the standard owed by the driver of a motor vehicle to others, whilst President of the New South Wales Court of Appeal in *Johnson v Johnson.*[175] Here his Honour stated: 'There is little doubt that what today is regarded as breach of the standard of reasonable care has been affected by the advent of widespread insurance, including compulsory insurance in industrial accident and motor vehicle injury cases'.[176]

3.3.1.2 Gleeson CJ

In contrast, Gleeson CJ limited any consideration of the compulsory statutory insurance scheme to something operating upon, but irrelevant to creating, legal liability,[177] stating:

> If the existence of a scheme of compulsory third party insurance is a reason for giving an affirmative answer, and not merely a basis for an inclination to be pleased with such an answer, then there must be a principled explanation for that ... Such insurance does not, however, provide a step in a process of reasoning towards an answer to the particular question that arises for decision in this appeal.[178]

Consequently, his Honour was critical of Kirby J's approach, which justified a revision of the standard of care owed by a learner driver to their supervising passenger on the grounds of compulsory liability insurance. Gleeson CJ also criticised argument that such insurance was a '*new* legal ingredient'[179] that justified overturning *Cook*, opining that: 'Schemes of compulsory insurance for third party liability in motor accidents are not new. They existed at the time of *Cook v Cook*, and for a long time before then'.[180]

Stapleton has also advocated the irrelevance of insurance to the formulation of tort law.[181] Similarly to Gleeson CJ, she argues that insurance should not provide "the reason" for a decision regarding liability at common law – there should be no causal link between the presence or availability of insurance and the development of legal rules or tortious standards of care. Rather, at its highest level of significance, judges consider insurance merely as a "makeweight" factor, or as part of the social background that justifies, or supports, a decision based on other "more legitimate" grounds. Limiting the relevance of insurance to providing 'an inclination to be pleased with an answer',[182] or legal decision, was affirmed in *Seale v Perry*. Here McGarvie J confirmed that, contrary to determining liability, 'in deciding whether it is fair, practical and sensible that one party in a particular category of relationship should be liable for his carelessness to the other, an inquiry whether one or other or both are likely to be covered by insurance, is an inquiry for quite a different purpose'.[183]

In the context of limiting insurance's relevance to merely forming part of the social background within which the law is made, Gleeson CJ acknowledged that

[174] *Imbree* (2008) 248 ALR 647 at 673.
[175] [1991] NSWCA 159.
[176] [1991] NSWCA 159 at 6 (Kirby P).
[177] *Imbree* (2008) 248 ALR 647 at 652.
[178] *Imbree* (2008) 248 ALR 647 at 654.
[179] *Imbree* (2008) 248 ALR 647 at 673 (Kirby J) (emphasis added).
[180] *Imbree* (2008) 248 ALR 647 at 652 (Gleeson CJ). Indeed, such schemes were enacted throughout Australia between 1935 and 1949: at 674.
[181] Stapleton, 'Tort, Insurance and Ideology', above n 156, 820, 827-8, 833, 843. See also Jane Stapleton, 'Private Law and Institutional Competition' (1999) 9(3) *Otago Law Review* 519, 531; Lewis, above n 129, 97-8, 101-2.
[182] *Imbree* (2008) 248 ALR 647 at 654 (Gleeson CJ).
[183] *Seale v Perry* [1982] VR 193 at 237 ('*Seale*'). See also 238; *Kars* (1996) 187 CLR 354 at 381-2.

> [w]ithout a doubt, insurance is a major factor in the practical operation of the law of negligence as it applies to motor vehicle accidents ... It may be fair to say that, without the availability of reasonably affordable insurance, the application of the principles of the common law of negligence to the risks involved in driving a motor vehicle would mean that few people would drive.[184]

His Honour concluded that, rather than insurance influencing legal liability, it was the claimant's vulnerability and the capacity of the driver to cause harm that 'explain[ed] compulsory insurance'.[185] Kirby J also recognised the existence of compulsory insurance as a relevant 'contextual consideration,' but as discussed, went further to conclude that in *Imbree* it influenced '*the answer* to questions such as the existence of a propounded duty of care; its ambit and definition'.[186]

3.3.2 The Future

Imbree acknowledged that the relevance of insurance to judicial decision making 'is, and long has been, a controversial question in our law'.[187] Kirby J's argument, that insurance is a consideration relevant to tortious liability, appears confined to instances of compulsory insurance, by recognising that 'courts should be "vigilant not to allow assumptions made in the traffic context to be generalised"'.[188] Additionally, whilst his Honour's conclusion, as to the relevance of compulsory insurance (when compared to situations of non-compulsory private insurance), might be more readily justified in not being subject to criticism for invoking:

- complex evidentiary issues as to the availability of insurance;[189] or
- distinctions between cases where a defendant is and is not insured,[190]

Kirby J was clearly in the minority on this issue. On the other hand, Gleeson CJ's distinction, in holding that whilst insurance might provide an inclination for being pleased with a decision, it ought not provide a reason for the legal decision itself, seems tenuous. Surely if something provides a reason for being pleased with an outcome, it also provides a justification for it. If not, might one not question the point of considering it at all?

Accordingly, the High Court's decision in *Imbree* provides no clear guidance as to the future relevance of insurance generally to tortious liability. However, whichever view one adopts, it

[184] *Imbree* (2008) 248 ALR 647 at 653-4.
[185] *Imbree* (2008) 248 ALR 647 at 653.
[186] *Imbree* (2008) 248 ALR 647 at 688 (emphasis added).
[187] (2008) 248 ALR 647 at 680 (Kirby J).
[188] *Imbree* (2008) 248 ALR 647 at 690 (citation omitted). See also 672-3, 674, 687-8, 690.
[189] That courts should be wary of reaching 'conclusions on the availability of insurance, or the impact of imposing a fresh liability on the insurance market generally, without proper material' or evidence was considered in *Marc Rich & Co; AG v Bishop Rock Marine Co Ltd* [1996] AC 211 at 228-9 (Lord Lloyd of Berwick). See also *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1996) 188 CLR 241 at 282-3; *Pyrenees* (1997) 192 CLR 330 at 425; Mills, above n 156, 35.
[190] Being compulsory, claims against an uninsured defendant would be quite exceptional, and where uninsured, the claimant might sue the nominal defendant established, for example, under the *Motor Accident Insurance Act 1994* (Qld). However Gleeson CJ stated that '[i]f the answer to the problem in the present case depends upon the existence of compulsory insurance, then presumably a different answer would, or at least may, be given in a case where there is no compulsory insurance': *Imbree* (2008) 248 ALR 647 at 653. See also Stapleton, 'Tort, Insurance and Ideology', above n 156, 825-6.

will be influenced by one's political and moral values[191] concerning torts' function in terms of affording compensation through corrective or distributive justice.[192] Those adopting the traditional view concerning the role of insurance arguably favour corrective justice, or interpersonal responsibility and the fixing of loss according to the relative fault of the parties in dispute.[193] This is in contrast to the wider socialisation or spreading of losses championed through distributive justice and fostered through a positive application of the effect of insurance upon law making.[194] Lord Denning MR acknowledged this in *Nettleship* when his Lordship, in grounding a learner driver's standard of care upon the availability of compulsory motor vehicle insurance,[195] stated that 'we are, in this branch of the law, moving away from the concept: "No liability without fault." We are beginning to apply the test: "On whom should the risk fall?"'[196] Indeed, it may not be possible, therefore, to reach any general agreement about the future role which insurance ought to play.[197]

Whether a claimant's ability to protect themself through the procurement of insurance, should be seen as a likely indicator of their vulnerability, will be influenced by similar concerns. For example, in rejecting the existence of insurance as a valid consideration in determining whether a duty of care existed in *Perre v Apand*, McHugh J also concluded that the ability to purchase insurance was 'generally not relevant to the issue of vulnerability'.[198]

3.4 Effect

The Australian High Court's decision in *Imbree,* eschewed distinctions between categories of drivers of motor vehicles and imposed a single, universal, and objective standard of care, irrespective of a driver's personal attributes (including age, experience, and competence).[199] Additionally, all claimants – whether they are professional or non-professional instructors, other passengers, or other road users – are now entitled to expect the same level of care from a learner driver when operating a vehicle,[200] namely that of a 'reasonable driver'.

It has been shown that *Imbree's* conclusion was heavily influenced by policy considerations, including changing perceptions concerning the vulnerability of driving instructors and the relevance of insurance to tortious liability. *Imbree* also recognised that contributory negligence was a better way than vulnerability to deal with an individual claimant's failure to take reasonable steps of self-protection. However, an increase in the standard of care owed

[191] Lewis, above n 129, 99; Stapleton, 'Tort, Insurance and Ideology', above n 156, 837. Cf Allan Beever, 'Corrective Justice and Personal Responsibility in Tort Law' (2008) 28(3) *Oxford Journal of Legal Studies* 475, 498-9.
[192] See, eg, Lord Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' (2002) 37 *Irish Jurist* 1, 4-5; Lord Diplock, above n 157, 499.
[193] See, eg, *Caltex* (1976) 136 CLR 529 at 580-1; *Seale* [1982] VR 193 at 237; Beever, above n 191, 494, 498.
[194] See, eg, *Imbree* (2008) 248 ALR 647 at 674; *Robertson* (1989) 52 SASR 356 at 361; *Brady v Girvan Bros Pty Ltd Trading As Minto Mall* (1986) 7 NSWLR 241 at 244.
[195] For example, his Lordship stated that 'Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard': *Nettleship* [1971] QB 691 at 699-700.
[196] [1971] QB 691 at 700.
[197] See, eg, Lewis, above n 129, 99.
[198] *Perre* (1999) 198 CLR 180 at 230.
[199] (2008) 248 ALR 647 at 655, 661 (Gummow, Hayne and Kiefel JJ), 671-2, 677 (Kirby J).
[200] *Imbree* (2008) 248 ALR 647 at 665 (Gummow, Hayne and Kiefel JJ). Unlike Megaw LJ in *Nettleship* (see above n 47), the Court did not consider the driving of objects other than motor vehicles: at 677 (Kirby J).

by a learner driver to their supervising instructor, from that of a reasonably competent learner to the ordinary standard owed by any other motorist, was arguably warranted on two further grounds.

Firstly, legislation contemplates the provision of assistance in the training of learners by other licensed, experienced, or supervising drivers.[201] In practice, these people are often 'relatives or friends acting in a voluntary capacity'.[202] The imposition of a higher standard of care in relation to any injury sustained by such persons therefore encourages them in their continued performance of this 'necessary social function'.[203] Secondly, authority suggests that if a child engages in the "adult activity" of driving, they remain subject to the standard of care ordinarily owed by the reasonably competent adult.[204] Accordingly, given further authority that holding a licence is irrelevant to the description or application of the required standard of care,[205] it is reasonable that any novice or learner who chooses to drive should similarly assume the full legal responsibility accompanying that decision.

The Court's rejection of *Cook*, and the principle that a passenger's knowledge of a driver's inexperience or incapacity is relevant to the standard of care owed, accords with section 141 of the *Motor Accidents Compensation Act 1999* (NSW).[206] However, it also has implications for other claimant v defendant relationships.

4. Further Implications

Cook held that it was neither possible nor desirable to identify in advance all the circumstances in which a claimant's knowledge of a driver's inexperience or incapacity would transform the parties' relationship, from 'the ordinary class of relationship between the driver of a motor vehicle and a passenger', into the special category necessary to reduce the standard of care owed.[207] However, the principle has not been confined to the standard owed by learner drivers to their passengers. Indeed, in practice, it has been applied 'to any condition which, to the passenger's knowledge, disables the driver from driving with the care and skill which an ordinary driver of ordinary prudence would exercise'.[208]

Based as it was upon dicta in *Insurance Commissioner v Joyce*[209] that in 'the case of the drunken driver's passenger ... the care he may expect corresponds with the relation he establishes',[210] *Cook's* principle has consequently been applied to argue that a reduced,[211] or

[201] See, eg, *Traffic Regulations 1999* (NT) reg 12; *Road Transport (Driver Licensing) Regulation 1999* (NSW) reg 15; *Transport Operations (Road Use Management – Driver Licensing) Regulation 1999* (Qld) reg 6(9), pt 3AA, sch 7; *Motor Vehicles Act 1959* (SA) s 75A; *Road Safety (Drivers) Regulations 1999* (Vic) regs 104, 213; *Road Traffic (Authorisation to Drive) Regulations 2008* (WA) pt 3; *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000* (Tas) reg 8(7); *Road Transport (Driver Licensing) Regulation 2000* (ACT) reg 21.
[202] *Imbree* (2008) 248 ALR 647 at 649 (Gleeson CJ).
[203] *Chang* [1973] 1 NSWLR 708 at 712 (Hutley JA).
[204] *Tucker* [1956] SASR 297; *McHale* (1966) 115 CLR 199 at 205, 208, 234; Fleming, above n 78, 126.
[205] *Imbree* (2008) 248 ALR 647 at 655, 662 (Gummow, Hayne and Kiefel JJ), 677 (Kirby J).
[206] Section 141(1) provides that: 'the standard of care required of the driver of a motor vehicle who owes another person a duty of care is not diminished or otherwise affected by any actual or imputed knowledge of the other person as to the skill or experience of the driver as the driver of a motor vehicle.'
[207] (1986) 161 CLR 376 at 387 (Mason, Wilson, Deane and Dawson JJ).
[208] *Cook* (1986) 161 CLR 376 at 391 (Brennan J). See also *Radford* (1990) 11 MVR 509 at 515.
[209] (1948) 77 CLR 39 at 45-6, 56-7, 59-60. See also above n 31 and accompanying text.
[210] (1948) 77 CLR 39 at 57 (Dixon J). See also *Cook* (1986) 161 CLR 376 at 384-5, 393.
[211] *Wills* [2004] 1 Qd R 296 at 313; *Avram* (2006) 31 WAR 400 at [12]-[20], [25], [70]-[77].

no,[212] standard of care should be owed by an intoxicated driver to a passenger who accepts passage in a vehicle despite having actual knowledge that the driver's ability to control the vehicle is thereby impaired. Similarly, *Cook's* reasoning has also been applied, in the context of a joint illegal enterprise,[213] to deny a duty of care on the basis that it is not possible to determine any alternative or appropriate standard of care in circumstances where the participants' "illegal" relationship is such that the claimant cannot reasonably expect that the defendant will exercise the standard of the hypothetical reasonable driver. For example, in *Gala v Preston*, Mason CJ, Deane, Gaudron and McHugh JJ concluded that:

> The joint criminal activity involving the theft of the motor vehicle and its illegal use in the course of a spontaneously planned "joy ride" or adventure gave rise to the only relevant relationship between the parties and constituted the whole context of the accident. That criminal activity was, of its nature, fraught with serious risks ... In the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care … In the circumstances just outlined, it would not be possible or feasible for a court to determine what was an appropriate standard.[214]

Whilst not expressly overruled in *Imbree*, in overruling *Cook* the High Court acknowledged that it was also departing from the approach adopted in *Joyce*.[215] Accordingly, *Imbree's* rejection of the relevance, to standard of care, of a claimant's actual knowledge of a defendant's incapacity to exercise reasonable care, is arguably not limited to learner drivers but requires the reconsideration of cases such as *Joyce* and *Gala* also. Indeed, in light of *Imbree*, in addition to applying *Cook*, these cases are also subject to criticism on the basis that, when compared to that owed to other road users, a different (or no) standard of care is imposed upon the driver in relation to their passenger.[216] However, when reconsideration occurs it is conceivable that, at least in joint illegality cases, a claimant's recovery might still be denied on separate policy grounds. Namely, that: 'To give validity to the criminal enterprise by using it as the foundation for erecting a standard of care is something which the law will not do [as] ... [t]o do so would be to condone a breach of the criminal law'.[217]

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[212] *Radford* (1990) 11 MVR 509 at 512-3, 514-5, 517, 524, 526-7. Here the Supreme Court of Victoria held that in the case of inebriated drivers 'there is no intermediate ground, where the level of drinking is enough to trigger off a confined standard of care, but not enough to trigger off the displacement of the duty of care': at 526 (Teague J). However an argument that no standard of care be owed was also rejected as the claimant lacked the requisite knowledge. See also *Suncorp Insurance & Finance v Blakeney* (1993) 18 MVR 361 at 365, 367-8 ('*Blakeney*'); *Hanson v The Motor Accidents Insurance Board* (1987) 14 Tas R 167 at 171-2; *Wills* [2004] 1 Qd R 296 at 319-21; *Joyce* (1948) 77 CLR 39 at 46, which suggest that no standard should be owed.

[213] *Gala* (1991) 172 CLR 243 at 251-5 (Mason CJ, Deane, Gaudron and McHugh JJ), 259, 269 (Brennan J), 278-9 (Dawson J); *Jackson* (1978) 138 CLR 438 at 455-6; *Fabre v Arenales* (1992) 27 NSWLR 437 at 439-40, 453; *Kickett v State Government Insurance Commission* (1997) 26 MVR 321. Cf *Gala* (1991) 172 CLR 243 at 289-90 (Toohey J).

[214] (1991) 172 CLR 243 at 254-5 (Mason CJ, Deane, Gaudron and McHugh JJ). See recently, *Miller* [2008] WADC 46. Here the District Court of Western Australia held that whether the claimant 'appreciated that he or she would be encountering a serious risk in participating in the criminal activity ... needs to be assessed on the basis of the particular plaintiff's knowledge and conduct and not on the basis of what the hypothetical plaintiff should have known and done': at [75] (Schoombee DCJ).

[215] See, eg, *Imbree* (2008) 248 ALR 647 at 672, 674 (Kirby J).

[216] As discussed previously, this is contrary to the High Court's preference for coherency and a uniform application of any modified standard of care, such that the one defendant does not owe different standards to different claimants in relation to the same activity. See above n 64-80 and n 136 and accompanying text.

[217] *Gala* (1991) 172 CLR 243 at 279 (Dawson J). See also 253 (Mason CJ, Deane, Gaudron and McHugh JJ), 270-3 (Brennan J), 277-80 (Dawson J), 291-2 (Toohey J); *Smith* (1970) 119 CLR 397 at 400, 418, 422, 424-5, 425-6 , 430-1, 433-4; *Jackson* (1978) 138 CLR 438 at 445, 450, 457-8; *Imbree* (2008) 248 ALR 647 at 677. Policy considerations were also used by Murphy J to support the non-exclusion of recovery in negligence due to illegality in *Jackson* (1978) 138 CLR 438 at 462-5.

Additionally, due to the higher standard of care imposed as a result of *Imbree*, one might expect a greater emphasis, in future cases, upon contributory negligence or voluntary assumption of risk,[218] in order to limit a driver's (or an insurance provider's) liability. Acceptance of passage in a car, with knowledge that a driver has an impaired ability to drive, due to inexperience, intoxication, or incapacity, is relevant to both defences.[219] Although, whilst contributory negligence would be assessed according to actual or constructive knowledge of the driver's condition when viewed from the perspective of a sober reasonable person,[220] volenti, in addition to a claimant's actual knowledge of risk, would require proof of its voluntary acceptance.[221]

5. Conclusion

Through an investigation of cases such as *Cook* and *Imbree*, this article has examined the principles and policy factors underpinning a learner driver's standard of care. It concludes that the area is currently influenced by factors such as: coherency; the unpredictability and uncertainty of the same driver owing varying standards of care; the difficulty in measuring variable standards of care; a desire to maintain the standard's objectivity; vulnerability; and insurance. However, in holding that a learner driver's standard of care can no longer be influenced, or lowered, by a passenger's knowledge of a driver's inexperience or incapacity, *Imbree's* conclusions, its utilisation of claimant vulnerability, and its consideration of the relevance of insurance to tortious liability, have important implications for other claimant v defendant relationships also. These will no doubt be subject to future High Court consideration.

[218] Some states have abolished the defence of voluntary assumption of risk in motor accident cases. See, eg, *Motor Accidents Act 1988* (NSW) s 76; *Motor Accidents Compensation Act 1999* (NSW) s 140.

[219] *Imbree* (2008) 248 ALR 647 at 649, 651 (Gleeson CJ), 677 (Kirby J). See also *Nettleship* [1971] QB 691 at 700-2, 710; *Joyce* (1948) 77 CLR 39 at 46, 56-7; *Blakeney* (1993) 18 MVR 361 at 364-5; *Wills* [2004] 1 Qd R 296 at 313-4; *Motor Accidents Act 1988* (NSW) s 74; *Motor Accidents Compensation Act 1999* (NSW) s 141(2); *Civil Liability Act* 1936 (SA) s 47; *Civil Law (Wrongs) Act 2002* (ACT) s 96; *Civil Liability Act 2003* (Qld) ss 48, 49; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 15; *Wrongs Act 1958* (Vic) s 14F.

[220] *Imbree* (2008) 248 ALR 647 at 668 (Gummow, Hayne and Kiefel JJ). See also *Joslyn* (2003) 214 CLR 552 at 558-9, 566-7; *Joyce* (1948) 77 CLR 39 at 58; *Wills* [2004] 1 Qd R 296 at 313-4; *Morton* [1987] 2 Qd R 419 at 425, 428-9; *Civil Liability Act 2003* (Qld) s 23(2); *Civil Liability Act 2002* (WA) s 5K(2); *Civil Liability Act 2002* (NSW) s 5R(2); *Wrongs Act 1958* (Vic) s 62(2); *Civil Liability Act 2002* (Tas) s 23(2).

[221] *Imbree* (2008) 248 ALR 647 at 667-8 (Gummow, Hayne and Kiefel JJ). See also *Joyce* (1948) 77 CLR 39 at 57-8; *Blakeney* (1993) 18 MVR 361 at 368; *Wills* [2004] 1 Qd R 296 at 313; *Duncan v Bell and State Government Insurance Office (Queensland)* [1967] Qd R 425 at 430-1.