The Risk of Litigation: a Review of Recent Court Findings

by C J McLure, Justice of the Supreme Court of Western Australia

Common law actions for negligence probably still constitute the largest segment of civil litigation in Australian courts. The focus of this paper is on recent decisions of the High Court of Australia on the common law of negligence, with particular emphasis on developments in relation to the duty and standard of care, and how the developments impact on the risk of litigation. The focus on duty of care is no mere whim. Since 1995 the High Court has considered that aspect of the law of negligence in at least 17 cases.

A discussion of the current law of negligence must start with its recent turbulent history. Up to and at the time of the crisis in the availability and affordability of liability insurance cover in 2002, participants in the insurance industry blamed the judiciary for expanding the scope of liability for negligence by a creeping erosion of the level of fault required to trigger the reallocation of loss. A number of members of the judiciary openly supported the view that the balance of competing interests had swung too far in favour of plaintiffs. The Chief Justice of the Supreme Court of New South Wales, the Hon J J Spigelman, connected the judicial expansion of liability for negligence with the widespread availability and use of liability insurance, see the *"Last Outpost of the Welfare State"* ((2002) 76 ALJR 432). However, in his landmark address to the Judicial Conference of Australia in April 2002 the Chief Justice identified a change in the long-term trend. He said:

> *"There is a growing body of recent High Court decisions in favour of defendants. Those decisions would have gone the other way if the trend had continued. The number of such cases is multiplied manifold in recent judgments of intermediate courts of appeal. In my opinion, the long term trend [of judicial expansion of liability] has been reversed."*

Then followed the Review of the Law of Negligence chaired by Ipp JA of the New South Wales Court of Appeal. The publication of the Review Report in September 2002 was followed by legislation throughout Australia at a pace and level of relative uniformity hitherto unknown in the history of the Federation or thought to be achievable. None of the High Court decisions to which I refer deal with the impact of recent statutory alterations to the common law.

The elements of the common law of negligence are well known. A plaintiff must establish a duty of care owed to him or her, a breach of that duty and a causal

connection between the damage sustained and the breach of duty. The damage must not be too remote from the breach.

Current Trends

The risk of litigation is inversely proportional to the level of predictability of the outcome of litigation. A high level of predictability has a correspondingly low level of risk. The identification of trends provides a framework within which to address recent developments and risk factors. One measure is to compare outcomes. Spigelman CJ in April 2002 noted the growing body of High Court decisions in favour of defendants. By that yardstick, the trend continues. In an article published in the Insurance Law Journal in 2003 Professor Harold Luntz provided a statistical analysis of decisions that favour plaintiffs and defendants between 1987 and 2003 and concluded that the end of 1999 was a very definite turning point for the start of the pro-defendant trend that has since continued.

That reflects outcomes at first instance and in intermediate courts of appeal in this jurisdiction and, I understand, around Australia. In the most recent High Court decision referred to in this paper, *Cole v South Tweed Heads Rugby League Football Club Ltd* ([2004] HCA 29) handed down in June 2004, Kirby J noted and, I infer, bemoaned what he described as the increasing number of decisions where judgments of negligence in favour of plaintiffs at trial are taken away not by statutory deprivation but by appellate courts endorsed by the High Court.

However, trend statistics of this kind are of limited assistance to practitioners in the insurance and legal field in the absence of an understanding of how the change in the trend in outcomes is being achieved.

One factor which directly affects the predictability of outcomes is developments and changes in the common law of negligence. That is also one of the many complex factors affecting the level of risk associated with litigation, particularly from the perspective of an insurer setting premiums.

In the last 10-15 years there have been a significant number of developments and changes, many of which involve an expansion of the scope of liability for negligence. They include the decisions in *Rogers v Whitaker*, ([1992] 175 CLR 479) concerning the duty on medical practitioners to warn patients of the material risks of treatment and the abandonment of the Bolam rule and *Bryan v Maloney* ([1995] 182 CLR 609) which widened the liability of home builders to subsequent purchasers. The scope of that liability has now been thrown into doubt as a result of the more recent decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* ([2004] 78 ALJR 628).

In *Brodie v Singleton Shire Council* ([2001] 206 CLR 512), the High Court by a majority of 4:3 overturned the long-standing principle of immunity of highway authorities from liability for non-feasance. In the result, the matter was returned to the trial Court for determination applying ordinary principles of negligence. The question of the liability of public authorities for non-feasance was also more recently considered in *Graham Barclay Oysters Pty Ltd v Ryan*, ([2002] 211 CLR 540), a case to which I will return.

In a trilogy of cases, *Tame v State of New South Wales* ([2002] 211 CLR 317), *Annetts v Australian Stations Pty Ltd* ([2002] 211 CLR 317), and *Gifford v Strang Patrick Stevedoring Pty Ltd*, ([2003] HCA 33), the High Court abandoned a number of potential control mechanisms that would otherwise narrow liability in negligence for pure psychiatric injury (that is, injury not relevantly associated with physical injury). Psychiatric injury does not have to arise from a sudden shock or as a result of being at the scene of an accident or its immediate aftermath or involve injury to a person in a particular relationship to the claimant.

In *Cattanach v Melchior*, ([2003] HCA 38), the High Court, again by a majority of 4:3, held that for a negligent failure to warn of the risks of a failed sterilisation the parents may recover as part of the damages the cost of raising the child. There is no set-off for any benefits the parents may derive from the child.

A departure from established rules is one aspect affecting the ability to predict outcomes and, thus, the risk of litigation. Another relates to changes in the general approach to and application of the principles that govern the imposition of liability for negligence. Brodie and the cases on psychiatric injury are part of a continuing trend away from inflexible, fixed rules and categories in favour of rules of general application which facilitate and promote the notion of individualised justice.

However, the considerations that underpinned the imposition of fixed rules, inflexible control mechanisms or categories continue to be relevant, although the weight to be given to them may differ according to the circumstances of a particular case. The period of transition from categories and fixed rules towards a coherent body of case law is challenging and stressful.

The intuitive reaction to the abandonment of fixed rules, control mechanisms and categories is likely to be that it will result in increasing uncertainty and unpredictability in forecasting outcomes. That is contentious. Recent empirical research is said to support the conclusion that broad principles are not less likely than detailed rules to lead to more predictable outcomes, and are more likely to do

so in easier cases, (see: Assoc Prof M P Ellinghaus and Prof E W Wright "The utility of broad principles: an empirical investigation", the Second Biennial Conference on the Law of Obligations, University of Melbourne (16 July 2004)).

What is not contentious is that there is a need for greater understanding of the approach of decision-makers in the application of what is a deceptively simple statement of the general principle that governs recovery for negligence.

Although the balance of outcomes in favour of plaintiffs and defendants has materially altered in favour of defendants, there have been important developments which do, or have the potential to, widen the scope of liability for negligence. The reconciliation of these trends is to be found in the statement and application of the law relating to the duty and standard of care. I propose to focus on what can be extracted from the post-April 2002 High Court decisions.

Duty of Care

At the time of writing, cases on the duty of care include:

- *Tame, Annetts* and *Gifford* (the duty owed to a claimant for pure psychiatric injuries);
- *Graham Barclay v Ryan* ([2002]) 211 CLR 540) (the duty owed by the State and public authorities for personal injuries);
- *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (the duty owed by a designer of defective commercial premises to the subsequent purchaser of those premises for pure economic loss);
- *Cole v Tweed Heads* (the duty owed by a commercial supplier of alcohol to a person who suffered physical injury as a result of intoxication).

An obvious point to emerge is that the High Court is often divided on the answer to the question whether a duty of care is owed. In broad terms, McHugh and Kirby JJ are more likely than other members of the High Court to conclude that a relevant duty of care is owed to the claimant (and that it has been breached). However, a number of points of principle are confirmed or emerge in these recent cases.

First, reasonable foreseeability of harm of the kind suffered is a necessary, although insufficient, condition for the existence of a duty of care. That is, there is no general duty to avoid injury to everyone whom it is reasonably foreseeable may suffer that

kind of injury if reasonable care is not taken, (Hayne J in *Tame v New South Wales* at 247–248).

Second, the formulation of the common law test of reasonable foreseeability of harm remains unchanged; the requirement is satisfied if the risk of harm of the kind suffered is not far-fetched or fanciful but real. *Dovuro Pty Ltd v Wilkins* ([2003] HCA 51 at [60] per Gunmow J).

McHugh J in *Tame* departs from the accepted test of reasonable foreseeability of harm in favour of a two-step process. In his view *"[m]any of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability"*.

He adopted the test stated by Walsh J in *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* ([1963] 63 SR (NSW) 948 at 960) which requires a defendant to consider, firstly, whether a risk exists and, if it does, whether it may reasonably be disregarded. However, as far as I am able to assess, McHugh J's application of this test of reasonable foreseeability has not resulted in any noticeable narrowing in the scope or application of the duty of care requirement.

Third, the proximity test is officially abandoned. There has been a return to the words of Lord Atkin in *Donoghue v Stevenson* ([1932] AC 562) as the *"foundational case for all modern considerations of the duty of care"* per Priestley JA in *Avenhouse v Council of the Shire of Hornsby* ([1998] 44 NSWLR 1 at 5). In particular, a duty is only owed to those:

> *"... so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"*.

Fourth, there is majority High Court support for the position that reasonableness is the test for the imposition of a duty of care. As formulated by Kirby J in *Graham Barclay*, a duty of care will be imposed when it is reasonable in all the circumstances to do so. According to Gleeson CJ, it is the reasonableness of a requirement that a person should have certain persons or interests in contemplation that determines the existence of a duty of care, (*Tame* at 9). What is reasonable is to be judged in the light of current community trends and defies rigorous categorisation of its elements. Further, reasonable foreseeability is to be understood and applied with due regard to whether it is reasonable to require a person to have in contemplation the risk of injury that eventuated. The two issues can be closely related.

Fifth, there are a variety of factors that are, or may be, relevant to whether it is reasonable to impose a duty of care and the relevance and weight to be accorded to them may vary according to the nature of the case in question (which will often have links with the old categories or where there were fixed rules reflecting policy considerations). Relevant factors include: physical, temporal, relational and causal closeness, vulnerability, power, control, personal autonomy, inconsistent public (and perhaps private) duty, assumption of responsibility, reliance, inconsistent legitimate private (commercial) rights, actual or constructive knowledge of relevant matters.

Sixth, a word of warning: a number of the recent cases raise issues involving the spectre of indeterminacy – in amount, time or class. They deal with issues at the outer edge of the scope of liability. The High Court is in the process of articulating a comprehensive and coherent statement that addresses all cases with the result that it uses very general concepts. There are analogies in other areas of the law of obligations. For example, the concepts of unconscionability in equity and good faith in contract law are descriptive of a result rather than a test to be applied in isolation from the complex rules that underpin relief. The question whether it is reasonable to impose a duty of care is a value judgment to be made at the end of the analytical process based on the application of known guides and precedents to the circumstances of the case.

Seventh, in novel cases the court will place great importance on the nature and extent of the practical consequences of imposing a duty of care in the circumstances of the case. Much of the sifting is achieved at the duty stage of the analysis. Careful attention needs to be given to whether a defendant should concede a duty of care.

There are also a number of practical matters of importance that ought be noted. Care is required in formulating (in the pleadings) the relevant duty of care in issue. It is wrong to formulate the duty with such particularity as to in effect circumvent the requirement of reasonableness at the breach stage of the analysis. On the other hand, to formulate the duty at too high a level of abstraction may provide an inadequate legal means by which to determine the issue in a particular case; it will be too abstract if it is divorced from the facts said to enliven the duty.

At its highest level of abstraction, under the ordinary principles of the law of negligence the duty is to take reasonable care to avoid foreseeable risk of injury. However, the practical content or extent of the duty is governed by the circumstances of each case, (see *Jones v Bartlett* [2000] 205 CLR 166 at 56 per Gleeson CJ). In considering the content or extent of the duty in question, it is often useful to begin by identifying:

1. the type of harm suffered: personal injury, property damage, pure economic loss, pure psychiatric injury;
2. the circumstances in which the plaintiff came to suffer the harm – such as whether it is the result of an act or omission; who created the risk; the obviousness of the risk; and
3. the particular want of care alleged against the defendant. As stated by Hayne J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*, ([2000] 205 CLR254 at 105), asking whether that damage caused by that want of care resulted from the breach of a duty which the defendant owed the plaintiff, may reveal more readily the scope of the duty from which the plaintiff's allegations of breach and damage must depend.

As with all areas of the law, true understanding cannot be achieved unless the general principles are seen in the context of the facts which enliven them.

As I said, *Tame, Annetts* and *Gifford* involved claims for pure psychiatric injury, an area of the law where issues of indeterminacy arise. In Tame, the plaintiff sought damages for psychiatric injury resulting from a police officer recording and communicating incorrect information concerning her level of sobriety to a third party. The police officer, who had no prior contact with the plaintiff, wrongly recorded her as having a high blood alcohol level at the time she was driving a car involved in an accident. In fact her blood alcohol level was nil. Her claim was in negligence, not defamation. The plaintiff had a pre-existing susceptibility to psychiatric illness. She was not a person of "normal fortitude".

The High Court held that the defendant did not owe a duty of care because the risk of psychiatric harm was not reasonably foreseeable. In reaching that conclusion, each member of the court had regard to the fact that the plaintiff was not a person of normal fortitude and that the police officer was not aware of her susceptibility. Reasonable foreseeability is determined by reference to a reasonable person in the position of the defendant. What the defendant knew or ought to have known about relevant surrounding circumstances affects what is reasonably foreseeable.

A minority of the court would require that normal fortitude be a condition of imposing a duty rather than a potentially relevant factor going to whether the harm was reasonably foreseeable.

The result coincides with common sense. The practical analysis would be along the following lines: pure psychiatric injury, therefore potential issues of indeterminacy so caution required; no (direct or other) relationship between plaintiff and

defendant; an extended causal nexus between the negligent act of wrongly recording the result and the injury; the officer did not know, nor ought reasonably to have known that the plaintiff was not a person of normal fortitude.

Contrast *Annetts* and *Gifford*. In Annetts the applicants' 16-year-old son went to work with the respondent as a jackeroo on a remote property in Western Australia. The son, to his parents' knowledge, went missing in the desert and died of dehydration and hypothermia. Before agreeing to permit their son to go to work for the respondent, the applicants made inquiries of it as to the arrangements for his safety and supervision. The applicants did not witness their son's death or suffer a sudden shock in consequence. The case was determined on the pleadings and admissions, on which basis the High Court concluded that the respondent owed a duty of care to the applicants to exercise reasonable care to avoid causing them psychiatric injury. More particularly, the respondent's duty was to properly care for and supervise the applicants' son which it breached by sending him to work alone in a remote area. The court had little difficulty in concluding that the risk of psychiatric injury was reasonably foreseeable. The important factors on the question of duty included the applicants' relationship to the deceased and their antecedent relationship with the respondent.

In *Gifford* the appellants, aged 19, 17 and 14 respectively, complained they had suffered psychiatric injury in consequence of learning of the death of their father who was crushed by a forklift. The court concluded that the deceased's employer owed a duty to take reasonable care to guard against the risk of psychiatric injury to the appellants. The outcomes in *Tame, Annetts* and *Gifford* accord with logic and common experience. They also demonstrate the interaction between foreseeability and the reasonable contemplation element of a common law duty of care.

In *Graham Barclay* the plaintiff suffered personal injury because he consumed oysters which were unfit for human consumption. He sued the growers and distributors of the oysters (the Barclay Companies), the local government authority (Council) and the State. The oysters, harvested from Wallis Lake, were contaminated as a result of the lake becoming polluted by human waste after heavy rainfall. The plaintiff contracted hepatitis A after eating the oysters. In the claim against the Barclay Companies the existence of a duty of care was accepted and the issue was whether breach had been established. In the claims against the Council and the State, the issue was whether they owed a relevant duty of care. The claims were based on non-feasance; it was the failure to exercise their powers, not negligence in the manner of their exercise that was said to constitute the breach. The claim to liability was direct, not vicarious.

The court was unanimous in its decision that the Council and the State did not owe a duty of care to the consumers of contaminated oysters. Reasonable foreseeability of the risk of the harm suffered was established. Accordingly, the question was whether it was reasonable that the State and Council should have consumers of seafood from Wallis Lake in contemplation. On a close examination of the regulatory framework in which the State and the Council operated, the Court concluded that the discretionary powers in issue were vested in them for the benefit of the general public. The mere existence of such a power will not be sufficient to give rise to a common law duty of care in negligence. Something more is required, such as, for example, the exercise of actual control or management of the risks that eventuated or a direct relationship with the plaintiff (or the class of which he forms part) so as to distinguish him from the general public. In this case neither the State nor the Council had assumed relevant control and had no direct relationship with consumers of the oysters so as to distinguish them from the general public.

In relation to the State, the evidence demonstrated that the limited nature and extent of its involvement in the management of the Wallis Lake fishing industry was a matter of policy that had substantial budgetary implications. As stated by Gleeson CJ, there will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct.

Woolcock concerns a claim for pure economic loss. Of all areas of the law of negligence this is probably the most controversial and challenging. One of the leading cases, *Perre and Apand Pty Ltd*, ([1999] 198 CLR 180) has been criticised for failing to provide adequate clarity or certainty. The notion of vulnerability takes centre stage. In *Woolcock* the economic loss claim was made by a subsequent purchaser of a commercial building. Thus, indeterminacy was an issue. The trustee of a property trust engaged consulting engineers to design foundations for a commercial building. Some years after the building was finished it was sold by the then trustee of the trust to the appellant. Subsequently it became apparent that the building was suffering substantial structural distress as a result of settlement of the foundations of the building or the material below the foundations or both.

The High Court held, (Kirby J dissenting), that the engineers did not owe the appellant a duty of care to avoid pure economic loss. The matter went by way of case stated. The court was asked to determine whether, on agreed facts, a further amended statement of claim disclosed a cause of action in negligence against the

engineers. The majority distinguished *Bryan v Maloney*, a case concerning a domestic dwelling.

The outcome in *Bryan v Maloney* also depended upon the anterior step of concluding that the builder owed the first owner a duty of care to avoid pure economic loss. The appellant in *Woolcock* had not demonstrated that the engineers were liable to the first owner. It was agreed in the case stated that, despite the first respondent obtaining a quotation for geotechnical investigations, the original owner of the land refused to pay for such investigations. Thus, unlike the situation in *Bryan v Maloney*, the relationship between the engineers and the original owner was not characterised by an assumption of responsibility by them and known reliance by the original owner.

However, the key factor in this case and other cases of a claimed duty of care to avoid economic loss is a plaintiff's "vulnerability" which is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant. The question is whether the plaintiffs could do anything to protect themselves from the economic consequences to them of the defendant's negligence. If no, it is more likely that a duty of care would be held to arise. In Woolcock, the facts alleged in the statement of claim and the agreed facts did not establish that the appellants were vulnerable in the relevant sense, that is, the appellants could not have protected themselves from the economic consequences of any negligence of the engineers in the design of the foundations of the building. The notion of vulnerability has some similarity with a number of other factors traditionally relied on when determining the existence of a duty of care, including reliance, obviousness (knowledge) of the risk, assumption of responsibility and control.

The liquor and hospitality industries must have heaved a collective sigh of relief when the decision in *Cole v Tweed Heads* was handed down in June. In that case the appellant was injured as a result of being hit by a car while walking in a careless manner on a public road. She was walking in a careless manner because she was drunk. The appellant claimed against the respondent, a licensed club, alleging that it owed her a duty to take reasonable care to monitor and moderate the extent of alcohol served to her and a duty to take reasonable care that the appellant travelled safely away from the club.

The club held a champagne breakfast at its clubhouse, adjacent to its football ground. The appellant arrived at the club at about 9.30 am and left about 6.00 pm.

The club provided free wine until about 10.30 am. Thereafter it sold alcohol to patrons. People were moving between the clubhouse and the football ground during the course of the day. The last alcohol sold by the club to the appellant was supplied at about 12.30 pm. It expressly refused to serve the appellant any further alcohol in the mid-afternoon. However, the evidence was that alcohol was supplied to and consumed by the appellant after 12.30 pm, although the evidence was silent on whether those who provided alcohol to the appellant did so from stocks purchased from the club. At 6.00 pm the appellant was asked to leave the clubhouse. The club's manager offered the appellant transport home which she refused. One of her two companions told the club's manager that he and his associate would "look after her". The accident occurred at about 6.20 pm on a road about 100 metres from the clubhouse.

Gleeson CJ and Callinan J concluded that the club did not owe a relevant duty of care to the appellant. McHugh and Kirby JJ concluded that the club did owe a duty of care to the appellant which had been breached. Gummow and Hayne JJ reached no conclusion on whether the club owed a duty of care; they concluded that if there was any breach of a duty to monitor and moderate, the breach was not causative of the loss and if there was a duty to take reasonable care not to allow her to leave the premises except by a safe means of transport, the club did not breach that duty.

In reaching his conclusion of no duty, the Chief Justice had regard to the practical consequences of imposing a duty of care in the circumstances. Firstly, he noted that an increased risk of physical injury may accompany relatively moderate consumption of alcohol. Secondly, reaction times to, and the demonstrated effect of, alcohol can vary. Thirdly, there were difficulties in a supplier of alcohol in a commercial (or social) setting assessing the extent of the risk for all relevant individuals. Weighed with those factors was the fact that consumers know the risks of consuming alcohol and the principle of personal autonomy which entitles people to do as they please even if it involves the risk of injury to themselves. He said that there were sound reasons associated with values of autonomy and privacy to leave individuals to decide for themselves how much they drink (and eat). He concluded that it was unreasonable in the circumstances of this case to impose a duty on the club to take reasonable care to protect the appellant against the risk of physical injury resulting from her consumption of alcohol. Callinan J also focused on issues of personal autonomy involving choice and responsibility.

The judges who upheld the duty dealt with personal autonomy issues by reference to the well-known effect of alcohol on a person's capacity to make appropriate

judgments. According to McHugh J, the club had a duty to prevent the appellant from drinking more alcohol after the time it ought to have realised that any further drinking by her could result in her suffering harm, which he put at about mid-afternoon. Defendants in negligence cases invariably refer to the statement of McHugh J in Tame (at 101) that the law of negligence should accord with what people really do or can be expected to do in real life situations and will fall into (or remain in) disrepute if it produces results that ordinary members of the public regard as unreasonable. However, in concluding in *Cole v Tweed Heads* that the club was legally responsible for the appellant's injuries he said that *"[i]nstinct must give way to the logic of the common law"*.

It is instructive to consider the approach of Gummow and Hayne JJ to the question whether the club owed a duty to the appellant to monitor and moderate her drinking. They commenced by focusing on the alleged breach which was that the club continued to serve her alcohol when it knew or should have known she was intoxicated. They then identified uncertainties and gaps in the evidence that caused them to refrain from determining the duty question. Firstly, there was uncertainty in what was meant by "serving" her alcohol; in particular, whether it extended to selling to others alcohol which it suspected the appellant may consume and, if so, how the club was to control what other patrons do with alcohol. Secondly, the evidence of what the club knew, or could reasonably be taken to have known, of the amount of alcohol the appellant consumed during the day was very slight. There was no evidence that would have revealed that servants of the club could have or should have been able to observe how much the appellant drank. Thirdly, it was unclear what level of intoxication was said to be relevant (not lawfully able to drive a motor vehicle or loss of self-control or judgment of more than a minor degree). It is apparent that the High Court is not going to uphold a duty of care in a novel situation without a clear appreciation of the practical consequences of doing so.

The recent cases confirm that the duty of care element of the common law of negligence is an important factor in controlling the scope of liability for negligence. In four of the six recent cases it resulted in, or contributed to, an outcome in favour of the defendants.

Breach of Duty – The Negligence Calculus

The classic statement of the correct approach at the breach stage of the negligence analysis is contained in the reasons of Mason J in *Wyong Shire Council v Shirt,* ([1980] 146 CLR 40). In deciding whether there has been a breach of the duty of care, the court *"must first ask itself whether a reasonable man in the defendant's*

position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff".

If the answer to that question is in the affirmative, it is then for the court to determine what a reasonable man would do by way of response to the risk. He continued:

> *"The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have."*

In the past, there was a tendency to focus on the particular harm that had eventuated and the steps that could have been taken to avoid that harm from which a finding of negligence would usually follow. That is, if the risk of harm was reasonably foreseeable and reasonably preventable, a finding of negligence would follow. The High Court has continued to emphasise that the failure to eliminate a risk that is reasonably foreseeable and preventable is not necessarily negligence: it is necessary to ask the further question of whether a defendant's failure to eliminate the relevant risk showed a want of reasonable care, (see McHugh J in Tame at 98-99).

The application of the relevant principles can be seen in *Graham Barclay v Ryan* and *Dovuro Pty Ltd v Wilkins, ([2003] 77 ALJR 1706)*. Firstly, Graham Barclay v Ryan. By majority, the Full Federal Court upheld the trial Judge's finding that the Barclay Companies had breached their duty of care. The background facts on that issue are as follows: oysters had been grown in Lake Wallis for a very long time and there had been no record of any earlier outbreak of hepatitis A contamination. Human waste was more likely to enter the lake after heavy rain (called a "fresh") following which it was industry practice to suspend harvesting oysters until the water had cleared. After heavy rain in November 1996 the Barclay Companies ceased harvesting for two days. Before and after recommencing, the Barclay Companies sample tested oysters for bacteria. The test result suggested, but did not establish, that the samples were free from viral contamination. Further, in accordance with health regulations, the Barclay Companies depurated the oysters after harvesting them, a useful but not entirely effective means of ensuring the oysters were free from contamination. Depuration involves submersion of oysters in clean water and the use of ultraviolet radiation. In February 1997 the Barclay Companies became aware of the hepatitis A outbreak and ceased harvesting.

As stated earlier, the Barclay Companies conceded they owed a duty of care to consumers of the oysters. By majority (4:3), the High Court concluded that the Barclay Companies had not breached their duty of care. It was not in dispute that the risk of the harm that eventuated was reasonably foreseeable. The only question was what was the reasonable response to the risk of injury to oyster consumers. The majority identified the only practical alternatives being for the Barclay Companies to cease harvesting and selling oysters for an unspecified, and potentially indefinite period, or to relocate their business to some unspecified waterway isolated from human beings. Each alternative was very expensive and inconvenient. The bare possibility of a known risk of a hepatitis A outbreak which, until that time, had never eventuated, did not constitute a magnitude of risk warranting such alternative actions (notwithstanding the severity of the consequences of contracting the virus).

Gummow and Hayne JJ (with whom Gaudron J agreed) concluded that the majority in the Federal Court had fallen into error in failing to identify with necessary precision by reference to the considerations identified in *Wyong Shire Council*, the reasonable response to the risk of harm that existed. The cause of the error was to identify the duty in terms of the alleged breach (being, in effect, the premature commencement of harvesting in the knowledge of an increased risk of contamination). Gummow and Hayne JJ said:

> *"A duty of care that is formulated retrospectively as an obligation purely to avoid the particular act or omission said to have caused loss, or to avert the particular harm that in fact eventuated, is of its nature likely to obscure the proper inquiry as to breach. That inquiry involves identifying, with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk."*

Two of the minority (Gleeson CJ and Callinan J) took a different approach with a different result. They took the view that, there being concurrent findings of negligence at trial and in an intermediate appellate court, the High Court should not intervene in the absence of clear error or injustice. Both were satisfied that the answer given by the majority in the Federal Court was fairly open. A finding of breach is a finding of fact, albeit one which also involves a value judgment as to what reasonableness requires.

Dovuro Pty Ltd v Wilkins focuses on the requirement for reasonable foreseeability of the risk of harm at the breach stage of the analysis. In that case the appellant lawfully imported and sold to distributors in Western Australia canola seed in bags containing very small quantities of the seed of three other plants. There was a

comprehensive regulatory scheme in place for the importation and distribution of the seeds into the country and the State. The bags were labelled "minimum 99% purity", but the identity of the other seeds was not disclosed. After the appellant had imported the seed, distributors had sold it and farmers had planted it, the Western Australian Department of Agriculture (then known as AgWest) became concerned about the presence of the non-canola seeds. Thereafter, declarations were made by the Agriculture Protection Board under the *Agriculture and Related Resources Protection Act 1976*, the effect of which was to prohibit the introduction into, or movement within, the State of the plants and to require their eradication. AgWest recommended to farmers that they keep a lookout for the plants and if they found any, to take certain precautions to avoid spreading the seeds of those plants. Despite many farmers buying the canola seed, there was no reported finding of any of the declared plants growing. Farmers who had sown the seed claimed damages for the economic loss suffered in complying with AgWest's recommendations.

The appellant conceded at trial that it owed a duty of care to the respondents. Its later attempt to withdraw the concession was unsuccessful. The precise terms of the conceded duty are not entirely clear. It seems to have been a concession that the appellant owed a duty to consumers of the seed to exercise reasonable care not to expose those consumers to a risk of injury of which the appellant knew or ought to have known. Thus, the duty was formulated at quite a high level of abstraction.

The alleged breaches included the appellant's failure, firstly, to check with the Western Australian authorities as to what their reaction to the sale of the product was likely to be and, secondly, to inform farmers of the exact contents of what they were buying.

The trial judge found negligence. The finding was upheld by a majority in the Full Federal Court but overturned by a majority (5:2) in the High Court. Gleeson CJ and Kirby J dissented, both on the ground that there were concurrent findings of breach which were fairly open.

It is accepted by all members of the court that foreseeability of harm arises at the duty and breach stage of the analysis. So much was said by Mason J in *Wyong Shire Council*. However, it seems that where a duty has been pleaded at an appropriate level – not so specific as to foreclose the breach analysis but not too general – a finding of reasonable foreseeability giving rise to a duty of care will satisfy the requirement of reasonable foreseeability at the breach stage.

As the conceded duty in this case was at a high level of generality, the court had to closely examine whether the risk of the harm suffered was reasonably foreseeable. McHugh J applied the two-step approach he had outlined in *Tame*. He identified the question as being whether the appellant ought to have known that selling the seed in Western Australia gave rise to a reasonably foreseeable risk that purchasers of the seed would suffer damage by reason of three plants, the seeds of which were mixed with the canola seed, becoming declared plants. He concluded that the risk was so negligible that it could be disregarded and accordingly there was no reasonable foreseeable risk of damage to the respondents.

The same answer was given by those in the majority who applied the traditional test of the risk of harm not being far-fetched or fanciful. Gummow, Hayne and Callinan JJ (with whom Heydon J agreed) identified the relevant question as whether the appellant should reasonably have foreseen that under the State legislation the three plants would or might be declared to be prohibited. It is clear from the judgments that what the appellant knew or ought reasonably to have known is an important factor in making a judgment about whether a risk is reasonably foreseeable. In that respect, there was no evidence that the plants in question were, or should have been, known to have been of concern to authorities under the comprehensive regulatory system.

It will not have escaped notice that the majority identify what has to be foreseeable in terms of the probability (not possibility) of what actually occurred; that is, the plants would or might be declared prohibited. Kirby J says this, in effect, raises the bar of foreseeability to probabilities not bare possibilities. I do not understand this to be the intention or effect. The relevant risk that had to be foreseeable was identified as the risk of financial loss resulting from the plants subsequently being declared prohibited. The negligence relied on was an omission. The direct cause of the loss was the conduct of a third party (the State) changing the regulatory framework after the event. In those circumstances, the plaintiff's case was framed in terms of what the respondent knew, or ought to have known, touching upon the risk of the State acting as it did.

Conclusion

Recent High Court decisions are consistent with the established trend in favour of pro defendant outcomes. The outcomes are being achieved as a result of the application of the requirements that there be a duty of care and breach of that duty. The High Court has acknowledged that, in the past, the law was applied too favourably in favour of plaintiffs. It is now in the process of achieving a more

appropriate balance between the competing policy interests in play. My perception is that the period of transition is incomplete but that there is no intention to move the balance too far in favour of defendants.

At the same time, the High Court is continuing the trend towards a coherent application of the general principles of negligence to all claims which requires that practitioners have a proper understanding of the policy issues involved and the relevance and complex interaction of a variety of factors, the weight to be given to which may vary from case to case. The High Court has not provided a simple formula from which outcomes can be predicted with a high degree of confidence. As reasonableness involves a value judgment based on the facts of each case, such a formula is unachievable.