HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No S43/2008

PAUL ANTHONY IMBREE — APPELLANT

AND

JESSIE McNEILLY & ANOR — RESPONDENTS

Matter No S392/2007

JESSIE McNEILLY & ANOR — APPLICANTS

AND

PAUL ANTHONY IMBREE — RESPONDENT

Imbree v McNeilly
McNeilly v Imbree
[2008] HCA 40
28 August 2008
S43/2008 & S392/2007

ORDER

Matter No S43/2008

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 July 2007 and 23 July 2007.*

3. *The parties have 7 days from the date of this order to file and serve agreed minutes of the consequential orders to be made.*

4. *In default of agreement upon the consequential orders to be made, the parties have 14 days from the date of this order to file and serve written submissions as to the form of consequential orders to be made.*

Matter No S392/2007

Application refused with costs.

On appeal from the Supreme Court of New South Wales

Representation

A S Morrison SC with M R Hall and A J Stone for the appellant in S43/2008 and the respondent in S392/2007 (instructed by Abrahms Turner Whelan Family Lawyers)

K P Rewell SC with M A Cleary for the respondents in S43/2008 and the applicants in S392/2007 (instructed by TL Lawyers)

CATCHWORDS

Imbree v McNeilly

Negligence – Standard of care – Definition of standard – Where unskilled and inexperienced driver with passenger who, aware of driver's lack of skill and experience, has undertaken to supervise driving – Whether "special relationship" between driver and supervising passenger such that standard of care required of driver in respect of supervising passenger is merely care reasonably to be expected of unqualified and inexperienced driver in the circumstances, rather than care to be expected of a reasonable driver – Whether *Cook v Cook* (1986) 162 CLR 376 should still be followed.

Negligence – Standard of care – Relevance of compulsory third party insurance to definition of standard of care in negligence in motor vehicle context.

Insurance – Motor vehicles – Compulsory third party insurance – Compulsory provisions applicable throughout Australia – Relevance of such insurance to definition of standard of care in negligence in motor vehicle context – Whether such insurance immaterial to standard of care to be expected of learner driver – Whether common law of negligence affected in relevant way by existence of compulsory third party insurance.

Words and phrases – "compulsory third party insurance", "duty of care", "proximity", "special relationship", "standard of care".

1 GLEESON CJ. I have had the benefit of reading in draft form the reasons for judgment of Gummow, Hayne and Kiefel JJ. I agree with the orders proposed by their Honours, and with their reasons for those orders.

2 The relationship that was said in *Cook v Cook*[1] to be special, and to require a departure from the normal objective standard of care, was that "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."[2] The injured passengers in *Cook v Cook*, *Nettleship v Weston*[3], and the present case, were not professional or qualified teachers. The occasion for the supervision was purely social. In practice, many, perhaps most, supervisors of learner drivers are relatives or friends acting in a voluntary capacity. In this case, as in *Cook v Cook*, the driver needed the supervising passenger's permission to drive the car. That permission was given subject to a stipulation that the driver should not exceed a certain speed. That is not uncommon. The ordinary traffic laws impose speed limits on inexperienced drivers. It is a basic precaution often adopted in informal situations of instruction or supervision.

3 There may be any number of ways in which personal attributes, permanent or temporary, may affect a driver's capacity to exercise care for the safety of others. Knowledge of such attributes may be relevant to contributory negligence, or to a defence of voluntary assumption of risk, but the fact of such knowledge is not normally treated as a defining aspect of the circumstances, so as to modify the care that is required as a legal obligation. It was not so treated by the plurality in *Cook v Cook*. What, then, of the additional factor of undertaking supervision of an inexperienced driver?

4 In the view of the plurality in *Cook v Cook*, even though all the passengers in a car may be aware of a driver's inexperience, it is generally only the supervising passenger to whom the lower standard of care is owed[4]. I say "generally" because the reasons in *Cook v Cook*[5] say that in rare cases the relationship between driver and passenger may fall into the special category postulated. There is nothing rare about a passenger knowing that a driver is inexperienced. There are, however, degrees of inexperience. In the ordinary case, the central feature of the relationship between the driver of a car and all the

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1 (1986) 162 CLR 376; [1986] HCA 73.

2 (1986) 162 CLR 376 at 388.

3 [1971] 2 QB 691.

4 (1986) 162 CLR 376 at 382-383.

5 (1986) 162 CLR 376 at 386.

passengers, including a supervisor, is the vulnerability of the passengers. (An extraordinary case may be, for example, one in which the driver is driving under the legal or practical compulsion of the passenger.) The driver of a car has the capacity to cause death or serious injury because of the nature of the activity undertaken. If a passenger fails to take reasonable care for his or her own safety, the principles of contributory negligence apply. According to the argument for the respondents, logic demands recognition that a person who is being supervised by another owes a lower standard of care to the supervisor than to anybody else. The appellant's case is that logic demands no more than a recognition that, depending upon the circumstances, the supervisor may be more likely than others to be affected by contributory negligence. The second seems to me the better view.

5 It will be necessary to return to the separate reasons of Brennan J in *Cook v Cook*. Those reasons attached decisive significance, not to the passenger's having undertaken to supervise the driver, but to the passenger's knowledge that the driver was inexperienced[6]. It appears that, in the present case, Brennan J would not have distinguished, in terms of the standard of care, between the various passengers, all of whom knew of the driver's lack of experience.

6 Underlying the plurality reasons was a question of the relevance of skill to care. Taking care for the safety of another may involve the exercise of skill, caution, alertness, physical mobility and other qualities. These may interact. They may be missing, or temporarily or permanently diminished, to a greater or lesser degree. In the first edition of Sir Frederick Pollock's *The Law of Torts*[7], the learned author said: "Due care and caution ... is the diligence of a reasonable man, and includes reasonable competence in cases where special competence is needful to ensure safety." If an activity, in order to be performed safely, requires a certain degree of skill, undertaking the activity without the requisite skill may itself be a form of negligence[8]. While the ability to drive a motor car is nowadays a common skill, it requires a degree of technical competence. This is recognised by legislation, in all parts of Australia, which regulates learning to drive. Under such legislation, an unrestricted licence to drive is gained only over time, and by degrees, and the restrictions to which a holder of a restricted licence may be subject may include such matters as speed and alcohol consumption.

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6 (1986) 162 CLR 376 at 393-394.

7 Pollock, *The Law of Torts*, (1887) at 359.

8 Salmond, *The Law of Torts*, (1907) at 23-24. See also Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed (1996) at 223-224.

7 It was not suggested in this case (or in *Cook v Cook* or in *Nettleship v Weston*) that the negligence of the driver consisted in undertaking the driving in the first place. There may be circumstances in which a person who takes control of a motor car is so lacking in competence that the act of taking control is itself negligent. Where that would leave an instructor, or supervisor, or other passenger, who directed or permitted the act is not the present problem. According to the circumstances, it could mean that there is no duty of care, or voluntary assumption of risk, or a high degree of contributory negligence, or an absence of causation.

8 In a case, like the present, where it is not claimed that there was such a degree of incompetence, resulting from inexperience, as to make taking control of the vehicle itself an act of negligence, then the hypothesis is that the driver, although inexperienced and potentially reliant on advice and information, was capable of driving the vehicle safely. In fact, in this case the first respondent drove safely for a substantial distance. In some respects, it may have been reasonable to expect him to be more cautious than an experienced driver. It was foreseeable that circumstances might arise in which his lack of experience would increase the risk of an accident. Yet he chose to drive. He thereby took on the capacity to cause death or serious injury to his passengers and others, and the legal responsibility that went with it.

9 Inexperience is one of many attributes that may affect a driver's ability to avoid danger. As was pointed out by counsel for the appellant, a visitor from overseas, who had never previously driven on the left side of the road, or across a desert, may be described as inexperienced if placed in the same situation as the driver in this case. 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.

10 To describe a case as special, or exceptional, implies existence of a principle by which it can be recognised, and distinguished from the ordinary. The plurality reasons in *Cook v Cook* accepted that, as a general rule, the standard of care owed by a driver to someone who might foreseeably be injured by lack of care is objective and impersonal, and is not modified by the personal attributes of the driver, which might include age, skill, alertness, physical or mental health, sobriety or even aspects of temperament, some of which, in the case of the one driver, may alter, perhaps over a short time. This is so because the care that is reasonably required of the driver of a car is a product of the harm that can result from failure to exercise care, and because the alternative would be an infinitely variable standard, responding to the particular combination of

attributes possessed by a driver at any given time[9]. It was concluded in *Cook v Cook*[10] that, because the absence of skill, or experience, was the reason for the instruction or supervision that was undertaken, it was irrational to impose a standard of care owed by the driver to the instructor or supervisor that was not modified to take account of the lack of skill or experience. That, with respect, is not at all obvious. The factors described as special may be significant, in a given case, for issues such as the existence of a duty of care, contributory negligence, voluntary assumption of risk, or causation. Given, however, that it is accepted that the driver owes a duty to the supervisor to take reasonable care for the supervisor's safety; given the wide variability in degrees of inexperience; and given the interaction of experience, or lack of it, with other personal attributes that bear upon safe driving, 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.

11 An alternative view, preferred by Brennan J in *Cook v Cook*, is that knowledge that the driver was inexperienced (in this case, a knowledge shared by all the passengers) is the key factor, with the result that the standard of care is "the standard of an inexperienced driver of ordinary prudence."[11] This approach, however, also raises the difficulty mentioned above. In *Nettleship v Weston*[12], Megaw LJ pointed to the problem of complex and elusive factors that might affect a particular person's ability to take care. I see no answer to the problem. It may be demonstrated by reference to *The Insurance Commissioner v Joyce*[13]. Dixon J, in successive sentences[14], referred to a "drunken driver" and a "driver affected by drink". It is now generally accepted that even a modest amount of alcohol may cause impairment of a driver's capacity, and the extent of the impairment may vary with other attributes of the driver, perhaps including experience.

12 The difficulty of applying a standard of an inexperienced driver of ordinary prudence is shown by the decisions at trial and in the Court of Appeal in this case. Four judges, bound by authority to apply that standard, and to work

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9 See *Joslyn v Berryman* (2003) 214 CLR 552 at 564 [30] per McHugh J; [2003] HCA 34.

10 (1986) 162 CLR 376 at 384.

11 (1986) 162 CLR 376 at 394.

12 [1971] 2 QB 691 at 708-709.

13 (1948) 77 CLR 39; [1948] HCA 17.

14 (1948) 77 CLR 39 at 57.

out the extent to which the accident was the result of inexperience, as compared with some other deficiency, produced four different results.

13 I agree with Gummow, Hayne and Kiefel JJ that *Cook v Cook* should not be followed, for the reasons and with the consequences they assign.

14 It was not argued for the appellant that a reason for not following *Cook v Cook* is that the respondents were insured under a statutory scheme of compulsory insurance. Nor was there any argument about whether it would have made a difference if the respondents had been voluntarily insured, or uninsured, or if their insurer had become insolvent[15]. The insurance that applied was, of course, insurance against legal liability for negligence. The statutory insurance regime operated upon – it did not create – the legal liability. 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.

15 It is useful to consider the detail of Lord Denning MR's reasoning in *Nettleship v Weston*[16] in this respect. His Lordship examined the responsibility of a learner driver towards an instructor after first having discussed three other aspects of the driver's responsibility: his or her responsibility in criminal law; his or her responsibility to other persons on or near the highway; and his or her responsibility towards passengers in the car. His Lordship was addressing a matter of legal coherence[17].

16 As to the learner driver's responsibility in criminal law, insurance had nothing to do with it. In that respect, as his Lordship noted, it is no defence for a learner to be doing his or her incompetent best[18].

17 As to the learner driver's responsibility to persons on or near the highway, his Lordship again noted that it is no excuse that a defendant was only a learner. There was no attenuation of the duty of care. It was in that connection that his Lordship referred to the "high standard" imposed largely as "the result of the policy of the Road Traffic Acts."[19] In that part of his reasons his Lordship refers

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15 The recent financial failure of a major Australian insurance company serves as a reminder that insurance is not necessarily synonymous with cover.

16 [1971] 2 QB 691 at 697-703.

17 cf *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59.

18 [1971] 2 QB 691 at 698-699.

19 [1971] 2 QB 691 at 699.

to five decided cases. The first[20] was a case about negligent management of a tea room. The second[21] was a case of damage caused by a skidding car. There is no reference to insurance, or to the policy of any legislation. The third[22] was a case of a pedestrian whose arm was bruised, coat torn, and shopping bag damaged by the protruding handle of a motor van. There was "abundant evidence"[23] of negligence of the driver. The plaintiff was awarded £10 damages. Again there was no reference to insurance, or the policy of any legislation. The fourth[24] was an Admiralty case about a collision between ships. There was no reference to insurance. The fifth[25] was a case of personal injuries resulting, not from negligent driving, but from brake failure of an inadequately maintained lorry. There was no reference to insurance. None of the motor vehicle cases referred to indicated, and none of them acknowledged, any "high standard", or addressed the problem of the inexperienced learner. Quite apart from those cases, however, his Lordship undoubtedly was correct to say that a learner's responsibility towards persons on or near the highway is not attenuated. The learner cannot say: "I was doing my best and could not help it." Having regard to the capacity of a motor vehicle to cause harm, and the vulnerability of others on or near the highway, that can be explained by considerations other than compulsory insurance. Indeed, it is probably the other way around: the capacity of a driver to injure others explains compulsory insurance. What is of present significance is that his Lordship referred to the policy of the Road Traffic Acts as a reason for requiring a high standard of care of drivers, not as a reason for declining to differentiate between learner drivers and others.

18 His Lordship then went on to consider the responsibility of a learner driver towards passengers in the car, and again observed that the standard of care was objective[26].

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20 *Glasgow Corporation v Muir* [1943] AC 448.

21 *Richley (Henderson) v Faull. Richley Third Party* [1965] 1 WLR 1454; [1965] 3 All ER 109.

22 *Watson v Thomas S Whitney & Co Ltd* [1966] 1 WLR 57; [1966] 1 All ER 122.

23 *Watson v Thomas S Whitney & Co Ltd* [1966] 1 WLR 57 at 60; [1966] 1 All ER 122 at 124.

24 *The Merchant Prince* [1892] P 179.

25 *Henderson v Henry E Jenkins & Sons* [1970] AC 282.

26 [1971] 2 QB 691 at 700-701.

19 Having done all that, his Lordship asked whether the care owed to a passenger who was also an instructor was less than the care owed according to the criminal law, or the care owed to people on or near the highway, or the care owed to other passengers. He answered that question in the negative, without further reference to insurance[27].

20 The respondents in the present case appeared to accept that the standard of care owed by an inexperienced driver to other people on or near the highway, and to passengers in the car, except the supervising passenger, is objective. The question of principle to be decided is whether the position is different in relation to the supervising passenger.

21 The problem of the objectivity of the standard of care of an inexperienced person, or the comparative standards of care owed by an inexperienced person, or a person suffering from some other form of disability or impairment, and an "ordinary" person, is not one peculiar to the drivers of motor vehicles that are subject to a scheme of compulsory third party insurance. A similar problem would arise in many other contexts, where there is no compulsory insurance. If 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. The result is both "morally incoherent", as Professor Stapleton described it[28], and productive of legal confusion.

22 The law governing the legal rights and obligations of motorists in all parts of Australia, although it varies significantly between different jurisdictions, is a combination of common law and statute. In some jurisdictions, common law principles as to damages have been replaced by detailed statutory regulation. Without doubt, insurance is a major factor in the practical operation of the law of negligence as it applies to motor vehicle accidents, and the various schemes governing insurance against third party liability, some of which include government regulation of the market, reflect legislative policy of great social importance. It may be that Lord Denning understated the position when he said that the standard of care expected of drivers reflected legislative policy. 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. The common law makes a defendant liable for all the harm of which his or her negligence is a cause, however slight the moral culpability involved in the

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27 [1971] 2 QB 691 at 701-702.

28 Stapleton, "Tort, Insurance and Ideology", (1995) 58 *Modern Law Review* 820 at 825.

negligence, and however extensive the harm. Momentary inattention can be a cause of harm for which few motorists could afford to pay compensation. In the present case, the damages of the appellant were assessed at $9,563,731. The Australian States and Territories have not followed the New Zealand example of dealing with the problem as an issue of social security. The common law continues to apply, but with a heavy overlay, varying in its detail, of statutory prescription and modification. Compulsory third party insurance is one aspect of that overlay.

23 The question in the present case is one of common law principle. Is the standard of care owed by an inexperienced driver to a supervising passenger the same objective standard as that owed to third parties generally? That is a matter that could be regulated by statute[29]. There is no legislation relevant to these proceedings that touches the point. 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. If it were not for insurance, the common law would operate with intolerable harshness in its application to driving. That is a sound reason in public policy for legislative intervention. If it were not for third party insurance, it may be assumed that the first respondent would not have been permitted, and (at least if well informed) would not have dared, to drive at all on the occasion in question. 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.

24 I agree that the appeal should be allowed, and consequential orders made as proposed by Gummow, Hayne and Kiefel JJ.

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29 See, for example, the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act* 2007 (NSW), which inserts s 141 in the *Motor Accidents Compensation Act* 1999 (NSW) with effect from 1 October 2008.

25 GUMMOW, HAYNE AND KIEFEL JJ. The appellant (Paul Anthony Imbree) allowed the first respondent (Jesse McNeilly[30]) to drive a four-wheel drive station wagon[31] on Larapinta Drive in the Northern Territory, a gravel road between Kings Canyon and Hermannsburg. The first respondent was then aged 16 years and five months. As the appellant knew, the first respondent had little driving experience, he was not licensed to drive, and he did not hold any learner's permit. He lost control of the vehicle and the vehicle overturned. The appellant, then a front-seat passenger, was seriously injured.

26 What was the standard of care that the first respondent (the driver) owed the appellant (the passenger)? Was it, as this Court held in *Cook v Cook*[32], "that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which the pupil is placed"? Or was it, as the appellant submitted, the same objective standard of care as a licensed driver?

27 These reasons will show that the standard of care which the driver (the first respondent) owed the passenger (the appellant) was the same as any other person driving a motor vehicle – to take reasonable care to avoid injury to others. The standard thus invoked is the standard of the "reasonable driver". That standard is not to be further qualified, whether by reference to the holding of a licence to drive or by reference to the level of experience of the driver. *Cook v Cook* should no longer be followed.

The facts

28 Before the accident which gives rise to this litigation, the appellant had had a great interest in four-wheel drive trips in and around Australia. He had undertaken several off-road trips to far north Queensland and to the Northern Territory. On the trip which leads to this litigation, the appellant was accompanied by two of his sons (Paul and Reece), an adult friend

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30 Except in the title to the appeal in this Court, the first respondent's first given name is recorded as "Jesse". That spelling is adopted in these reasons

31 The vehicle was owned by the appellant's employer, the second respondent to this appeal, but the appellant used the vehicle as if it were his own. The two respondents have been jointly represented at all stages of the litigation. No issue in this Court was said to require separate consideration of the position of the second respondent.

32 (1986) 162 CLR 376 at 384 per Mason, Wilson, Deane and Dawson JJ; [1986] HCA 73.

(Mr Ben Watson), and the first respondent (a friend of Paul Imbree junior). Paul Imbree junior was then aged 16 years and had just obtained a New South Wales learner's permit to drive a vehicle.

29 The appellant knew that the first respondent had previously driven a four-wheel drive vehicle owned by his grandparents. The appellant knew however that the first respondent did not have a learner's permit. When the party travelled through Dubbo and Nyngan they tried to find an office of the Roads and Traffic Authority at which the first respondent could obtain a permit, but the offices were closed.

30 In the later part of their journey from New South Wales to the Northern Territory, the appellant allowed first his son Paul, and then the first respondent, to drive for about 30 to 40 minutes each. He told both that they should not exceed 80 kmh. Each drove uneventfully. The trip proceeded into the Simpson Desert and again the appellant allowed each of the two boys to drive on two occasions. This driving was in more challenging conditions and again it passed without concern. After visiting Ayers Rock and Kings Canyon, the party headed towards Hermannsburg and Alice Springs on Larapinta Drive. Initially the road was hilly and corrugated and the appellant and Mr Watson drove. When the terrain changed, and the road was what the appellant would later describe as "a very wide two lane dirt track with no significant corrugations compared to what [he had] struck earlier", he allowed first his son Paul, and then the first respondent, to drive.

31 When the first respondent drove, the appellant sat beside him in the front passenger seat. For a time the driving proceeded without any event out of the ordinary. Both the appellant and the first respondent then saw a piece of tyre debris on the road. Instead of straddling and driving over the debris, the first respondent steered the vehicle to the right. The appellant yelled at the first respondent, telling him to brake. He did not. When the vehicle was on the far right-hand side of the road, the first respondent turned sharply to the left and accelerated. This caused the vehicle to roll over.

32 The appellant suffered spinal injuries that have rendered him tetraplegic.

The proceedings below

33 The appellant brought proceedings in the Supreme Court of New South Wales against the first respondent as driver and the second respondent as owner of the vehicle. The primary judge, Studdert J, gave judgment for the appellant[33].

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33 *Imbree v McNeilly* [2006] NSWSC 680.

His Honour rejected[34] the respondents' contention that the appellant had voluntarily assumed the risk of injury, found[35] that the first respondent had "behaved with carelessness over and above what could be attributed merely to inexperience", and further found[36] that the appellant had been contributorily negligent. The appellant's damages, assessed at more than $9.5 million, were reduced by 30 per cent on account of his contributory negligence.

34 The respondents in this Court appealed to the Court of Appeal; the appellant cross-appealed. Both the appeal and the cross-appeal were allowed in part. The Court of Appeal (Beazley, Tobias and Basten JJA) considered[37] a number of issues that are not pressed in this Court. In particular, questions of illegality, voluntary assumption of risk, and quantum of damages, were considered by the Court of Appeal, but none of these questions is raised in this Court.

35 All members of the Court of Appeal rightly treated this Court's decision in *Cook v Cook* as establishing that "[a]ctions which are fairly to be seen as the result of [a learner driver's] inexperience and lack of qualification rather than as having been caused by superimposed or independent carelessness did not, of themselves, constitute a breach of the duty of care"[38] which the learner driver owed to a licensed driver who was supervising the learner. The Court of Appeal divided in opinion about whether, in this case, the driver of the vehicle (the present first respondent) had breached the duty of care he owed his front-seat passenger (the present appellant). The majority (Beazley JA and Basten JA) found[39] that the driver had been careless, but that the carelessness lay in swerving off the road rather than, as the primary judge had found, steering around the tyre debris. Beazley JA further found[40] the driver to have been careless in accelerating as he did. The third member of the Court (Tobias JA) concluded[41]

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34 [2006] NSWSC 680 at [51].

35 [2006] NSWSC 680 at [48].

36 [2006] NSWSC 680 at [86]-[87].

37 *McNeilly v Imbree* (2007) 47 MVR 536.

38 (1986) 162 CLR 376 at 388 per Mason, Wilson, Deane and Dawson JJ.

39 (2007) 47 MVR 536 at 538-539 [13] per Beazley JA, 555-556 [83] per Basten JA.

40 (2007) 47 MVR 536 at 538 [12].

41 (2007) 47 MVR 536 at 542 [29].

that the driver's acceleration and over-steering did not breach the standard of care of a driver with the limited skills and experience of this driver.

36 The Court of Appeal also divided in opinion about what apportionment of liability should be made on account of the contributory negligence of the present appellant as the instructor or supervisor of the first respondent as driver. Basten JA[42] assessed the appellant's contribution at two-thirds; Beazley JA assessed[43] his contribution at one-half. Tobias JA, who had concluded that the driver was not negligent, went on to consider contributory negligence and agreed[44] with Basten JA that the appellant's contribution should be assessed as two-thirds.

Proceedings in this Court

37 By special leave, the appellant appeals to this Court. His central proposition was that the driver, the first respondent, should be held to have owed him the same objective standard of care as a licensed driver. He submitted that *Cook v Cook* should be overruled. Because, as he submitted, the Court of Appeal had applied the wrong standard of care, it followed that the apportionment of responsibility had miscarried. The appellant further submitted that the respondents had not shown that any contributory negligence of the appellant was a cause of the damage that he suffered. Finally, as an alternative argument, the appellant submitted that, in any event, the Court of Appeal should not have interfered with the primary judge's assessment of contributory negligence.

38 The respondents sought special leave to cross-appeal. They submitted that although "the approach of this Court in *Cook v Cook* to the standard of care owed by a driver whose ability is compromised by a lack of skill and experience, or by some other factor, known to the plaintiff, is correct, [it] requires re-statement in contemporary terms". The consequence of that re-statement, so the respondents argued, would be that, consonant with the reasoning of Tobias JA in the Court of Appeal, the appellant's claim for damages should have been dismissed. That is, having regard to the appellant's knowledge of the first respondent's limited skills and experience, the latter's driving did not depart from the standard of care the appellant was entitled to expect the first respondent to exercise.

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42 (2007) 47 MVR 536 at 561-562 [111].

43 (2007) 47 MVR 536 at 539 [15].

44 (2007) 47 MVR 536 at 546 [48].

Cook v Cook

39 *Cook v Cook* was decided in 1986. It was one of a large number of decisions made by this Court during the 1980s about the law of negligence. Many of those cases focused upon duty of care. Thus this Court considered[45] what duty of care a public authority owed in exercising or not exercising its powers[46] and spoke of a "general dependence" upon public authorities to perform their functions with due care[47]. This Court also re-expressed[48] the duty of care owed by an employer to an employee as a non-delegable duty: a duty to ensure that reasonable care and skill was exercised[49]. And this Court rejected[50] a theory of concurrent general and special duties owed by an occupier of land to an entrant in favour of determining only whether, in all the relevant circumstances, the defendant owed a duty of care under the ordinary principles of negligence.

40 These decisions about duty of care must be understood in their historical context. In 1977, in *Anns v Merton London Borough Council*[51], the House of Lords had formulated a two-stage test for determining duty. In 1985, this Court

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45 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; [1985] HCA 41.

46 See now *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; [1998] HCA 5; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54.

47 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 per Mason J. See now *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 343-345 [18]-[20] per Brennan CJ, 385-388 [157]-[165] per Gummow J, 408-412 [225]-[232] per Kirby J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 658-660 [310] per Callinan J.

48 *Kondis v State Transport Authority* (1984) 154 CLR 672; [1984] HCA 61. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258; [1982] HCA 40.

49 See, now, as to non-delegable duties: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] HCA 13; *Scott v Davis* (2000) 204 CLR 333; [2000] HCA 52; *New South Wales v Lepore* (2003) 212 CLR 511; [2003] HCA 4.

50 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7.

51 [1978] AC 728.

rejected that approach[52] preferring, instead, to analyse questions of duty of care by reference to proximity. And for a time, both before and after the decision in *Cook v Cook*, proximity was seen as the unifying criterion of duties of care[53]. Many of the decisions about duty of care that have just been mentioned made extensive reference to proximity.

41 By 1999[54], if not earlier, this Court had rejected proximity as a satisfactory tool for determining whether a defendant owed a duty of care. Further, the three-stage approach described in *Caparo Industries Plc v Dickman*[55] and subsequently adopted by the House of Lords[56] was rejected[57] in this Court.

42 The reasons of the plurality in *Cook v Cook* depended, in important respects, upon the application of notions of proximity. Proximity was seen as informing not just *whether* a duty of care was owed, but also the *content* of the duty of care that was owed. Thus, the plurality said[58] that:

> "The more detailed definition of the objective standard of care for the purposes of a particular category of case must necessarily depend upon the identification of the relationship of proximity which is the touchstone and control of the relevant category."

That is, as their Honours went on to say[59]:

> "[T]he more detailed definition of the content of that objective standard will depend upon the relevant relationship of proximity from which it

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52 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

53 *Jaensch v Coffey* (1984) 155 CLR 549 at 584 per Deane J; [1984] HCA 52. See *Hill v Van Erp* (1997) 188 CLR 159 at 176-177 per Dawson J, 210 per McHugh J, 237-239 per Gummow J; [1997] HCA 9.

54 *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36.

55 [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich.

56 *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211.

57 *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59.

58 (1986) 162 CLR 376 at 382.

59 (1986) 162 CLR 376 at 382.

> flows and into which the reasonable person of the law of negligence must be projected; it 'is because that relation may vary that the standard of duty or of care is not necessarily the same in every case'[60]."

43 It was on this footing that the plurality in *Cook v Cook* concluded[61] that:

> "While the personal skill or characteristics of the individual driver are not directly relevant to a determination of the content or standard of the duty of care owed to a passenger, 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 of that kind of vehicle."

Thus, because "it would be to state a half-truth to say that the relationship was, if the pupil was driving, that of driver and passenger ... the standard of care which arises from the relationship of pupil and instructor is that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which the pupil is placed"[62].

44 In his separate reasons in *Cook v Cook*, Brennan J rejected[63] "a concept of proximity other than reasonable foreseeability of injury as a tool for analysis or as a practical criterion for determining the existence of a duty of care". It followed, in his Honour's opinion[64] that such a concept was not to be used "as a tool for analysis or a practical criterion for determining the standard of care required for discharging a duty of care". Nonetheless, Brennan J held that the circumstances out of which the duty of care owed by the learner driver to the instructor arose included the plaintiff's knowledge, when she accepted carriage in the vehicle, that the driver was inexperienced. It followed, in his Honour's view[65]

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60 *The Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 56 per Dixon J; [1948] HCA 17.

61 (1986) 162 CLR 376 at 383.

62 (1986) 162 CLR 376 at 384.

63 (1986) 162 CLR 376 at 393.

64 (1986) 162 CLR 376 at 393.

65 (1986) 162 CLR 376 at 394.

that "the standard of care required to discharge the driver's duty in those circumstances is the standard of an inexperienced driver of ordinary prudence".

Reconsidering *Cook v Cook*

45 As Mason J said in *State Government Insurance Commission v Trigwell*[66], this Court "is neither a legislature nor a law reform agency". But this Court has long since held[67] that it can, and if appropriate will, reconsider its earlier decisions. In *The Commonwealth v Hospital Contribution Fund*[68], Gibbs CJ identified four matters which in that case justified departure from earlier decisions. Those considerations were summarised in *John v Federal Commissioner of Taxation*[69] as being that (a) the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases; (b) there were differences in the reasoning that led to the earlier decisions; (c) the earlier decisions had achieved no useful result but considerable inconvenience; and (d) that the earlier decisions had not been independently acted on in a manner which militated against reconsideration. The need to consider these matters is obvious. It is necessary to do that, however, with a clear recognition of more basic principles. In particular, it is necessary to recognise that, when a court of final appeal considers judge-made law, "[w]hile stare decisis is a sound policy because it promotes predictability of judicial decision and facilitates the giving of advice, it should not always trump the need for desirable change in the law"[70] especially, we would add, if the change is necessary to maintain a better connection with more fundamental doctrines and principles.

46 In so far as the reasoning of the plurality in *Cook v Cook* depended upon the application of notions of proximity, it is reasoning that does not accord with subsequent decisions of this Court denying the utility of that concept as a determinant of duty. Subsequent development of legal doctrine denies the continued existence of the foundation upon which the reasoning of the plurality

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66 (1979) 142 CLR 617 at 633; [1979] HCA 40.

67 See, for example, *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58 per Griffith CJ; [1914] HCA 15; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244 per Dixon J; [1952] HCA 2.

68 (1982) 150 CLR 49 at 56-58; [1982] HCA 13.

69 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5.

70 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 216 [92] per McHugh J.

appears to have rested[71]. This observation, however, does not conclude the issues that now arise. There are several reasons why that is so. First, the immediate question in this case concerns the content of the duty of care, not whether any duty of care should be found to exist. Secondly, it is to be noted that Brennan J arrived at substantially the same conclusion as the plurality about the content of the duty of care owed by a learner driver to the instructing or supervising driver, but expressly disclaimed reliance upon proximity. Thirdly, the reasoning of the plurality in *Cook v Cook*, which gave primacy in determining the content of the duty of care to identifying the relationship between the parties out of which the duty arose, reflected what had been said by Dixon J, in his dissenting reasons in *The Insurance Commissioner v Joyce*[72], more than 30 years before proximity was identified as a concept unifying at least some aspects of the law of negligence.

47 It follows, therefore, 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 defendant owes a duty of care, provides no sufficient basis for rejecting the principle that it established. It is necessary to look beyond the reliance on proximity reasoning.

48 The reasoning in *Cook v Cook*, of both the plurality and Brennan J, identified the factual consideration critical to the conclusion reached as being that the plaintiff *knew* that the driver was inexperienced. That is, what the plaintiff knew was held to affect the standard of care that the plaintiff could expect the learner driver to observe. Nonetheless, the standard of care was held to be an objective standard. That is, the relevant standard of care was identified not as what *this* plaintiff could reasonably have expected *this* defendant to have done or not done, but as what a particular class of defendants (within which this defendant fell) could reasonably be expected to do or not do. Thus, the plurality held that the standard of care in a particular case was not to be adjusted "by reference to the physical characteristics and expertise or the usual carefulness or otherwise of the *particular* driver"[73] (emphasis added). Rather, it was held[74] that:

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71 cf *Lamb v Cotogno* (1987) 164 CLR 1 at 11; [1987] HCA 47; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 613-615 per Gummow J; [1996] HCA 38.

72 (1948) 77 CLR 39.

73 (1986) 162 CLR 376 at 387.

74 (1986) 162 CLR 376 at 387.

> "It is only when special and exceptional circumstances clearly transform the relationship between a particular driver and a particular passenger into a special or different class or category of relationship that the case will be one in which the duty of care owed by the particular driver to the particular passenger will be either expanded or confined by reference to the objective standard of skill or care which is reasonably to be expected of a driver to a passenger *in the category of a case where that special or different relationship exists*." (emphasis added)

The onus of establishing facts giving rise to such a special or different class or category was cast[75] upon the party asserting it.

49 There have been various statements in this Court to the effect that in many well-settled areas of the law of negligence the existence of a duty of care and its content present no difficulty and that one such example concerns the responsibilities of a motorist on the highway to avoid causing injury to the person or property of another[76]. The reference to "special and exceptional circumstances" in the passage from *Cook v Cook* set out above invites the question why the relevant legal relationship should be regarded as any more specific than that of driver and passenger[77]. As Dias and Markesinis pointed out shortly after *Cook v Cook* was decided[78], the trend of English authority, including *Nettleship v Weston*[79], had been to eschew distinctions between categories of drivers of motor vehicles.

50 Further, the translation of the particular knowledge of a plaintiff into the identification of a separate category or class of relationship governed by a distinct and different duty of care encounters various difficulties. These are both doctrinal and practical.

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75 (1986) 162 CLR 376 at 387.

76 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441-442 per Gibbs CJ; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 289-290 [103] per Hayne J; [2000] HCA 61; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 443 [63] per Gummow J; [2005] HCA 62.

77 See Kidner, "The variable standard of care, contributory negligence and *volenti*", (1991) 11 *Legal Studies* 1 at 12-13.

78 *Tort Law*, 2nd ed (1989) at 103-104.

79 [1971] 2 QB 691.

51 The fundamental reason why *Cook v Cook* should no longer be treated as expressing any distinct principle in the law of negligence is that basic considerations of principle require a contrary conclusion. No different standard of care is to be applied in deciding whether a passenger supervising a learner driver has suffered damage a cause of which was the failure of the learner driver to act with reasonable care.

52 After some elaboration of the basic considerations of principle to which reference is made above, it will be convenient to consider the significance for that elaboration of what was said, well before *Cook v Cook*, in *Joyce*.

A reasonable learner driver?

53 The basic considerations of principle may be stated as follows. First, the inquiry is about the applicable standard of care. Secondly, the standard to be applied is objective. It does not vary with the particular aptitude or temperament of the individual. Thirdly, it is, and must be, accepted that 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. The learner may have to display "L-plates" for all other road users to see, but that learner will be held to the same standard of care as any other driver in fulfilling the learner's duty to take reasonable care to avoid injuring *other* road users. Fourthly, it was not suggested in argument, and there is nothing in *Cook v Cook* that would suggest, that a learner driver owes a lesser standard of care to any passenger in the vehicle *except* the licensed driver who sits in the adjoining seat. In particular, it was not suggested that any knowledge of another passenger that the driver was inexperienced affects the standard of care that the driver must observe to avoid injury to that other passenger.

54 Knowledge of inexperience can thus provide no 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 outside the car rather than one who was seated in the car, in the adjoining seat. The other passenger will ordinarily know that the driver is a learner driver; the road user outside the car can see the L-plates. Yet it is not disputed that the learner driver owes each of those persons a standard of care determined by reference to the reasonable driver.

55 To reject knowledge of inexperience as a sufficient basis upon which to found a different standard of care is to reject the only basis, other than proximity, for the decision in *Cook v Cook*. Yet rejection of knowledge as a basis for applying a different standard of care is required not only by the observation that knowledge of inexperience is held not to affect the standard of care owed to other

passengers or other road users who observe a display of L-plates, but also by the essential requirement that the standard of care be objective and impersonal.

56 No matter whether the content of the standard of care is described as that of the "inexperienced driver of ordinary prudence"[80] or the "unqualified and inexperienced driver (but with some knowledge of the controls of a motor vehicle) in the situation in which the [driver] was placed"[81] there are evident practical difficulties in applying such a standard. The division in opinion in the Court of Appeal in this case illustrates the difficulties that arise[82].

57 Both statements of the standard would require the drawing of difficult distinctions between "inexperience" on the one hand and "prudence" on the other, or between a want of application of (as yet unlearned) skills and a want of reasonable care. And both forms of the statement of applicable standard leave unanswered the question whether the distinctions that are drawn are to be applied regardless of how long the person has been learning to drive and regardless of whether the driver has attained a standard (but not the age) at which a licence could be issued. That is, 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 use of the word "inexperienced". In particular it leaves undefined what level of competence is to be assumed in such a driver.

58 Further, to describe the relevant comparator as "unqualified" points only to the absence of approved demonstration of adequate driving competence. Demonstration of relevant ability is beside the point. What is at issue is the definition of a standard of reasonable care, not any external recognition of attaining an ability to drive in accordance with that standard. And for like reasons, to describe the relevant comparator as a "licensed driver" diverts attention from the central inquiry: what would a reasonable driver do? Being authorised by the applicable law to drive unsupervised on a public road is neither a necessary nor a sufficient characteristic of the reasonable driver. Holding or not holding the relevant licence is irrelevant to the description or application of the relevant standard of care. The reasonable driver is to be identified by what such a driver would do or not do when driving, not by what authority a driver would need to have in order to drive lawfully.

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80 (1986) 162 CLR 376 at 394 per Brennan J.

81 (1986) 162 CLR 376 at 388 per Mason, Wilson, Deane and Dawson JJ.

82 cf *Nettleship v Weston* [1971] 2 QB 691.

Instructor or supervisor?

59 One other possible footing for a conclusion that different standards of care are to be applied to a learner driver according to whether the person who suffered damage was the supervising driver, or was another passenger or other road user, should be examined. Both in *Cook v Cook*, and in the present case, the relationship between the parties was described by identifying the plaintiff as the "instructor" or "supervisor" of the defendant as a learner driver. What is meant in this context by "instructor" or "supervisor"?

60 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. But whatever dissonance may stem from an unwillingness of the learner to respond to command or control, the parent, though licensed to drive the vehicle, may have no experience as a teacher, let alone experience in teaching another to drive a motor vehicle. This would suggest that the term "instructor" may not be apt. The expression "supervisor", however, is not wholly inapt, even in the case of the parent and a child who is not receptive to advice, let alone instruction. Use of the term "supervisor" reflects some important features of the legislative regulation of learning to drive a motor vehicle on public roads.

61 It is convenient to identify those legislative features by particular reference to provisions of the *Traffic Act* (NT), the *Motor Vehicles Act* (NT) and the Traffic Regulations (NT) as they were in force at the time of the accident that gives rise to the present litigation. First, driving on a public street in the Territory without a current licence to drive was prohibited[83]. Provision was made[84] for the issue of learner's permits (called a "permit licence") but such a permit would be issued only if the applicant was aged more than 16 years and had passed a test of knowledge of road rules[85]. (If the applicant had attained the age of 16 years but not the age of 16 years and 6 months, the applicant had also to have passed an approved training course[86].)

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83 *Traffic Act* (NT), s 32(1).

84 *Motor Vehicles Act* (NT), s 9.

85 *Motor Vehicles Act*, s 10(1).

86 *Motor Vehicles Act*, s 10(1).

62 The holder of a learner's permit was required[87] to display L-plates on the vehicle and to be accompanied[88] by the holder of a full (as distinct from provisional) licence to drive. The licensed driver had to sit in the front passenger seat[89] and that licensed driver was liable[90] for an offence committed by the learner driver "as if the licence holder was the driver of the vehicle".

63 It is this last feature of the statutory landscape which suggests that the licensed driver who sits beside a learner driver is in a position to supervise the learner's conduct. But nothing in the applicable Northern Territory legislation and regulations required the licensed driver to offer the learner some instruction about how to drive. That was a matter left to the participants to resolve. Hence the conclusion, stated earlier, that the use of the word "instructor" may not be apposite if it connotes an educative process.

64 Because the accident happened in the Northern Territory, particular regard must be had to the law of the Territory. That was the law of the place of the wrong[91]. In considering the development of the common law of Australia, however, it is necessary to consider whether there is a "consistent pattern of legislative policy to which the common law in Australia can adapt itself"[92].

65 In that regard, it may be noted that the then applicable regulatory provisions in some Australian jurisdictions other than the Northern Territory placed the licensed driver who must accompany a learner driver in a position of supervision[93]. By contrast, in South Australia, the accompanying driver was required to supervise *and instruct* the learner driver in the safe and efficient driving of the motor vehicle[94], and in Tasmania, the accompanying driver was to

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87 Traffic Regulations (NT), reg 12(4).

88 reg 12(6).

89 reg 12(2) and (6).

90 reg 12(10).

91 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36.

92 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-62 [23] per Gleeson CJ, Gaudron and Gummow JJ; [1999] HCA 67.

93 Road Transport (Driver Licensing) Regulation 1999 (NSW), reg 12(5)(a); Road Transport (Driver Licensing) Regulation 2000 (ACT), reg 21(5)(a).

94 Motor Vehicles Regulations 1996 (SA), reg 27(4).

instruct the learner[95]. It may be doubted, therefore, whether a consistent pattern of legislative policy is to be discerned. Nonetheless, it is convenient, for present purposes, to proceed on the basis that the licensed driver who accompanies a learner driver is obliged at least to supervise the learner.

66 It is not necessary to decide whether the ambit of the supervision that may be asserted by that licensed driver extends beyond ensuring compliance with the road law to include all aspects of the learner's operation of the vehicle. And of course if the licensed driver was bound to "instruct" the learner, the obligations of the licensed driver would more readily be understood as encompassing all aspects of the learner's operation of the vehicle. Rather, it must be recognised that 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 specially 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 aptitude and experience of the learner driver.

67 What is it about the relationship between supervisor and learner that would lead to the conclusion that the reasonable care which the learner must use to avoid damage to the supervisor is less than the reasonable care which the learner must show for the safety of others?

68 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. That is a matter which goes directly to questions of contributory negligence; it does not touch the question of the driver's negligence. 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?

No different standard of care

69 The common law recognises many circumstances in which the standard of care expected of a person takes account of some matter that warrants identifying a class of persons or activities as required to exercise a standard of care different

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95 Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), reg 8(7)(a)(i); cf *Road Traffic Act* 1974 (WA) s 50 and its requirement that a learner driver be accompanied by a "driving instructor".

from, or more particular than, that of some wholly general and "objective community ideal"[96]. Chief among those circumstances is the profession of particular skill. A higher standard of care is applied in those cases. That standard may be described by reference to those who pursue a certain kind of occupation, like that of medical practitioner, or it may be stated, as a higher level of skill, by reference to a more specific class of occupation such as that of the specialist medical practitioner[97]. At the other end of the spectrum, the standard of care expected of children is attenuated[98].

70 But what distinguishes the principle established in *Cook v Cook* from cases of the kind just mentioned is that *Cook v Cook* requires the 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. In all other cases in which a different level of care is demanded, the relevant standard of care is applied uniformly. No distinction is drawn according to whether the plaintiff was in a position to supervise, even instruct, the defendant although, of course, if the plaintiff was in that position, a failure to supervise or instruct may be of great importance in deciding whether the plaintiff was contributorily negligent.

71 There is no warrant for the distinction that was drawn in *Cook v Cook*. *Cook v Cook* should no longer be followed in this respect.

72 The principle adopted in *Cook v Cook* departed from fundamental principle and achieved no useful result. It is necessary, of course, to recognise that it is a decision that has stood for more than 20 years. Although it seems that there are few if any decided cases in which it has been applied to deny liability, it must be assumed that its application may have affected the terms on which cases have been compromised and the apportionments of responsibility that have been made by courts and parties. Yet despite these considerations, it is better that the departure from principle is now recognised. The plaintiff who was supervising the learner driver, the plaintiff who was another passenger in the vehicle, the plaintiff who was another road user are all entitled to expect that the learner driver will take reasonable care in operating the vehicle. The care that the learner should take is that of the reasonable driver.

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96 Fleming, *The Law of Torts*, 9th ed (1998) at 119.

97 See, for example, *Rogers v Whitaker* (1992) 175 CLR 479; [1992] HCA 58.

98 *McHale v Watson* (1966) 115 CLR 199; [1966] HCA 13.

73 As foreshadowed, it is appropriate to say something more about *The Insurance Commissioner v Joyce*.

The Insurance Commissioner v Joyce

74 The plaintiff in *Joyce* agreed to travel as passenger in a car driven by a person who, two hours after a collision in which the plaintiff passenger was seriously injured, was found very drunk and asleep under a bush near the scene of the accident. This Court divided (Latham CJ, Rich J; Dixon J dissenting) in holding that the passenger must fail in his action. There was a divergence in opinion about whether the evidence permitted the inference that the driver was evidently drunk when the passenger agreed to get into the car. That division need not be explored.

75 Of present relevance is the analysis by Dixon J of the three different bases upon which the claim of a gratuitous passenger who accepted carriage in a vehicle driven by a person known by the passenger to be drunk would then have been held to fail. Those three bases were: first, no breach of duty; second, voluntary assumption of risk; third, contributory negligence (then a complete defence). Of the first of these bases, no breach of duty, Dixon J said[99]:

> "[The passenger] has been regarded as depending upon a relation which by accepting a place in the conveyance he sets up between himself and the person responsible for its management. For those who believe that negligence is not a general tort but depends on a duty arising from relations, juxtapositions, situations or conduct or activities, the duty of care thus arises. For those who take the contrary view, the standard of care is thus determined. But whatever be the theory, the principle applied to the case of the drunken driver's passenger is that *the care he may expect corresponds with the relation he establishes. If he knowingly accepts the voluntary services of a driver affected by drink, he cannot complain of improper driving caused by his condition, because it involves no breach of duty.*" (emphasis added)

76 The same outcome was identified as required if the case were to be analysed by reference to principles of voluntary assumption of risk or contributory negligence. And Dixon J concluded[100]:

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99 (1948) 77 CLR 39 at 57.

100 (1948) 77 CLR 39 at 59-60.

> "Of the three forms I have set out in which the driver may state his defence, for my own part I prefer the first. It appears to me that *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* and that it is a more satisfactory manner of ascertaining their respective rights than by opposing to a fixed measure of duty exculpatory considerations, such as the voluntary assumption of risk or contributory negligence. No doubt as a sufficient degree of knowledge or appreciation of the conditions giving rise to the danger is necessary under the first as well as under the second principle and as the burden of proving knowledge is upon the defendant, *little difference will be seen in the forensic application of the two*." (emphasis added)

All three forms of analysis were said[101] to depend upon proof of "some degree of actual knowledge on the part of the passenger of the alcoholic conditions he is accepting". It was recognised[102] that there would be no voluntary assumption of risk if "notwithstanding knowledge, the person concerned has exposed himself to the danger only because of the exigency of the situation in which he stands". And it was further recognised[103] that there could be special circumstances which made the conduct of accepting a lift from a drunken driver "reasonable and so prevent it from being contributory negligence, as when he cannot otherwise preserve some interest of sufficient value to justify the risk which his conduct entails". No doubt it was the similarity of the circumstances in which application of principles of voluntary assumption of risk and contributory negligence would be qualified that led to the conclusion that little difference was to be seen in the forensic application of these two principles.

77 The view expressed[104] by Dixon J, that it was more satisfactory to ascertain the rights of the parties by determining the measure of the defendant's duty according to the circumstances in which the defendant accepted the plaintiff as a passenger than "by opposing to a fixed measure of duty exculpatory considerations, such as the voluntary assumption of risk or contributory negligence", was founded[105] on the premise that the standard of care to be applied

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101 (1948) 77 CLR 39 at 57.

102 (1948) 77 CLR 39 at 57.

103 (1948) 77 CLR 39 at 58.

104 (1948) 77 CLR 39 at 59.

105 (1948) 77 CLR 39 at 57.

depends upon the particular "relations, juxtapositions, situations or conduct or activities" out of which the duty of care arises. More particularly, two aspects of the relations established by a passenger voluntarily accepting carriage by a drunken driver were given primacy: the notion that "if [the injured person] knows of the danger and runs the risk he has no cause of action"[106] and that, as Latham CJ said in *Joyce*[107]:

> "In the case of the drunken driver, all standards of care are ignored. The drunken driver cannot even be expected to act sensibly. The other person simply 'chances it.'"

It was the combination of those two notions that resulted in the denial of liability, no matter whether the case was analysed as one of no breach of duty, voluntary assumption of risk, or contributory negligence.

78 The introduction of statutory provisions for apportionment of liability on account of contributory negligence would now effectively preclude complete denial of liability in a case like *Joyce*, if the other two forms of analysis adopted in that case (no breach, and voluntary assumption of risk) were not adopted. It is necessary, therefore, to focus upon those other two forms of analysis.

79 Voluntary assumption of risk is a doctrine "nowadays but rarely invoked with success"[108]. In some jurisdictions legislation provides[109] that a defence of voluntary assumption of risk is not available in some motor accident cases[110]. And legislation dealing with assumption of risk, by reference to a notion of "obvious risk", is now common[111].

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106 *Cavalier v Pope* [1906] AC 428 at 432 per Lord Atkinson, cited in *Bond v South Australian Railways Commissioner* (1923) 33 CLR 273 at 277 per Knox CJ and Starke J; [1923] HCA 50.

107 (1948) 77 CLR 39 at 46.

108 Fleming, *The Law of Torts*, 9th ed (1998) at 334.

109 See, for example, *Motor Accidents Act* 1988 (NSW), s 76; *Motor Accidents Compensation Act* 1999 (NSW), s 140; *Civil Liability Act* 1936 (SA), s 47(6), formerly *Wrongs Act* 1936 (SA), s 24K(6).

110 *Joslyn v Berryman* (2003) 214 CLR 552 at 563 [28] per McHugh J; [2003] HCA 34.

111 *Civil Liability Act* 2002 (NSW), ss 5F-5I; *Wrongs Act* 1958 (Vic), ss 53-56; *Civil Liability Act* 1936 (SA), ss 36-39; *Civil Liability Act* 2003 (Q), ss 13-16; *Civil*

(Footnote continues on next page)

80 None of these statutory provisions was said to be engaged in this case. And because it was not suggested that any of these provisions was engaged, it will be convenient, in the balance of these reasons, to deal with the subject of voluntary assumption of risk without specific reference to the provisions. What is said, however, must be read recognising that if any of the provisions that have been mentioned is engaged, regard must first be had to the statute.

81 Absent relevant statutory modification, the doctrine of voluntary assumption of risk requires[112] proof that "the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk ... impliedly agreed to incur it". In the absence of some express exclusion of liability or notice of exculpation, demonstrating that a plaintiff both knew of a risk and voluntarily agreed to incur that risk will often be difficult. But if both conditions are satisfied, the plaintiff's claim against the defendant will fail. And the conclusion that a plaintiff voluntarily assumed the risk in question is readily seen as equivalent to concluding that the defendant owed that plaintiff *no* duty of care.

82 The conclusion that a defendant owed the plaintiff *no* duty of care is open in a case like *Joyce* if, as Latham CJ said[113], "[i]n the case of the drunken driver, *all* standards of care are ignored [because the] drunken driver cannot even be expected to act sensibly" (emphasis added). And as indicated earlier in these reasons, it is that same idea which would underpin a conclusion that the plaintiff voluntarily assumed the risk of being driven by a drunken driver.

83 But the analysis that has been made also reveals that a plaintiff's knowledge of the deficiencies of the defendant does not so readily lead to a conclusion of the kind reached in *Cook v Cook*: that the defendant does owe the plaintiff a duty of care, but that the standard of care to be met is less than the standard which otherwise would be expected.

Liability Act 2002 (WA), ss 5E-5F and ss 5M-5P; *Civil Liability Act* 2002 (Tas), ss 15-17; cf *Civil Law (Wrongs) Act* 2002 (ACT), ss 42-44.

112 *Yarmouth v France* (1887) 19 QBD 647 at 657 per Lord Esher MR; *Osborne v London and North Western Railway Co* (1888) 21 QBD 220 at 223, 224 per Wills J; *Letang v Ottawa Electric Railway Co* [1926] AC 725 at 731 per Lord Shaw of Dunfermline.

113 (1948) 77 CLR 39 at 46.

84 Reference was made[114] in *Cook v Cook* to the example cited[115] by Latham CJ in *Joyce* of the person who gives a watch to a blacksmith for repair:

> "If a person deliberately agrees to allow a blacksmith to mend his watch, it may well be said that he agrees to accept a low standard of skill. But even in such a case, the blacksmith is bound to act sensibly, though he is not subject to the responsibilities of a skilled watchmaker."

The accuracy of the conclusion expressed may readily be accepted, if only because acting sensibly, the blacksmith should, perhaps, refuse to undertake the task[116]. But the proposition is not one that provides a safe basis for extrapolation into a general proposition that the standard of care to be met varies according to the state of the plaintiff's knowledge of the defendant's ability to reach that standard.

A plaintiff's knowledge and the standard of care

85 Actual knowledge of a defendant's inability to reach a standard of reasonable care may be a necessary, but it would not be a sufficient, step towards a conclusion about voluntary assumption of risk. And both what a plaintiff actually knows, and what that plaintiff ought reasonably to have known, will be relevant to an inquiry about contributory negligence. The answers to both questions (about what a plaintiff knew and what a plaintiff ought to have known) will bear upon whether the plaintiff failed to take reasonable care for his or her own safety.

86 Standing alone, however, a plaintiff's actual knowledge of good reasons to think that the defendant may not meet the standard of the reasonable person provides no sufficient or certain basis for concluding that some lesser yet objective standard of care should be applied. It provides no sufficient basis for that conclusion because there is an unarticulated middle step in reasoning from a plaintiff's knowledge that a defendant may not use reasonable care, to applying to the resolution of a claim for damages for negligence an objective, and thus generalised, standard of care which reduces the required standard of care by reference to some known attribute of the defendant. That middle step can be described in a number of different ways. Using the language of Dixon J in

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114 1986) 162 CLR 376 at 382 per Mason, Wilson, Deane and Dawson JJ.

115 (1948) 77 CLR 39 at 46.

116 cf *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 36 per Deane J; [1985] HCA 3.

Joyce[117], it could be described as a step that defines or identifies the relevant "relations, juxtapositions, situations or conduct or activities" of or between the parties. Alternatively, it could be described as a step of identifying the relevant characteristics of the hypothesised reasonable actor whose conduct sets the standard of care that is being applied. It is not necessary to choose between those descriptions for they are not intended to be different in their operation. But without first identifying how that middle step is to be taken, the state of the plaintiff's actual knowledge of the defendant's deficiencies provides no certain basis for a conclusion about what is the relevant standard of care.

87 *Joyce* held[118] that no relevant reasonable actor could be identified in that case because a drunken driver "cannot even be expected to act sensibly". By contrast, in *Cook v Cook*, the relevant reasonable actor was identified[119] by the plurality as the "unqualified and inexperienced driver (but with some knowledge of the controls of a motor vehicle) in the situation in which the [driver] was placed when the [licensed driver] instructed her to turn left". As noted earlier, in his separate reasons Brennan J described[120] the relevant reasonable actor as "an inexperienced driver of ordinary prudence".

The finding of negligence in the courts below

88 Although this matter was decided at trial and on appeal to the Court of Appeal by application to the first respondent of too lax a standard of care, he was found not to have satisfied that standard. It follows that the appellant was entitled to succeed in his claim against both respondents. Had the correct standard of care been applied, the first respondent would have been held negligent.

89 It also follows that the respondents' application for special leave to appeal, to contend first, that the first respondent owed the appellant a standard of care less onerous than that of the reasonable driver, and secondly, that the appellant's claim should accordingly have been dismissed, should be refused.

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117 (1948) 77 CLR 39 at 57.

118 (1948) 77 CLR 39 at 46 per Latham CJ.

119 (1986) 162 CLR 376 at 388.

120 (1986) 162 CLR 376 at 394.

The findings of contributory negligence in the courts below

90 The findings of contributory negligence in the courts below proceeded from the premise that, taking reasonable care for his own safety, the appellant would have given different instructions to the first respondent. The primary judge identified[121] three different instructions the appellant could and should have given the first respondent:

> "[B]efore [the first respondent] drove on Larapinta Drive, [first] that in the event that the vehicle entered on to the shoulders he ought not to change direction sharply and [second, that] he ought not to accelerate when seeking to return to the road surface proper.
>
> ...
>
> [Third, the appellant] having seen the tyre, should have pointed out to the first [respondent] that the proper course was for him to drive over the top of it."

91 In the Court of Appeal, the events which comprised the accident were analysed rather differently from the way in which the primary judge had analysed them. But the differences in analysis were directed to what it was that the first respondent had done that might depart from the standard of care as identified in *Cook v Cook*. The primary judge's findings about the respects in which the appellant had been contributorily negligent were not disturbed.

92 In this Court the appellant submitted that the primary judge erred in finding that the appellant should have instructed the first respondent not to change direction sharply and not to accelerate when seeking to return to the road surface proper. It was submitted that these instructions reflected too closely what eventually happened and that they were, therefore, instructions crafted only with the benefit of hindsight[122]. It followed, so the appellant submitted, that the finding was founded on a false premise: that it was reasonable to expect the appellant to offer the first respondent a litany of instructions that would cover every possible eventuality that might have been encountered on the road.

93 It may be accepted that the primary judge's findings about the first two instructions to be given were framed with particular application to the events that

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121 [2006] NSWSC 680 at [84]-[85].

122 cf *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Vairy v Wyong Shire Council* (2005) 223 CLR 422.

had happened. Reduced to their essentials, however, both instructions amounted to a single piece of advice: do nothing sudden when driving on a dirt road. It was open to the primary judge to find that failure to offer this kind of advice to the first respondent amounted to a want of care for the appellant's own safety.

94 Although the appellant submitted that the primary judge also erred in finding that the appellant had been contributorily negligent in not telling the first respondent to straddle the debris on the roadway, that submission was not further developed. Again it was open to the primary judge to find that the appellant had not taken reasonable care for his own safety when he had observed the debris but had not told the first respondent how to deal with it.

95 As noted earlier, the Court of Appeal set aside the apportionment of responsibility at which the trial judge had arrived. In doing so the Court of Appeal was, of course, comparing the extent to which the departure from what was required of the appellant and the first respondent caused or contributed to the appellant's damage. And in doing that the Court of Appeal was necessarily measuring the responsibility of the first respondent against a lesser standard of care than we would hold to be applicable. No doubt the same point may be made about the basis upon which the primary judge made his apportionment.

96 When it is recognised that one particular respect in which the appellant was found to be contributorily negligent was the failure, having observed the debris on the road, to instruct the first respondent to straddle it, we are of the view that it is right to conclude that the appellant's responsibility for the accident was not insignificant. When coupled with a failure to offer the basic advice to a learner driver to make no sudden change of direction or speed on a dirt road, an apportionment of 30 per cent contributory negligence to the appellant was not unjust. Rather than prolong this litigation further, it is better that this Court substitute its view of the proper apportionment of responsibility by adopting the proportions that were assigned by the primary judge.

97 For these reasons, we would order that the appeal to this Court be allowed with costs. The respondents' application for special leave to appeal to this Court should be refused with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 July and 23 July 2007 should be set aside.

98 There was no challenge, in this Court, to some conclusions of the Court of Appeal that would require adjustment of the amount of the verdict entered for the present appellant at trial. The parties should have 7 days in which to submit agreed minutes of the orders this Court should make in consequence of allowing the appeal. In default of agreement upon the orders to be made, each side should file and serve within 14 days of the date of making this order its written

submissions as to the form of the orders it contends should be made, and its argument in support of those submissions.

99 KIRBY J. This appeal comes from a sharply divided decision of the Court of Appeal of New South Wales[123]. It concerns the common law duty of care owed by a learner driver to a passenger in his motor vehicle who, as a result of the driver's incompetence and inexperience, is injured.

100 The Court of Appeal ultimately upheld the entitlement of Mr Paul Imbree ("the appellant") to recover damages from the driver and owner of the motor vehicle in which he was travelling as a passenger when he was injured and rendered tetraplegic[124]. However, by a different combination of judges, the damages awarded to the appellant at trial by Studdert J ("the primary judge") were reduced by two-thirds (as against the one-third found by the primary judge)[125] because of the appellant's contributory negligence. In this Court the contesting parties seek the substitution of orders favourable to their respective contentions.

The challenge to the principle in *Cook v Cook*

101 *The decision in Cook*: The proceedings concern the principles that apply to the appellant's recovery under the common law of Australia. Those principles arise for consideration in the context of the liability owed by a driver and owner of a motor vehicle, where an unlicensed learner driver is driving the vehicle under the supervision of a passenger sitting next to him who is fully aware of the driver's inexperience and who is injured as a result of it.

102 In Australia, since 1986, the liability of an inexperienced driver to such a passenger and derivatively of the owner of the vehicle (which in this case was the appellant's employer) has been determined in accordance with the decision of this Court in *Cook v Cook*[126]. By the principle stated in that decision, this Court held that the duty of care owed to such a passenger was limited. It was that "reasonably to be expected of an unqualified and inexperienced driver in the circumstances"[127]. Correctly, the primary judge and all the judges in the Court of Appeal applied that principle.

103 *The challenge to the decision*: In this Court, the appellant secured special leave to appeal to argue (amongst other things) that *Cook* was incorrectly decided

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123 *McNeilly v Imbree* (2007) 47 MVR 536.

124 Per Beazley and Basten JJA; Tobias JA dissenting. See joint reasons at [35].

125 *Imbree v McNeilly* [2006] NSWSC 680 at [91].

126 (1986) 162 CLR 376; [1986] HCA 73.

127 (1986) 162 CLR 376 at 384 per Mason, Wilson, Deane and Dawson JJ.

and should no longer be followed; that the principle applicable was one requiring a single, universal, objective standard of care, irrespective of the personal attributes of the driver (including age, inexperience and incompetence); and that, by that standard, there was negligence by the driver and no contributory negligence on the part of the appellant or, at least, that the apportionment made by the primary judge should be restored.

104 The respondents defended the principle in *Cook* as "correct, but requir[ing] re-statement in contemporary terms". Additionally, they sought special leave to appeal to argue that the driver owed the appellant a less onerous duty of care than that of the normal experienced and licensed driver; that the appellant's entire claim for damages for negligence should be dismissed; or that (at the least) the ultimate orders of the Court of Appeal should be affirmed.

105 *Conclusions on the challenge*: I agree in the essential conclusions expressed in the reasons of Gummow, Hayne and Kiefel JJ ("the joint reasons"). Specifically, I agree that:

(1) The principle in *Cook* should no longer be followed by Australian courts[128];

(2) The appellant was entitled to succeed in his claim for negligence against the respondents by reason of the standard of care which the driver owed to him in the circumstances described[129];

(3) Accordingly, the respondents' application for special leave to propound a duty by the driver to the appellant of an inconsistent and lesser ambit should be refused[130]; and

(4) The discount for contributory negligence ordered by the Court of Appeal was erroneous and that of the primary judge should be restored[131].

106 I agree with much that is written in the joint reasons. However, important to my conclusion concerning the duty of care owed by the driver to the appellant is the fact that such liability, although arising under the common law, falls to be determined in the context of statutory prescriptions, enacted in substantially

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128 Joint reasons at [71]-[72].

129 Joint reasons at [88].

130 Joint reasons at [89].

131 Joint reasons at [95]-[96].

common form throughout Australia, providing for a compulsory scheme of third party insurance for the liability of all drivers (and owners) of motor vehicles operating on public roads throughout the nation. Such insurance affords indemnity to drivers and owners against the risk of liability for injury to third parties – whether other passengers in the motor vehicle, drivers or passengers in other motor vehicles or pedestrians – injured on a public road as a result of negligent driving[132].

107 *Factor of compulsory insurance*: The added consideration of compulsory insurance was referred to in the reasons of Lord Denning MR in *Nettleship v Weston*[133]. In a factual context similar to that arising in the present appeal, his Lordship departed (as we effectively do) from the approach of Dixon J in *The Insurance Commissioner v Joyce*[134]. Lord Denning often exhibited a tendency to identify novel considerations that challenged formal reasoning[135]. Over the years since Lord Denning wrote his opinion on this subject a greater realisation has emerged concerning the influence that statute has upon the content of the common law. Moreover, judges (and others) are more willing than in the past to acknowledge the relevance of insurance (especially compulsory statutory insurance) to the content of negligence liability, suggesting an acceptance that it is a consideration material to defining the content and standard of the duty of care owed in the circumstances. The ambit of that duty is, in turn, also relevant to the application to this case of further statutory provisions, also applicable throughout Australia, providing for apportionment of liability in respect of proved contributory negligence[136].

108 The relevance of the added consideration of compulsory insurance has been discussed in various cases. It was also addressed in the argument of these proceedings before this Court[137]. It is clearly an aspect of the social reality in

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132 In the Northern Territory, the relevant legislation is the *Motor Vehicles Act* (NT).

133 [1971] 2 QB 691 at 699-700.

134 (1948) 77 CLR 39 at 56; [1948] HCA 17. See *Nettleship* [1971] 2 QB 691 at 700.

135 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1165; 198 ALR 59; [2003] HCA 30.

136 In the Northern Territory, the applicable law is the *Law Reform (Miscellaneous Provisions) Act* (NT), s 16(1). The other laws of Australia providing for apportionment are noted in *Joslyn v Berryman* (2003) 214 CLR 552 at 563 [27] (fn 40) per McHugh J; [2003] HCA 34.

137 See eg [2008] HCATrans 182 at 400-500, 2275-2375, 3280-3290.

which the common law principle falls to be expounded in this case. Its existence encourages my acceptance of a single universal, objective standard of care owed by all drivers. Giving weight to the consideration of compulsory insurance accords with a growing preparedness of the courts to acknowledge the influence of insurance, at least where it is compulsory and provided by statute, in defining the content of legal liability. I would not therefore ignore this consideration.

109 Without giving weight to the availability of compulsory statutory insurance, it would be difficult, in my view, to justify a change in this Court's approach as expressed in *Cook*[138]. Despite the super-added ingredient of "proximity" introduced in that case, the decision in *Cook* essentially followed a line of negligence reasoning that can be traced to Dixon J's dissenting opinion in *Joyce*[139]. That is, reasoning that measures the existence and ambit of a duty of care in negligence by reference to personal considerations, of which the inexperience, lack of qualifications and inadequate training and instruction of a learner driver of a motor vehicle are clearly prime examples.

110 *Essentiality of the consideration*: For this Court to overturn *Cook* and to substitute a single, uniform and objective standard as the criterion for the existence and ambit of the duty of care, owed by one motorist to third parties, a new legal ingredient is necessary. What is that ingredient that authorises and obliges this Court to adopt a different approach? In my opinion, it is the existence of compulsory motor vehicle third party insurance: a statutory phenomenon that has existed in the context of motor vehicle accidents in Australia for approximately 60 years. Since the inception of this statutory regime, in default of proof of the currency of such insurance, a person's vehicle will not be registered for use on public roads anywhere in the Commonwealth.

111 If such compulsory insurance were *not* part of the legal background to the expression of the applicable common law, and if it were the case, or even possible, that someone in the position of the driver (or the owner) of the vehicle would, or might, be personally liable for the consequences of that person's driving affecting a passenger (such as the appellant) or other third party it is extremely unlikely, in my view, that the courts would impose on them liability, as in the case of the appellant's claim, sounding in millions of dollars. Such a course would be unrealistic and futile, characteristics the courts usually endeavour to avoid.

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138 (1986) 162 CLR 376.

139 (1948) 77 CLR 39 at 59-60.

112 Repeatedly in recent years this Court has insisted that the proper place to start in legal analysis, where relevant statutory provisions exist, is the statute[140]. Compulsory third party motor vehicle insurance statutes were enacted throughout Australia between 1935 and 1949. Since then, they have assumed an established place on the legal landscape[141]. Aside from some matters of detail, they are fundamentally identical. Whatever may be the relevance of liability insurance for other areas of substantive law, in the field of liability of drivers and owners of motor vehicles to those whom they injure, the time has come to adjust the fiction of individual personal liability. This Court should acknowledge the relevance of compulsory insurance to the content of the liability for motor vehicle accident liability. We should draw from the existence of such insurance a persuasive reason for departing from the individual culpability principle previously expressed by this Court in *Joyce's* case and applied in *Cook*. In doing so, we should adopt the single, universal, objective standard now proposed by the joint reasons in this Court. After 60 years, it is time that fiction acknowledged reality.

The facts, approach and relevant legislation

113 *The facts*: The basic facts are explained in the joint reasons[142]. At trial, the respondents submitted, in accordance with the principle in *Cook*, that Mr Jesse McNeilly[143] (the driver) owed the appellant no duty of care because of several considerations revealed in the evidence[144]. Alternatively, they suggested that the duty owed was limited by such considerations. Thus, the respondents relied on the following facts which, they submitted, were pertinent to the personal culpability of the learner driver in charge of the vehicle when it overturned, injuring the appellant:

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140 See cases collected in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 198 [84] (fn 86); [2006] HCA 43.

141 See Fleming, *The Law of Torts*, 9th ed (1998) at 442 citing *Motor Vehicle Act* 1949 (NT); *Motor Accidents Act* 1988 (NSW); *Motor Car Act* 1958 (Vic); *Motor Accident Insurance Act* 1994 (Q); *Motor Vehicle Act* 1959 (SA); *Motor Vehicle (Third Party Insurance) Act* 1943 (WA); *Motor Accidents (Liability and Compensation) Act* 1973 (Tas); and *Motor Traffic Act* 1936 (ACT).

142 Joint reasons at [28]-[32].

143 As noted in the joint reasons, except in the title to the appeal in this Court, the first respondent's first given name is recorded as "Jesse". As in the joint reasons, that spelling is adopted here.

144 *Imbree* [2006] NSWSC 680 at [41].

- The driver was a learner driver: young, inexperienced and unlicensed;
- The appellant allowed the driver to drive the vehicle in which he was a passenger, knowing that he had these limitations;
- He allowed the driver to drive on a roadway that was obviously unsuitable for a driver with such a lack of experience;
- He did so notwithstanding road signs that clearly warned of the dangers of "loose surface, dust, corrugations" and stated "careful driving techniques are advised"[145];
- He allowed this in circumstances of awareness of occasional obstructions on the roadway, such as discarded tyres; and
- He failed to give careful instruction before and whilst the vehicle was driven, as the conditions obviously demanded.

114 Notwithstanding submissions that it was no longer to be regarded as expressing the law[146], the primary judge properly held himself bound to apply the reasoning of this Court in *Cook*. Studdert J therefore turned to consider whether the appellant could recover notwithstanding that the standard of care that could be expected of the driver had to be adjusted to fit the special relationship that arose in the circumstances, namely that of an instructor/supervisor and a learner driver[147].

115 Was the duty of care required of the driver (and hence of the respondents) 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? Would an analysis in accordance with *Cook*, purporting to apply the general approach of Dixon J in *Joyce's* case[148], justify a reduction, or even the elimination of liability on the part of the respondents because the appellant had:

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145 [2006] NSWSC 680 at [19].

146 [2006] NSWSC 680 at [44]-[45].

147 [2006] NSWSC 680 at [48]-[49] applying *Cook* (1986) 162 CLR 376 at 384.

148 (1948) 77 CLR 39 at 56-59. See *Cook* (1986) 162 CLR 376 at 384-387.

- Voluntarily accepted for himself the risks of being a passenger in a vehicle driven by such a driver in such circumstances;

- Contributed by his own negligence to the very type of consequence that flowed from permitting a driver of such limited skills to drive the vehicle in such specially dangerous conditions, particularly without affording him adequate instruction and warnings before and during the time that he was driving the vehicle; or

- Denied himself entitlement to recovery by knowingly permitting the driver to take charge of the vehicle, although he was unlicensed under the applicable law of the Northern Territory (including as a learner, provisional driver or permit licence holder)[149]?

116 *The approach*: In response to the foregoing submissions, an immediate question was presented by the fact that the negligence and contributory negligence (if any) occurred in the Northern Territory although the appellant's proceedings were brought, and fell to be decided, in the courts of New South Wales.

117 In Australia, this course of action was legally permissible. New South Wales courts are bound to apply to the facts the law of the place of the wrong. In this case, that law was the law of the Northern Territory[150]. The common law of Australia is the same in all parts of the Commonwealth. It is to be applied by all courts, subject to any modification occasioned by any relevant statute law "of the place where the acts or omissions occurred that give rise to the civil wrong in question"[151].

118 A number of provisions of the statute law of the Northern Territory were drawn to attention and need to be examined.

119 *The relevant legislation*: The statute law of the Northern Territory includes legislation, as in other States and Territories of the Commonwealth, obliging all drivers and owners of vehicles driven on public roads in the Territory

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149 *Motor Vehicles Act* (NT), s 9; Traffic Regulations (NT), regs 11, 12. The provisions of s 9 of the *Motor Vehicles Act* (NT) were replaced with effect from 21 June 2007 by the *Transport Legislation (Road Safety) Amendment Act* 2007 (NT), s 5.

150 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 540 [86]-[87], 562-563 [157]; [2000] HCA 36.

151 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 563 [157].

to be insured against third party risk. The provision in force at the time of the appellant's injury was the *Motor Vehicle Act* (NT).

120 The respondents' motor vehicle was insured under a compulsory third party motor vehicle insurance policy which, although issued elsewhere in Australia (namely in New South Wales), indemnified the driver and owner of the vehicle against liability resulting from an injury to a third party (such as the appellant) in the Northern Territory. Although the appellant sued to recover from the driver and owner of the motor vehicle, it was uncontested that their liability was undifferentiated. Both of them were represented by lawyers retained by the compulsory third party insurer. In practical terms, the issue of legal principle contested in this appeal concerns the ultimate liability of such insurers for negligence occasioned by the acts and omissions of inexperienced learner drivers such as Mr McNeilly.

121 Throughout the Commonwealth, legislation has also been enacted in the several States and Territories, governing the issuing of licences and permits, including to learner drivers and learner licensees[152]. Provisions, either in statute or (more commonly) in regulations[153], govern various obligations in the case of learner drivers. Such regulations typically concern the obligatory presence of an accompanying licensed driver; the affixing of "L" plates to signify that a learner driver is driving; the obligation of zero or of a diminished permitted blood alcohol level whilst driving; and the observation of a reduced maximum speed. Moreover, in the several States and Territories, differing rules are applicable to licensed drivers who accompany learner drivers or permit holders, specifying the

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152 *Road Transport (Driver Licensing) Act* 1998 (NSW), ss 19-20.

153 Traffic Regulations (NT), regs 11, 12; cf *Road Transport (Driver Licensing) Act* 1998 (NSW), ss 19, 20 and Road Transport (Driver Licensing) Regulation 1999 (NSW), reg 12(1)(a); *Transport Operations (Road Use Management) Act* 1995 (Q), s 171(1) and Transport Operations (Road Use Management – Driver Licensing) Regulation 1999 (Q), reg 6(9); *Motor Vehicles Act* 1959 (SA), s 145(1) and Motor Vehicles Regulations 1996 (SA), reg 28; *Road Safety Act* 1986 (Vic), s 95(1) and Road Safety (Drivers) Regulations 1999 (Vic), reg 213(1); *Road Traffic Act* 1974 (WA), s 111 and Road Traffic (Authorisation to Drive) Regulations 2008 (WA) regs 44-55; *Vehicle and Traffic Act* 1999 (Tas), s 45 and Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas), reg 8(7); *Road Transport (Driver Licensing) Act* 1999 (ACT), ss 26, 28 and Road Transport (Driver Licensing) Regulation 2000 (ACT), reg 21(4) and (5).

extent of the accompanying driver's obligations to supervise and/or instruct the pupil[154].

122 The foregoing licensing legislation, including in the Northern Territory, obviously contemplates regulation of the training of learner drivers by licensed drivers who thereby assume a measure of responsibility for such training[155]. As the joint reasons point out[156], there are differences in the language of such regulations. In the Northern Territory, it appears sufficient that the licensed driver should travel in a front seat of a vehicle with a learner[157] whereas in other Australian jurisdictions express requirements of "supervision" or "instruction" apply. Accepting that some supervision is inherent in the circumstances, a question remains as to the content of that obligation and as to whether omissions or shortcomings operate to eliminate or diminish the driver's common law duty of care to third parties, including to the supervising passenger.

123 No breach of any Northern Territory regulation or statute was pleaded against the appellant nor particularised at trial. Nor was any such breach relied on, or suggested, by any of the judges in the Supreme Court. This Court has long established that provisions made, by or under statute, for the licensing of persons and things do not necessarily create a private right of action in another person injured by the conduct of those who were not licensed[158]. In the present case, any non-compliance with the regulations was not, as such, causative of the events leading to the appellant's injuries. At most, the regulations do no more than affirm what commonsense dictates, namely that the supervising passenger who is a licensed driver, accompanying the inexperienced learner driver, should give all reasonable advice and information so as to ensure the safety of the vehicle and of others potentially affected whilst it is being so driven.

124 But does any knowledge on the part of the supervising passenger eliminate or diminish the duty of care owed by the learner driver? Alternatively, does it afford the driver a defence of contributory negligence which that driver

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154 See Road Transport (Driver Licensing) Regulation 1999 (NSW), reg 12(5) ("supervise").

155 Northern Territory Government, *Driving In The Northern Territory – Road Users' Handbook*, 2nd ed (2007) at 5.

156 Joint reasons at [64]-[65].

157 Traffic Regulations (NT), reg 12(2).

158 *Leask Timber and Hardware Pty Ltd v Thorne* (1961) 106 CLR 33 at 38 per Dixon CJ, 42 per Kitto J, 46 per Taylor J, 47 per Windeyer J; [1961] HCA 73.

(and the owner) can plead and prove to reduce the recoverable damages proportionately to the respective contributions to the damage?

The essential question for decision

125 *The essential question*: The fundamental question for decision is whether, as this Court held in *Cook*, the content and ambit of any duty of care owed to a person in the position of the appellant is what is "reasonably to be expected of an unqualified and inexperienced driver in the circumstances"? Alternatively, is it a single, universal, objective standard of care applicable to all drivers (experienced and inexperienced; skilled and unskilled; licensed and unlicensed) when they undertake the driving of a motor vehicle on a public road? I leave aside the driving of objects that are not motor vehicles. I do not deal with driving on private property or the control of objects on the water or in the air. I omit any consideration of the special case of stolen motor vehicles where particular statutory or policy provisions may affect the resolution of the issue. In all of these cases, different considerations may apply. But what is the law applicable to a case such as the present – the normal case of a driver of a motor vehicle on a public road?

126 As the casebooks show, injuries and accidents caused by learner drivers, whilst in charge of motor vehicles on public roads, are not uncommon. Inevitably, licensed and experienced drivers will have (or develop) defects of various kinds that may diminish their capacity to drive motor vehicles with reasonable care, either generally or in particular circumstances. Similarly, different learner drivers will exhibit distinctive and varying abilities (or lack thereof) to perform the functions of driving a motor vehicle with reasonable care. In such matters, and much else, human beings differ in their skills and capacities.

127 Proficiency in the driving of motor vehicles varies in accordance with individual characteristics such as age, eyesight, hearing, manual dexterity, spatial perception, intelligence, comprehension, reaction speed, transient or long-term emotional conditions and so forth. Yet all of those with the ability to drive a motor vehicle with normal care were once learners. Moreover, in order to arrive at reasonable skill in driving, it is necessary to expose the learner to opportunities for varying experiences in driving, both under skilled instruction and under the instruction of non-professional family members or friends, in safe and secluded places as well as public roads presenting varying degrees of challenge for a novice.

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128 *Opinions in answer*: It is no coincidence that the common law of negligence developed from a tort originally expressed by reference to particular categories to one later explained by reference to an overarching legal theory. This

evolution occurred at a time when motor vehicles presented many negligence claims to the courts[159].

129 In Australia, this Court has gradually replaced many special rules that were responses to earlier particular case situations with general principles of broad application[160]. Necessarily, however, any broad principles of the common law must themselves adapt to relevant legislation. Sometimes, such legislation is confined to particular jurisdictions. Whilst it must be applied there, it may not impact on the single common law applicable throughout Australia[161]. On the other hand, occasionally, legislation may include common themes that apply throughout the nation. In such cases, the common law principle may itself adapt to such legislative provisions. Such is the flexibility and practicality of judge-made law[162].

130 Thus, the question presented by these proceedings is whether the existence throughout Australia of legal requirements governing owners and drivers of motor vehicles, to secure and maintain defined insurance against the risks of injury to third parties as a precondition to valid registration and driving of vehicles anywhere in the Commonwealth, is such a universal feature of Australian statute law as to inform the content of the common law rule that is then to be expressed in answer to the question of legal principle presented by this appeal?

131 Until now, the answer to that question has generally been assumed (or stated) to be in the negative. In part, this has been because of an approach taken to the suggested irrelevance of insurance in deriving the content of substantive law. It has also, in part, been specific to the significance of insurance for the law of negligence as it affects the liability of owners and drivers of motor vehicles. In the past, this Court has generally ignored the existence of compulsory

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159 See *Donoghue v Stevenson* [1932] AC 562 at 580-581.

160 See eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 21, 22, 32; [1985] HCA 3; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541-544, 547-548; [1994] HCA 13; *Jones v Bartlett* (2000) 205 CLR 166 at 237 [244]; [2000] HCA 56.

161 Joint reasons at [61]-[65].

162 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-62 [23]; [1999] HCA 67.

insurance[163]. Occasionally, when it has been considered (although in contexts different from the present), the relevance of such insurance has been denied[164].

132 In England, compulsory liability insurance for owners and drivers of motor vehicles was adopted in 1930, following the pioneering example of New Zealand in 1928[165]. The relevance of insurance for some aspects of the liability of drivers of motor vehicles was accepted, at least by Lord Denning, in 1971. In *Nettleship*[166], explaining why he could not endorse the approach of Dixon J in *Joyce's* case, Lord Denning said, in a case having several factual similarities to the present[167]:

> "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 mind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity.[168]
>
> The high standard thus imposed by the judges is, I believe, largely the result of the policy of the Road Traffic Acts. 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.[169] Thus 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

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163 As in *Joyce* (1948) 77 CLR 39 and *Cook* (1986) 162 CLR 376.

164 As in *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47.

165 Fleming, *The Law of Torts*, 9th ed (1998) at 442.

166 [1971] 2 QB 691.

167 [1971] 2 QB 691 at 699-670.

168 Citing *Richley v Faull* [1965] 1 WLR 1454; [1965] 3 All ER 109 and *Watson v Thomas S Whitney & Co Ltd* [1966] 1 WLR 57; [1966] 1 All ER 122.

169 Citing *The Merchant Prince* [1892] P 179 and *Henderson v Henry E Jenkins & Sons* [1970] AC 282.

> risk fall?' Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her."

133 In the same case, Salmon LJ agreed with Lord Denning but only in part. He held that "a learner driver is responsible and owes a duty in civil law towards persons on or near the highway to drive with the same degree of skill and care as that of the reasonably competent and experienced driver"[170]. However, in respect of passengers, his Lordship held that a "special relationship" might displace "this standard or even [negative] any duty, although the onus would certainly be upon the driver to establish such facts"[171]. In coming to his view, in dissent on this point, Salmon LJ applied the reasoning of Dixon J in *Joyce's* case. He declared that although that decision had been delivered in 1948, nothing had happened "since which makes it any less convincing now than it was then".[172]

134 The third judge in *Nettleship* (Megaw LJ) agreed with Lord Denning in disapproving the approach of Dixon J in *Joyce's* case and specifically Dixon J's opinion[173] that:

> "[T]he circumstances in which the defendant [driver] accepts the plaintiff as a passenger and in which the plaintiff accepts the accommodation in the conveyance should determine the measure of duty".

According to Megaw LJ[174]:

> "Theoretically, the principle as thus expounded is attractive. But, with very great respect, I venture to think that the theoretical attraction should yield to practical considerations."

135 Megaw LJ listed a number of such "practical considerations" that brought him to a different conclusion. These included[175]:

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170 [1971] 2 QB 691 at 703.

171 [1971] 2 QB 691 at 703.

172 [1971] 2 QB 691 at 704. This was a riposte to Lord Denning's suggestion, at 701, that Dixon J "might think differently today".

173 [1971] 2 QB 691 at 707.

174 [1971] 2 QB 691 at 707 referring to *Joyce* (1948) 77 CLR 39 at 59.

175 [1971] 2 QB 691 at 707-709.

- The unpredictability and uncertainty of having differing standards of care owed by the same driver to passengers compared to those owed to other motorists and to pedestrians;

- The time-consuming debates that would then arise as to the precise knowledge and extent of experience of the learner driver and the standard of the competence and experience of the instructor;

- The possibility that the defects of the learner driver might not become known to the victim of negligence until the very incident occurred which was alleged to give rise to civil liability;

- The desirability in "our legal process" of avoiding "varying standards, depending on such complex and elusive factors"[176]; and

- The logic inherent in Dixon J's approach would be applicable not just to passengers travelling with learner drivers but also to passengers travelling with other non-learner drivers having known defects or limitations of a physical or temperamental kind.

136 Megaw LJ did not himself refer to the existence of compulsory insurance. In this Court, in support of his argument, the appellant essentially embraced Megaw LJ's list. He argued that it was sufficient to rebut the respondents' arguments that, in the absence of "morally blameworthy" conduct on the part of the driver, they were not legally liable.

137 *Re-expressing legal doctrine*: It is easy enough to understand why, in this appeal, the appellant skirted around the consideration of compulsory insurance. The relevance of that consideration is, and has long been, a controversial question in our law[177]. The appellant would not wish to embrace needless controversies. However, the advocate's task, which is to win a case, is not the same as that of a judge, least of all a judge in this Court.

138 When this Court is asked to express governing legal doctrine, and especially when (as here) the formidable reasons of Dixon J in *Joyce's* case and the explicit holding of the Court in *Cook* stand in the way of re-expression, it is necessary, in my view, to grapple with the consideration of compulsory third party motor vehicle insurance. That element clearly played a part in

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176 [1971] 2 QB 691 at 708.

177 See eg Lewis, "Insurance and the tort system", (2005) 25 *Legal Studies* 85 at 94-95, 99.

Lord Denning's reasoning in *Nettleship*. We too should give weight to it. We should do so not to revive obedience to the opinions of English courts (about which *Cook* continues to state the law applicable to courts in this country[178]). Instead, we should do so because the common thread in the majority reasoning in *Nettleship* was the rejection of the "theoretically attractive" approach of Dixon J in *Joyce's* case out of a preference for "practical considerations" that inform judgments about the liability of drivers, including learner drivers, to third parties. Self-evidently, the consideration that, by law, all such drivers in Australia are indemnified by compulsory third party motor vehicle insurance is a consideration of the greatest practicality and importance.

139 *Cook* is a decision that has stood for more than 20 years. Countless decisions of courts, lawyers and insurance personnel have been made on the strength of its correctness. In addition, in the past 20 years, many legislative interventions have been adopted in Australia against the background of the principle in *Cook*. Such laws have regulated both the scope of the indemnity, available under compulsory motor vehicle policies, and the ambit of recovery applicable to persons injured in motor accidents[179].

140 I recognise the force of the respondents' argument to the effect that this Court should leave *Cook* to stand, in the expectation that, if change were needed, because of perceptions of injustice to injured passengers supervising or travelling with learner drivers, such a change should be left to the legislatures which have not been inactive in this field. In some ways, the problem presented in this appeal is similar to that in *Brodie v Singleton Shire Council*[180]. Here, too, the issue whether this Court should override established law, and re-express it in a different way, is not clear-cut. For me, its resolution, once again, is a close run thing[181]. The re-expression of the law has obvious economic consequences about which this Court has no or little specific information.

141 *Contrary considerations*: Moreover, quite apart from the ordinary considerations of legal authority and judicial restraint, there are (as Lord Denning and Megaw LJ both acknowledged in *Nettleship*) reasons of legal principle and policy that give a measure of support to the approach adopted in *Cook*, grounded

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178 *Cook* (1986) 162 CLR 376 at 390.

179 See, for example, State and Federal legislation enacted in recent times collected in Masel (ed), *The Laws of Australia: Torts* (2003) at 24-26 [3] including legislation on motor accidents and civil liability in most jurisdictions of Australia.

180 (2001) 206 CLR 512 at 591-604 [203]-[237]; [2001] HCA 29.

181 (2001) 206 CLR 512 at 600 [226].

as it is in the influential reasons of Dixon J in *Joyce's* case. This is so despite the dalliance in *Cook* with the now discarded criterion of "proximity".

142 At the core of common law negligence liability lie notions defined by reference to standards that may be expected of a reasonable person. If a person knowingly agrees to travel as a passenger with, and to supervise, a young, inexperienced learner driver, without the protection of dual controls or other mechanical means of taking charge of the motor vehicle should the need arise, why not adhere to a principle of law that the knowledge of such a passenger may reduce, or even eliminate, any legal liability on the part of the driver or owner to that passenger[182]? Other motorists and pedestrians will normally have no such knowledge or means of knowledge. Even 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. But the case of passengers with actual knowledge of the driver's limitations is different. Given the absence of a universal no fault liability in the common law of negligence, why should the courts not simply adhere to the notion that a passenger who allows an inexperienced, unqualified person to drive a car under his or her inexpert "supervision" can only reasonably expect the standard of care that such a learner driver can ordinarily be expected to exhibit in the given conditions?

143 The answer to these questions depends, in part, on the list of practical and theoretical considerations which Megaw LJ collated in *Nettleship*. However, these alone would not, in my view, be sufficient to warrant reversal of the settled law of Australia and its re-expression in terms of a new single, universal and objective standard. To take that step, in my view, it 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, with potential consequences that could be seriously disproportionate and unjust and contrary to the statutes. 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 in the case of motor vehicle negligence legislation. In the result, the principles in *Cook* do not stand as a rule of the common law of Australia.

144 *The resulting question*: But is the existence of such insurance legally irrelevant to the presence and ambit of a duty of care, breach of which is insured against? Did Lord Denning err in *Nettleship* by referring to this consideration?

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182 Joint reasons at [75]-[76].

Should I, like the joint reasons and the reasons of Heydon J (and Megaw LJ and others before them) simply ignore such insurance and reach my conclusion without any regard to the requirement for compulsory insurance cover[183]? Upon these questions, differing opinions have been expressed both by judges and by other respected commentators.

The suggested irrelevance of compulsory insurance

145 *Res inter alios acta*: The traditional view of English law was that the existence, or absence, of a policy of insurance between a party sued and an insurer is irrelevant to any issue about the legal liability of the insured in the first place.

146 This approach can be explained in terms of one of the maxims traditionally recognised by English law: "*Res inter alios acta alteri nocere non debet*". This holds that a transaction between strangers ought not to injure another party[184]. The general notion lying behind the maxim is that a person ought not to be affected by something done behind the person's back or to which he or she was not personally a party. More specifically, in the context of insurance, the maxim expresses the idea that insurance provides indemnity for whatever might be found to be the legal liability of the insured. Accordingly, so it is said, the existence of insurance and the contents of any policy are matters independent of, and anterior to, the events that are said to enliven the cover. This reasoning has had a considerable impact on legal thinking in common law countries. There are many, even today, who adhere to it, without qualification.

147 *Leading cases*: The *res inter alios acta* principle was invoked in this context by Viscount Simonds in *Lister v Romford Ice and Cold Storage Co Ltd*[185]:

> "[A]s a general proposition it has not, I think, been questioned for nearly 200 years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded".

148 The same judge later reaffirmed his view in *Davie v New Merton Board Mills Ltd*[186]. Speaking of the existence of employer indemnity insurance Viscount Simonds stated:

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183 See joint reasons and reasons of Heydon J; cf reasons of Gleeson CJ at [21]-[23].

184 Wingate, *Maximes of Reason* (1658) at 327; *Coke on Littleton*, 15th ed (1794), vol 1 at §231.

185 [1957] AC 555 at 576-577 (footnote omitted).

186 [1959] AC 604 at 627.

> "[T]his is not a consideration to which your Lordships should give any weight at all in your determination of the rights and obligations of the parties. … It is not the function of a court of law to fasten upon the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie upon him."

149 A reason for the silence of Megaw LJ on the insurance issue raised by Lord Denning in *Nettleship* may be explained by Lord Denning's rejection of Megaw LJ's denial of the relevance of insurance in *Launchbury v Morgans*[187], a case decided only five months previously. There, Megaw LJ had said[188]:

> "[I]f one were to bring in questions of insurance, one might speculate … [b]ut this court may not, in accordance with its judicial duty, indulge in such speculation. [Counsel] was doing no more than carrying out his duty to the court in refraining from discussing the insurance position."

150 When *Launchbury* went to the House of Lords, Lord Wilberforce remarked[189]:

> "Liability and insurance are so intermixed that judicially to alter the basis of liability without adequate knowledge (which we have not the means to obtain) as to the impact this might make on the insurance system would be dangerous and, in my opinion, irresponsible."

151 Words to the same effect were expressed at a similar time by Lord Diplock, extra-curially[190]. He too resisted the idea of imposing liability "irrespective of fault" on "whoever can most easily cover the risk by liability insurance". Doubtless, this was added by way of response to Lord Denning's question in *Nettleship*[191]. Yet Lord Diplock accepted[192]:

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187 [1971] 2 QB 245.

188 [1971] 2 QB 245 at 263.

189 *Morgans v Launchbury* [1973] AC 127 at 137.

190 Diplock, "Judicial Development of Law in the Commonwealth", [1978] 1 *Malaysian Law Journal* at cviii.

191 [1971] 2 QB 691 at 700. See above these reasons at [132].

192 Diplock, "Judicial Development of Law in the Commonwealth", [1978] 1 *Malaysian Law Journal*, cviii at cxii.

> "It may be that is the way that we are going. As respects road accidents it is the way, in part at any rate, some Commonwealth jurisdictions have already gone. But this is welfare legislation. It is outside the province of the law of tort: spreading the risk is not a function to be undertaken by judges under the guise of defining a duty of care owed by one citizen to another."

152 In the context of liability insurance, the traditional view just stated has been endorsed in more recent times, both in the House of Lords[193] and in the Supreme Court of Canada[194].

153 *Opinions in this Court*: The closest that this Court has come to considering the issue was *Lamb v Cotogno*[195]. The question there was whether, having regard to the system of compulsory insurance under the then *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW), it was legally appropriate to re-express the common law governing the liability of the driver (or owner) of an insured motor vehicle to pay exemplary damages to a person injured because of the high-handed driving of a driver.

154 In the Court of Appeal of New South Wales, in a dissenting opinion, I expressed the view that the enactment of universal compulsory insurance statutes in Australia rendered it anomalous to burden the insurance fund with liability for exemplary damages awarded for a purpose of punishment[196]. However, this Court was unpersuaded of the need to re-express the common law in that respect[197]. The essential holding of the Court in the case is found in the Court's conclusion[198]:

> "[T]here is no principle or trend to be discerned in the *Motor Vehicles (Third Party Insurance) Act* or any other legislation concerning the

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193 *Hunt v Severs* [1994] 2 AC 350 at 363 per Lord Bridge of Harwich.

194 *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 at 794-796 [71]-[75] per Cory J.

195 (1987) 164 CLR 1. See also eg *Harriton v Stephens* (2006) 226 CLR 52 at 95-96 [139]-[140]; [2006] HCA 15.

196 *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 566-570.

197 *Lamb* (1987) 164 CLR 1 at 11.

198 *Lamb* (1987) 164 CLR 1 at 12; cf *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25 [80]; [1998] HCA 70.

> measure of damages to be applied in cases of compulsory insurance. Clearly the Act is drafted against the background of the common law and if any inference is to be drawn from it upon the admittedly contentious question of exemplary damages, it is that there was no intention to disturb the existing situation."

155 The Court's decision in *Lamb* does not decide the legal question presented by the present appeal. Moreover, since *Lamb*, this Court has repeatedly held that, where any statutory provision has entered upon, and is relevant to, an issue in legal proceedings, the correct starting point in ascertaining the applicable law is not a past expression of the law by judges but its expression in the positive law made by or under statute or a law adapted to such statutory law. Where enacted law (with its larger democratic legitimacy) impinges upon a legal subject matter, the duty of the courts is to ascertain and express the applicable common law by reference to any such legal rule, where it is relevant[199].

The relevance of compulsory insurance

156 *Lord Denning's early views*: From early days, Lord Denning expressed the opinion that the "remarkable development" of the law of negligence[200] in the years after the mid-1930s was associated with judicial knowledge and recognition of the existence and availability of universal liability insurance. Initially, his Lordship's observation was made in the context of the liability of occupiers for demised premises[201]. Later it was extended to employers' liability policies[202]. Later still he referred to the consideration in motor vehicle policies[203]. His Lordship then extended his reasoning to a wider range of cases[204].

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199 For a number of cases in which the Court has made this point see *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24] (fn 35); [2003] HCA 59; *Central Bayside General Practice v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 197-198 [84] (fn 86); [2006] HCA 43.

200 *Mint v Good* [1951] 1 KB 517 at 527 per Denning LJ.

201 As in *Mint* [1951] 1 KB 517 at 527.

202 *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 QB 180 at 191-192.

203 Mentioned in *Romford* [1956] 2 QB 180 at 191; *Launchbury* [1971] 2 QB 245 at 253; *Nettleship* [1971] 2 QB 691 at 699-700.

204 See eg *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 at 397-398; *Morris v Ford Motor Co Ltd* [1973] QB 792 at 798; *Lamb v Camden London*

(Footnote continues on next page)

157 *Later English authority*: As time went on, increasing numbers of English judges, in explaining the content of substantive principles of law, found it relevant to refer to the existence of insurance, sometimes compulsory or otherwise voluntary but available and commonly procured insurance. Thus, in *Hodgson v Trapp*[205] Lord Bridge of Harwich, dealing with the deductibility of various benefits from personal injury damages said:

> "If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as the 'benevolent donor', intends to benefit 'the wrongdoer' as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to me entirely artificial. … To allow double recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground."

158 Acknowledgment of the potential relevance of insurance to the resolution of questions before the courts was also explained by Lord Griffiths in *Smith v Bush*[206]:

> "There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss."

159 To like effect was the opinion of Lord Hoffmann in *Morgan Crucible Co Plc v Hill Samuel & Co Ltd*[207]. His Lordship considered that economic realities (including the existence of insurance without which "liability would mean personal ruin") could enter into the judgment of whether a duty of care existed

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Borough Council [1981] QB 625 at 637-638 referring to *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

205 [1989] AC 807 at 823.

206 [1990] 1 AC 831 at 858.

207 [1991] Ch 295 at 302-303.

and, if so, its definition[208]. Five years later, in the House of Lords, Lord Hoffmann resisted the assignment of a duty of care in negligence at common law to highway authorities for the imperfect condition of a highway on the basis that "there is compulsory insurance to provide compensation to the victims. There is no reason of policy or justice which requires the highway authority to be an additional defendant."[209]

160 In *Marc Rich and Co AG v Bishop Rock Marine Co Ltd*[210], in the context of defining a duty of care by classification societies to cargo owners, Lord Steyn likewise paid specific regard to the probable costs of imposing such a duty, with the consequential requirement that would then arise to obtain non-compulsory insurance. In a later extra-judicial comment[211], Lord Steyn elaborated his views:

> "The primary aim of tort law is the pursuit of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. There is, however, another perspective, namely considerations of distributive justice. It concentrates on the place of the plaintiff and the defendant in society … Not surprisingly, our courts have not shut their eyes to such considerations: the insurance position of parties has sometimes been treated as relevant."

161 *New Zealand authority*: In New Zealand, a similar evolution in judicial reasoning occurred in the Court of Appeal evidencing a gradual retreat from the rigid rejection of insurance as universally irrelevant to a recognition of its potential impact on more substantive legal obligations.

162 This development may be seen in the reasons of Woodhouse J in *Bowen v Paramount Builders (Hamilton) Ltd*[212] and in *Takaro Properties Ltd v Rowling*[213],

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208 In accordance with *Caparo Industries Plc v Dickman* [1990] 2 AC 605. The holding in *Caparo* was not followed by this Court in *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49]; [2001] HCA 59. However, the point made by Lord Hoffmann remains relevant.

209 *Stovin v Wise* [1996] AC 923 at 958. This raises a question as to whether such a conclusion, unexpressed, may have affected the decision of the majority of this Court in *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870; 245 ALR 653; [2008] HCA 19.

210 [1996] AC 211 at 239-241. See also *Vowles v Evans* [2003] 1 WLR 1607 at 1614.

211 Steyn, "Perspectives of Corrective and Distributive Justice in Tort Law", (2002) 37 *The Irish Jurist* 1 at 4-5.

212 [1977] 1 NZLR 394 at 419.

written before the commencement of the *Accident Compensation Act* 1982 (NZ). Likewise, in considering the liability of an individual outside that statute for a fire that broke out in his motor vehicle parked in a building which was thereby damaged, Cooke P concluded that[214]:

> "The comparative likelihood as to insurance should not have as much weight as the other considerations, but need not be dismissed as altogether irrelevant."

163 *Australian authority*: In a number of cases, both in this Court and elsewhere, Australian judges have also reflected (although less frequently) the general judicial trends by now emerging elsewhere.

164 In *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[215], for example, Mason J, citing the United States *Restatement* and contrasting it with the foregoing opinion of Lord Diplock, acknowledged the relevance of considering, when defining the presence and ambit of a duty of care "the availability of insurance as a protection against liability". Earlier, Stephen J in *The Willemstad*[216], had declined to take into account views expressed by legal writers about the desirability of spreading losses through insurance in deciding whether a tortious duty of care existed.

165 On the other hand, in the Supreme Court of Victoria in *Seale v Perry*[217], McGarvie J expressed himself as more sympathetic to what he took as the emerging trend in the English authorities. To like effect was the opinion of King CJ in *Robertson v Swincer*[218] where the availability, cost and likelihood of insurance were considerations that the Supreme Court of South Australia took into account in deciding whether or not to recognise a duty of care out of a particular relationship. Such realities were also given expression by Clarke JA (Gleeson CJ and Hope AJA agreeing) in *Lynch v Lynch*[219] in defining the ambit

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213 [1978] 2 NZLR 314 at 323.

214 *Mayfair Ltd v Pears* [1987] 1 NZLR 459 at 462.

215 (1981) 150 CLR 225 at 250-251; [1981] HCA 59.

216 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 580-581; [1976] HCA 65.

217 [1982] VR 193 at 237-238.

218 (1989) 52 SASR 356 at 361.

219 (1991) 25 NSWLR 411.

of the respondent's recoverable loss in respect of nursing and allied services in a negligence claim. Clarke JA said[220]:

> "In the particular context of a compulsory insurance scheme, and when claims against an uninsured defendant who renders gratuitous services could be regarded as quite exceptional, the considerations of policy in favour of allowing the claim far outweigh those that tell in favour of rejecting it."

166 Over the years, I have also recognised the relevance of insurance to substantive obligations under the common law. I did so in the Court of Appeal of New South Wales in several cases concerned with occupiers' and employers' liability[221]. Similarly, in this Court, I have referred to the availability, cost and likelihood of insurance as relevant considerations in defining the existence, and ambit, of duties of care owed by local authorities[222]; landlords[223]; householders engaged in a garage sale[224]; and small independent contractors engaged by quasi-employers who may or may not be insured[225].

167 In *Kars v Kars*, Toohey, McHugh and Gummow JJ and I, in joint reasons, observed that[226]:

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220 (1991) 25 NSWLR 411 at 420.

221 *Brady v Girvan Bros Pty Ltd Trading as Minto Mall* (1986) 7 NSWLR 241 at 244; *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 518; *Cekan v Haines* (1990) 21 NSWLR 296 at 300; *Johnson v Johnson*, unreported, Court of Appeal (NSW), 10 September 1991 at 10-13; *Popovic v Wollongong Spanish Club Ltd*, unreported, Court of Appeal (NSW), 16 April 1993 at 3.

222 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 424-425 [253]; [1998] HCA 3.

223 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 401-402; [1997] HCA 39; *Jones v Bartlett* (2000) 205 CLR 166 at 234-235 [236].

224 *Neindorf v Junkovic* (2005) 80 ALJR 341 at 356 [65], 358 [76]; 222 ALR 631 at 648, 651; [2005] HCA 75.

225 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 193 [106]; [2006] HCA 19.

226 (1996) 187 CLR 354 at 381-382 (footnote omitted).

> "[A] review of the relevance of insurance to the development of the common law liability in tort may indeed be timely. However, this is not the occasion for it. In the present case, in a context of compulsory insurance provided by legislation, resort is had to the fact of such insurance to do no more than to recognise the reality that the source of the provision of services is not identical to the source of the plaintiff's recovery. It is used simply to contradict the argument of the appellant resting on a manifestly false premise of fact."

168 A question presented in the present proceedings is whether the developments in legal reasoning that I have now elaborated (and there are many more) support the need to go beyond repeatedly asserting manifestly false premises about facts. Such assertions may suggest that a variable definition of an inexperienced driver's duty of care to passengers will discourage parents and friends from giving permission to learners to have charge of a vehicle when this would be unsafe. Or that it would promote more attention by a supervising passenger to duties of instruction to learner drivers about dangers. Or that it would exclude or moderate recoverable damages to a court with notions of personal culpability. Given the existence of statutory compulsory third party motor vehicle insurance any such suggestions are unrealistic.

169 *Compulsory insurance: a special case*: In addition to the foregoing Australian cases, there are many earlier decisions in which I have suggested that the existence of compulsory insurance, (particularly in the context of motor vehicle accidents but also in compulsory employer's liability), necessarily provides a contextual consideration that influences the answer to questions such as the existence of a propounded duty of care; its ambit and definition; and the consequences for liability and damages that flow from this consideration[227]. I have repeated such views in this Court[228]. Initially, on this subject I was a lone voice. However, as I have shown, in other countries, especially England, this is no longer so. Sometimes, Australian law takes a greater time to catch up with shifts in legal doctrine. The present appeal affords us such an opportunity.

170 The resistance of judges and others to the assignment of risks to a party simply because it has "deep pockets" and has procured insurance against liability, is understandable. However, that concern may be readily distinguished from the

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227 *Cotogno (No 3)* (1986) 5 NSWLR 559 at 570-571; *Maitland City Council v Myers* (1988) 8 MVR 113 at 119-120; *Holland v Tarlinton* (1989) 10 MVR 129 at 133-134; *Kappos v Berghoffer* (1990) 11 MVR 480 at 481-482; *Mitchell v Government Insurance Office (NSW)* (1992) 15 MVR 369 at 371-372; *Williams v Government Insurance Office (NSW)* (1995) 21 MVR 148 at 154.

228 See eg, *Gray* (1998) 196 CLR 1 at 25 [80], 26-27 [82].

present case. Here, the liability insurance is compulsory. It has been mandated by statute in respect of the Northern Territory (and everywhere else in Australia) for 60 years and more. It cannot be seriously denied that the existence of this insurance has profoundly affected court decisions in motor vehicle negligence cases. It has done so on such questions as when a duty of care attaches; what the duty requires; and what damages may be recovered in circumstances that would otherwise be ruinous or futile.

171 The availability and existence of voluntary liability insurance is one thing. The compulsory provisions for universal statutory third party insurance of all motor vehicles registered for use on Australian roads is quite another. The latter form of insurance exists to provide coverage against "fault" on the part of drivers of motor vehicles. It does so because of the recognition, by the 1930s, that the use of vehicles would inevitably occasion a toll of death and injury, for which a system of compulsory insurance was essential. That system was necessary to prevent intolerable burdens of unrecoverable losses falling upon persons injured in consequence of the ever-increasing use of motor vehicles on Australian roads of varying conditions. Such persons would otherwise often have been thrown back upon social security entitlements, welfare agencies or their families. Instead, a statutory insurance fund was provided from subventions paid by *all* motorists. That is the context in which the applicable principle of the common law falls to be determined.

172 Another way in which the existence of compulsory third party motor vehicle insurance operates in this area of tort law concerns the applicability of the second purpose of tort law, namely to encourage care to avoid personal liability and thereby to modify potentially harmful behaviour[229]. Where, as in this context, the payment of a compulsory (but relatively small) premium exempts the driver or owner from personal liability for negligence in all but the most exceptional of cases, it is hard to see how the second objective of the common law is attained. This simply serves to reinforce the conclusion that the common law liability in issue is not "pure". It is a hybrid form of liability in which the common law is inescapably affected by the presence of compulsory statutory insurance.

173 *Opinions of scholars*: Distinguished text writers have accepted this reality. For example, Professor John Fleming explained[230]:

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229 See eg *Neindorf v Junkovic* (2005) 80 ALJR 341 at 359-360 [83]-[87]; 222 ALR 631 at 653-654.

230 Fleming, *The Law of Torts*, 9th ed (1998) at 13; cf *Yates v Jones* [1990] *Aust Torts Reports* ¶81-009 at 67,641.

> "[W]hile in theory insurance follows liability, in experience insurance often paves the way to liability. In short, it is a 'hidden persuader'."

174 Professor Peter Cane, in his 2006 edition of *Atiyah's Accidents, Compensation and the Law*[231] accepted that insurance has affected the development of negligence law. Particularly so because "the size of damages awards in personal injury cases is explicable only on the basis that judges are influenced by the widespread presence of insurance"[232].

175 Professor Michael Jones, in his *Textbook on Torts* recognised that the availability of compulsory insurance is well known to the courts and that "in some instances this knowledge influences the shape of legal rules … The best example is the very high objective standard of care required of motorists"[233]. The author suggested that there are "signs that the courts' attitude to liability insurance is changing" from a total denial of relevance to a more nuanced principle of occasional materiality.

176 In the latest edition of their text *Tort Law*, Professors Simon Deakin, Angus Johnston and Sir Basil Markesinis[234] concluded:

> "Insurance has … made the imposition of liability more frequent in certain areas of the law – especially traffic accidents and products liability – and has induced some strange twists in traditional concepts as a consequence. … overall, there is no denying the fact that, as a result of modern insurance practices, the notions of 'duty' (and causation) are at times used to conceal insurance dictates and the term 'negligence' is employed in contexts where the defendant could not humanly have avoided the accident in question."

These authors also argue that[235]:

> "[D]espite the difficulties inherent in such exercises, our courts would be well advised … to consider these insurance arguments more openly. For not only has this approach gained acceptance in modern life, whether we

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231 7th ed (2006) at 250.

232 7th ed (2006) at 251.

233 Jones, *Textbook on Torts*, 8th ed (2002) at 13.

234 6th ed (2008) at 14.

235 6th ed (2008) at 14.

like it or not, it also provides a useful tool (along with others) in solving the problems posed by modern tort cases."

177 Even writers such as Professor Jane Stapleton, who has been resistant to the consideration of insurance in the exposition of substantive tort liability, acknowledges what she calls "[t]he special case of motor vehicle accidents"[236]. As she observes, in that instance[237]:

> "[T]here is … no opportunity for prior bargaining: the parties are strangers. But the case has two unusual features: the desire for self-preservation on both sides means that the 'fault' notion can look particularly artificial in this context; and there is a general belief that an individual's chance of being injured by such 'carelessness' in a road accident is not all that much different from their chance of inadvertently causing such injuries to others. This atypical mutuality of risk means that the pools of potential defendants and potential plaintiffs seem virtually identical. In such a situation, compulsory liability insurance, which technically is about cover for negligently causing injury to *others*, can appear to be equivalent to a system whereby drivers pay into the same pool for cover for the risk of *themselves* being injured by negligence."

178 Professor Stapleton's plea that courts should be "vigilant not to allow assumptions made in the traffic context to be generalised" may be accepted[238]. However, in resolving the present appeal, which arises solely in the motor vehicle context, it is sufficient to add the consideration of compulsory third party motor vehicle insurance to the list of practical considerations collected by Megaw LJ, in favour of acknowledging a single, universal, objective definition of the ambit of the duty of care owed by all drivers to those put at risk by their driving.

179 That single standard, obliging observance of a common duty of reasonable care, applies whether the driver is skilled or inexperienced. It extends to the drivers and passengers of other vehicles on the road, to pedestrians, and to passengers in the vehicle who have knowledge of the incompetence of the driver, including a learner driver. Only this approach serves to fulfil the basic objectives

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236 Stapleton, "Torts, Insurance and Ideology", (1995) 58 *Modern Law Review* 820 at 841.

237 Stapleton, "Torts, Insurance and Ideology", (1995) 58 *Modern Law Review* 820 at 841-842 (footnote omitted).

238 Stapleton, "Torts, Insurance and Ideology", (1995) 58 *Modern Law Review* 820 at 842-843.

of the law of negligence in this context as it operates to protect (by compulsory insurance) all those who use the public roads of this country. That is the basic objective of the statutes requiring third party liability insurance for motor vehicles in use on public roads throughout Australia. It is to be reflected in this Court's statement of the duty owed by all drivers under the common law. It is a consideration that this Court should not continue to ignore.

Conclusions and orders

180 When, therefore, I add to the considerations listed by Megaw LJ in *Nettleship*, that of compulsory statutory liability insurance, mentioned there by Lord Denning, and when I add that consideration to those recounted by the joint reasons, I come to the same conclusions as are reached in the joint reasons.

181 The reasoning in *Cook* is flawed because of its reliance on the now superseded criterion of "proximity". It is therefore proper for this Court to re-examine that reasoning and to place it upon a firmer doctrinal footing. In doing so, the Court should take into account *all* of the relevant considerations mentioned in past authority, as well as any relevant considerations of legal principle and policy. The latter invite attention to the statutory context in which the common law duty of care owed by a driver on a public road in Australia falls to be defined. That context includes the universal operation of compulsory third party insurance of broad similarity operating throughout the nation. It is well past time, in this special context, that this reality should be acknowledged as affecting the existence and content of the duty of care owed by the driver of a motor vehicle to others reliant on that driver's skill.

182 On this basis I agree in the conclusions expressed by the joint reasons that the statements in *Cook* as to the duty of care owed by an unqualified and inexperienced driver should be overruled and replaced with the single standard expressed in terms of the imported skill of the "reasonable driver"[239].

183 I also agree in the other conclusions reached in the joint reasons, and for the reasons there given, in disposing of the respondents' application for special leave to cross-appeal; and in deciding the remaining questions in the proceedings, including the appellant's appeal against the disturbance by the Court of Appeal of the determination reached by the primary judge on the issue of contributory negligence.

184 It follows that I agree in the orders proposed in the joint reasons[240].

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239 Joint reasons at [27].

240 Joint reasons at [97]-[98].

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185 HEYDON J. The proceedings before Studdert J and the Court of Appeal were necessarily conducted on the assumption that *Cook v Cook*[241] was correct. That assumption was unfavourable to the plaintiff's interests. In this Court the plaintiff advanced many arguments in support of the contention that *Cook v Cook* should be overruled. But is it necessary to take that step?

186 In the course of argument it became apparent that the conclusion that there had been actionable negligence causing loss to the plaintiff – a conclusion arrived at by the trial judge and upheld by a majority of the Court of Appeal – could be supported without overruling *Cook v Cook*. Even if the content of the first defendant's duty to the plaintiff was that mandated by *Cook v Cook*, the conclusion that there should be a verdict for the plaintiff was correct for the reasons given by Studdert J. It is thus not necessary to consider the correctness of *Cook v Cook* from the point of view of liability.

187 In relation to contributory negligence, the plaintiff put three submissions in this Court. The first was that there was no causal connection between any contributory negligence and the damage which the plaintiff suffered. The second was that the reasoning which caused the Court of Appeal to increase the percentage by which the plaintiff's damages should be reduced for contributory negligence was erroneous. The third was that if the second submission were accepted, the figure selected by the trial judge should be restored even though, if *Cook v Cook* were wrong, his approach to contributory negligence had been distorted by that case.

188 The plaintiff's first submission on contributory negligence should be rejected. For the reasons given in the plurality judgment, the plaintiff failed to undermine the conclusion of the courts below that the contributory negligence of the plaintiff had been a cause of the damage that he suffered[242]. That controversy does not depend on the correctness of *Cook v Cook*.

189 The plaintiff's second submission about contributory negligence was that while the Court of Appeal majority did not disagree with the three respects in which Studdert J found the plaintiff to have been guilty of contributory negligence, they weighted the relevant factors differently. It was submitted that this did not sufficiently expose any error justifying alteration of Studdert J's percentage. This submission is correct.

190 If the plaintiff had contended that Studdert J's necessary acceptance of *Cook v Cook* had led him to select too high a percentage for contributory

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241 (1986) 162 CLR 376; [1986] HCA 73.

242 At [94]-[96].

negligence, it would have been necessary to examine the question whether *Cook v Cook* was correct. But the plaintiff's third submission on contributory negligence involved an acceptance of the conclusion reached by Studdert J as to the correct percentage deduction. Like the first two submissions on contributory negligence, it therefore did not involve any reconsideration of *Cook v Cook*.

191 It follows that the Court of Appeal's orders, so far as they were controversial, can be reversed, and those of Studdert J restored, by accepting submissions of the plaintiff other than the submission that *Cook v Cook* should be overruled. The plaintiff's submission that *Cook v Cook* be overruled is not a necessary step towards the reversal of the Court of Appeal's orders or the upholding of Studdert J's orders. For that reason I would reserve my opinion on the correctness of that case.

192 The orders proposed in the plurality judgment should be made.

193 CRENNAN J. I agree that the appeal should be allowed and orders made as proposed by Gummow, Hayne and Kiefel JJ. I agree with the reasons of the Chief Justice and agree also with the reasons of Gummow, Hayne and Kiefel JJ.