HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND CALLINAN JJ

PARASKEVAS NAXAKIS APPELLANT

AND

WESTERN GENERAL HOSPITAL & ANOR RESPONDENTS

Naxakis v Western General Hospital [1999] HCA 22
13 May 1999
M43/1998

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders of the Court of Appeal of the Supreme Court of Victoria made 5 September 1997, in so far as they dismiss the appeal against the judgment entered in favour of the respondents. In lieu thereof, order that the appeal from that judgment to the Court of Appeal be allowed with costs, the orders of Harper J made 20 August 1996 set aside in so far as they relate to the respondents, and there be a new trial of the action between the appellant and the respondents.*

3. *The costs of the first trial between the appellant and the respondents to abide the outcome of the second trial.*

On appeal from the Supreme Court of Victoria

Representation:

N A Moshinsky QC with V A Morfuni for the appellant (instructed by Swersky & Velos)

B D Bongiorno QC with B M Griffin for the respondents (instructed by Blake Dawson Waldron)

CATCHWORDS

Naxakis v Western General Hospital & Anor

Practice and Procedure – Civil trial by jury – Direction by trial judge to return verdict in favour of defendant – Circumstances in which trial judge may withdraw case from jury – Legal test to be applied in assessing sufficiency of evidence – Role of jury.

Negligence – Medical negligence – Physical injury – Breach of duty – Legal test for determining whether defendant had complied with the relevant standard of care – Rule in *Rogers v Whitaker* – Causation – Balance of probabilities – Loss of chance analysis in cases of physical injury.

1 GLEESON CJ. The principles to be applied in determining whether a trial judge should direct the jury to return a verdict for the defendant in a civil trial by jury were stated by Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd*[1].

2 In considering the reasoning of the trial judge, and the Court of Appeal, in the present case it is necessary to give due recognition to one aspect of those principles. Statements to the effect that the judge must assume that the jury will accept the evidence favourable to the plaintiff and reject the evidence favourable to the defendant often involve a degree of over-simplification. Sometimes the evidence in a case cannot be so neatly categorised. A witness may retract, or modify, or explain, his or her own evidence. Or, to take an example given by Jordan CJ, evidence which, if left unexplained, might sustain a case for the plaintiff, may be the subject of explanation by later evidence. If that explanation is one which a jury could not reasonably reject, and "does not in any relevant aspect involve evidence that is capable of being treated as genuinely in dispute"[2], then it may destroy the effect of the earlier evidence.

3 Careful analysis and evaluation of evidence, in a case which requires an understanding of complex medical issues, was appropriate and necessary in determining whether there was a case to be left to the jury. Even so, the purpose of such analysis and evaluation is that explained by Jordan CJ, and the trial judge may not intrude upon the role of the jury.

4 In the present case, as the examination of the evidence made by Kirby J demonstrates, the trial judge, in the reasoning which led to a conclusion that there should be a verdict by direction, went beyond the limits of his proper function.

5 The appeal should be allowed and there should be a new trial. In that connection, there was some reference in argument to the possibility that the plaintiff's case might be put on an alternative basis, relating to the loss of a chance. That question was not examined by the trial judge or by the Court of Appeal, and it was not fully argued in this Court. I express no opinion about it.

6 I agree with the orders proposed by Kirby J.

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1 (1941) 42 SR (NSW) 1.

2 (1941) 42 SR (NSW) 1 at 4.

7 GAUDRON J. Paraskevas Naxakis, the appellant, was admitted to Western General Hospital ("the hospital") on 14 July 1980. He was then 12 years old. He had been involved in an altercation with a school mate on his way home from school and was struck on the head by the other boy's vinyl school bag, possibly twice. He collapsed and was seen by a general practitioner who referred him to the hospital.

8 While in the hospital, the appellant first came under the care of a general surgeon and was then transferred to the care of Mr Jensen, the second respondent and senior neurosurgeon at the hospital. Mr Jensen treated him for a subarachnoid haemorrhage caused by a blow to the head. It will later be necessary to refer to that treatment. For the moment, however, it is sufficient to note that there were unusual features of the appellant's condition but he gradually improved and was discharged from hospital on 23 July 1980.

9 On 25 July, the appellant collapsed at home. He was taken to the Royal Children's Hospital where it was found that he had a major intracranial bleed from a burst aneurysm. Later, he underwent surgery and the aneurysm was clipped. It is now clear that the symptoms displayed by the appellant while in hospital were the result of an aneurysmal bleed.

History of the proceedings

10 The appellant suffered permanent physical and intellectual impairment in consequence of the burst aneurysm and brought an action for damages in the Supreme Court of Victoria against the hospital, Mr Jensen and various other defendants. So far as concerns the other defendants, the action was either not pursued or dismissed and it is convenient to proceed as if the action had been brought only against the hospital and Mr Jensen.

11 The matter came on for hearing before Harper J and a civil jury. The thrust of the case against the hospital and Mr Jensen was that alternative diagnoses should have been considered and an angiogram performed to establish the cause of the appellant's condition. At the close of the evidence, it was submitted on behalf of the hospital and Mr Jensen that there was no case to go to the jury. His Honour acceded to that submission and entered judgment accordingly.

12 In ruling upon the submission that there was no case to go to the jury, Harper J referred to *Protean (Holdings) Ltd v American Home Assurance Co*[3] and expressed the relevant test to be "whether there is any evidence that ought reasonably to satisfy the tribunal of fact, in this case the jury, that the facts sought to be proved are established". His Honour referred to the evidence in the case, and noted that "the overwhelming body of evidence point[ed] to the conclusion that

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3 [1985] VR 187 at 240.

Mr Jensen was not at fault in persisting with his diagnosis of traumatic subarachnoid haemorrhage". Against that evidentiary background, it was significant, in his Honour's view, that "not one medical witness said that ... he ... would have ordered an angiogram [and n]one suggested that the failure to order an angiogram was in any way open to criticism." On that basis, his Honour concluded that "it ... [was] not ... open to the jury to find that Mr Jensen was in breach of his duty to the plaintiff in failing so to order".

13 The appellant appealed unsuccessfully to the Court of Appeal. Hayne JA (with whom Ormiston and Phillips JJA agreed) held that the test which should have been applied was whether "there was *no* evidence on which the jury could properly conclude that the plaintiff had made out his case". His Honour reviewed the evidence and concluded that the appeal should be dismissed because "[a]n essential step in the appellant's argument was that [the unusual features of the appellant's condition] should have required the [hospital and Mr Jensen] to act before the second episode of bleeding on 25 July 1980" and "no doctor said that that was so". Further, in his Honour's view, there was no basis for a claim that Mr Jensen failed to consider the possibility of an aneurysm because there was no evidence that he did not. The appellant now appeals to this Court.

Symptoms and treatment in the hospital

14 The appellant was first seen in the casualty section of the hospital. It was said in the referral from the general practitioner who saw him soon after the altercation that the appellant "was apparently knocked unconscious in a fight". The referral noted that he reacted to painful stimuli and responded verbally. When admitted to casualty, the appellant had an abrasion behind his left ear. He was conscious and lucid but later became unarousable for five minutes. X-rays were performed and later interpreted by Mr Jensen as indicating "possible right lambdoid diastasis", which, so far as children are concerned, is, apparently, the equivalent of a skull fracture. However, the radiologist reported that there was no abnormality[4].

15 The appellant was transferred from casualty to the children's ward. Whilst there, he suffered severe headaches, photophobia, marked neck stiffness and opisthotonos – spasm of the muscles of the neck, back and legs, in the course of which the body is bent backwards. A provisional diagnosis was made of traumatic subarachnoid haemorrhage and, possibly, subacute extradural haematoma in the posterior fossa. A CAT scan was carried out on 18 July and haematoma was then excluded. However, the CAT scan showed not only a subarachnoid haemorrhage, but intraventricular bleeding in the fourth and, possibly, in the lateral ventricles.

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4 The radiologist's report is dated some two weeks after the x-ray was performed. It is not clear whether an earlier oral report was provided to Mr Jensen before he interpreted the x-rays.

The appellant gradually improved without further treatment and, as already indicated, was discharged from hospital on 23 July.

No case: the relevant test

16 It is well settled that, where there is a jury, the case must be left to them "[i]f there is evidence upon which [they] could reasonably find for the plaintiff"[5], or, as was said by Hayne JA in the Court of Appeal, the case can be taken away only if "there was *no* evidence on which the jury could properly conclude that the plaintiff had made out his case."[6] That does not mean that the case must be left to the jury if the evidence is "so negligible in character as to amount only to a scintilla"[7]. However, if there is evidence on which a jury could find for the plaintiff, it does not matter that there is contradictory evidence or, even, as was said by Harper J at first instance, "that the overwhelming body of evidence points to the [contrary]"[8].

17 Moreover, when considering whether there is some evidence upon which a jury could find for a plaintiff, it is important to bear in mind that the jury may properly accept parts of a witness's evidence and reject others[9]. Thus, for example, a jury may believe what is said by a witness in examination in chief and reject apparent modifications or qualifications elicited in cross-examination.

Medical negligence

18 Before turning to the evidence in this case, it is important to bear in mind that the test for medical negligence is not what other doctors say they would or would not have done in the same or similar circumstances. Even less so, is it that other

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5 *Hocking v Bell* (1945) 71 CLR 430 at 441 per Latham CJ.

6 *Naxakis v State of Victoria & Ors* unreported, Victorian Court of Appeal, 5 September 1997 at 8.

7 *Hocking v Bell* (1945) 71 CLR 430 at 441 per Latham CJ, 486-487 per Starke J, 503 per McTiernan J. See also *Ryder v Wombwell* (1868) LR 4 Exch 32 at 38-39; *Bell v Thompson* (1934) 34 SR (NSW) 431 at 436-437 per Jordan CJ (with whom Street J agreed); *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42 at 52 per Clarke JA (with whom Mahoney and Meagher JJA agreed).

8 See *Hocking v Bell* (1945) 71 CLR 430 at 443-444 per Latham CJ and the cases there cited.

9 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 669 per Murphy J; 9 ALR 437 at 449. See also *Cooper v Slade* (1858) 6 HLC 746 at 795 [10 ER 1488 at 1507]; *Barker v Charley* [1962] SR (NSW) 296 at 303-304 per Evatt CJ, Herron and Sugerman JJ and the cases there cited.

doctors have *not* said that they would pursue a particular course of action, a factor that seems to have been significant both at first instance and in the Court of Appeal.

19 To treat what other doctors do or do not do as decisive is to adopt a variant to the direction given to the jury in *Bolam v Friern Hospital Management Committee*[10] ("the Bolam rule"). According to the Bolam rule, "a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."[11]

20 The Bolam rule, which allows that the standard of care owed by a doctor to his or her patient is "a matter of medical judgment"[12], was rejected by this Court in *Rogers v Whitaker*[13]. In that case it was pointed out that, in Australia, the standard of care owed by persons possessing special skills is that of "the ordinary skilled person exercising and professing to have that special skill [in question]"[14]. In that context, it was held that "that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade"[15].

21 In *Rogers v Whitaker*, I pointed out that, at least in some situations, "questions as to the reasonableness of particular precautionary measures are ... matters of commonsense."[16] In this case, the first question to be determined is, in essence, whether it was unreasonable for the hospital and Mr Jensen not to have taken the precautionary measure of excluding other causes of the appellant's symptoms. And assuming there was some evidence that there were steps that could be taken to exclude other causes, it was for the jury to form their own conclusion whether it was reasonable for one or more of those steps to be taken. It was not for the expert medical witnesses to say whether those steps were or were not reasonable. Much less was it for them to say, as they were frequently asked,

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10 [1957] 1 WLR 582; [1957] 2 All ER 118.

11 As formulated by Lord Scarman in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 881.

12 [1985] AC 871 at 881.

13 (1992) 175 CLR 479 at 487, 493.

14 (1992) 175 CLR 479 at 487.

15 (1992) 175 CLR 479 at 487.

16 (1992) 175 CLR 479 at 493.

whether, in their opinion, the hospital and Mr Jensen were negligent in failing to take them.

Precautionary measures: the evidence

22 Before turning to the evidence, it is relevant to note that, as particularised, the appellant's case was constituted by three broad and closely related claims. The first was the failure to consider alternative diagnoses; the second the failure to conduct an angiogram; and the third was to discharge the appellant without considering other possible diagnoses[17].

23 So far as concerns failure to consider other diagnoses, there was clear and undisputed evidence that a subarachnoid haemorrhage can result from causes other than trauma or a blow to the head. Moreover, there was evidence from Mr Jensen that the case was unusual and that the appellant did not progress as hoped. Thus, he gave evidence that he ordered a CAT scan because the appellant "was perhaps a little slower to recover and the neck retraction was somewhat unusual and I thought that some more uncommon complication of head injury had to be excluded, or considered". A little later, he said that the appellant "wasn't bouncing back, if you like, in quite the way I had hoped he would, and I thought: we have to consider this possibility, that there's some additional factor in this head injury". He also said that the appellant's "neck retraction was ... more than usual; it was quite marked" and that he "thought a scan should be done to ensure that there was no life-threatening problem there that would need attention by means of an operation".

24 Quite apart from Mr Jensen's evidence, there was evidence from neurosurgeons called on behalf of the appellant that a subarachnoid haemorrhage

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17 By his particulars and amended particulars, the appellant claimed that the hospital and Mr Jensen were negligent in:

"(a) Failing to adequately diagnose the [appellant's] complaints;

(b) Failing to conduct any or any adequate investigation of the [appellant's] condition;

(c) Failing to treat the [appellant] adequately or at all;

(d) Failing to conduct an angiogram on the [appellant];

(e) Failing to continue or maintain treatment of the [appellant] in the face of ongoing symptoms;

(f) Discharging the [appellant] in the face of ongoing symptoms without sufficiently diagnosing the same".

could result from a significant head injury, but that the appellant did not appear to have suffered such an injury. There was also evidence that the appellant's symptoms gave clues that "all was not well, all was not as it appeared" and that the pattern of bleeding revealed by the CAT scan was such as to "raise the suspicion that there may have been some other cause [of the subarachnoid haemorrhage] ... than simply a blow to the head". Critically, there was also evidence that "if one did have a suspicion of another cause, the logical thing would be to do a cerebral angiogram".

25 The evidence which has been recounted would, if accepted, permit a jury to conclude that alternative diagnoses should have been considered and, also, that an angiogram should have been performed. The same evidence would permit of a finding that the appellant should not have been discharged from hospital until that had been done.

Causation: the evidence

26 For the appellant's case to be left to the jury there also had to be evidence from which the jury could conclude that the failure to diagnose the presence of an aneurysm caused or materially contributed to its bursting[18]. In this regard, it is important to note that, contrary to what seems to have been assumed by the Court of Appeal, it was not inevitable that the aneurysm would burst when it did. There was evidence that, had the appellant been kept in hospital, calm and sedated, and given aminocaproic acid, the risk of a second bleed would have been minimised. Further, there was evidence that an angiogram could have been performed and that, if it had been, it "would almost certainly have revealed the aneurysm". In addition, there was evidence that the aneurysm could have been clipped and that, as at 23 July, the appellant was fit enough to undergo surgery for that purpose.

27 The evidence that steps could be taken to minimise the risk of a second bleed and that the appellant was able to undergo surgery on 23 July, two days prior to the bursting of the aneurysm, would, if accepted, permit a jury to conclude that, if an angiogram had been undertaken, the appellant would have been given appropriate treatment, surgery performed and the bursting of the aneurysm averted.

Loss of a chance

28 It was contended for the appellant that, even if the evidence did not permit of a finding that, if an angiogram had been undertaken, surgery would have been performed in time to prevent the aneurysm from bursting, there was evidence upon which the jury could conclude that the appellant had lost a valuable chance,

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18 See *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412 per Mason CJ, Deane and Toohey JJ, 419 per Gaudron J; *Chappel v Hart* (1998) 72 ALJR 1344 at 1347 per Gaudron J; 156 ALR 517 at 520.

namely, the chance of successful surgery. In the view that I take of the evidence in this case, it is not strictly necessary to consider that further argument. However, as there must be a rehearing, it is appropriate that I express my view on the notion that, in a case such as the present, damages are recoverable for the loss of a chance.

29 It is well settled that, where breach of contract results in the loss of a promised chance[19], that is an actual loss for which damages will be awarded "by reference to the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised."[20] So, too, damages may be recovered for a commercial opportunity that is lost in consequence of a breach of contract[21]. And it was held in *Sellars v Adelaide Petroleum NL*[22] that the loss of a commercial opportunity is "loss or damage" for the purposes of s 82(1) of the *Trade Practices Act* 1974 (Cth)[23]. Moreover, there is no reason in principle why loss of a chance or commercial opportunity should not constitute damage for the purposes of the law of tort where no other loss is involved. However, different considerations apply where, as here, the risk eventuates and physical injury ensues.

30 In cases involving the failure to diagnose or treat a pre-existing condition, there is no philosophical or logical difficulty in viewing the loss sustained as the loss of a chance to undergo treatment which may have prevented some or all of the injuries or disabilities sustained. Indeed, in such cases, philosophical or logical analysis would lead to the conclusion that characterisation of the loss as the loss of a chance is strictly correct. It would also lead to the conclusion that the all or nothing approach involved in allowing damages for the actual harm suffered on the basis that it was more likely than not that the harm would have been prevented by proper treatment is, at best, rough justice.

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19 See, for example, *Chaplin v Hicks* [1911] 2 KB 786; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

20 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 349.

21 See, for example, *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

22 (1994) 179 CLR 332 at 348 per Mason CJ, Dawson, Toohey and Gaudron JJ, 364 per Brennan J.

23 Section 82(1) provides:

> " A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

31 It has been suggested that to allow compensation for the loss of chance would alleviate problems associated with proof of causation[24]. There is, in my view, a tendency to exaggerate the difficulties associated with proof of causation, even in medical negligence cases. For the purposes of the allocation of legal responsibility, "[i]f a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring."[25] And in that situation, the trier of fact – in this case, a jury – is entitled to conclude that the act or omission caused the injury in question unless the defendant establishes that the conduct had no effect at all or that the risk would have eventuated and resulted in the damage in question in any event[26].

32 The notion that, in cases of failure to diagnose or treat an existing condition, the loss suffered by the plaintiff is the loss of chance, rather than the injury or physical disability that eventuates, is essentially different from the approach that is traditionally adopted. On the traditional approach, the plaintiff must establish on the balance of probabilities that the failure caused the injury or disability suffered, whereas the lost chance approach predicates that he or she must establish only that it resulted in the loss of a chance that was of some value[27]. As already indicated, it has been suggested that the lost chance approach avoids problems of proof of causation. However, it may be that if damages were to be awarded for the loss of a chance, the difficulties associated with proof of causation would simply reappear as difficulties in establishing the value of the chance in question.

33 Moreover, the lost chance approach is not one that necessarily works to the benefit of the individual plaintiff. If damages were to be awarded for the chance lost, rather than the actual injuries or disabilities suffered, consistency would require that damages be assessed according to the value of the chance, not the injury or disability. Thus, a chance which is 51% or greater but less than 100%,

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24 See Stauch, "Causation, Risk, and Loss of Chance in Medical Negligence", (1997) 17 *Oxford Journal of Legal Studies* 205 at 218-225; Waddams, "The Valuation of Chances", (1998) 30 *Canadian Business Law Journal* 86, especially at 92-95.

25 *Chappel v Hart* (1998) 72 ALJR 1344 at 1350 per McHugh J; 156 ALR 517 at 525.

26 See *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421 and the cases there cited. See also *Chappel v Hart* (1998) 72 ALJR 1344 at 1346-1347 per Gaudron J, 1352 per McHugh J, 1358 per Gummow J, 1367 per Kirby J; 156 ALR 517 at 520, 527, 535 and 548.

27 See *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355.

must result in an award of damages less than would be the case if damages were awarded for the injury or disability which eventuates[28].

34 Additionally, the lost chance approach cannot easily be applied in conjunction with the traditional balance of probabilities approach. As already indicated, the lost chance approach requires proof that a valuable chance has been lost. A chance would have no value if the defendant could establish, on the balance of probabilities, that the pre-existing condition would have resulted in the injury or disability in question in any event. Thus, if proof on the balance of probabilities were also retained, damages for loss of a chance would be awarded only in those cases where the plaintiff cannot establish, on the balance of probabilities, that the risk would not have eventuated and the defendant cannot establish that it would. There is, thus, limited practical significance for an approach which allows for loss of a chance if the traditional approach is also retained.

35 There is a further difficulty in allowing damages for the loss of a chance in a case such as the present. Assessment of the value of the chance must depend either on speculation or statistical analysis. And in the case of statistics, there is the difficulty that a statistical chance is not the same as a personal chance. Thus, as was pointed out by Croom-Johnson LJ in *Hotson v East Berkshire Area Health Authority*:

> "If it is proved statistically that 25 per cent of the population have a chance of recovery from a certain injury and 75 per cent do not, it does not mean that someone who suffers that injury and who does not recover from it has lost a 25 per cent chance. He may have lost nothing at all. What he has to do is prove that he was one of the 25 per cent and that his loss was caused by the defendant's negligence."[29]

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28 See *Hotson v East Berkshire Area Health Authority* [1987] AC 750 at 759-760 per Sir John Donaldson MR who would have adopted the loss of chance approach in that case and who said:

> "As a matter of common sense, it is unjust that there should be no liability for failure to treat a patient, simply because the chances of a successful cure by that treatment were less than 50 per cent. Nor, by the same token, can it be just that if the chances of a successful cure only marginally exceed 50 per cent, the doctor or his employer should be liable to the same extent as if the treatment could be guaranteed to cure. If this is the law, it is high time that it was changed".

29 [1987] AC 750 at 769. See also *Herskovits v Group Health Co-operative of Puget Sound* 664 P 2d 474 at 490-491 (1983).

And as his Lordship also pointed out, if a plaintiff establishes that he was one of the 25% who would have recovered if properly treated, his or her loss is not merely the loss of a chance, but the injury or disability that eventuated[30].

36 Finally, where the risk inherent in a pre-existing but undiagnosed or untreated condition eventuates, there is not simply the loss of a chance. Rather, the "factors bound up in the earlier chance have already played themselves out" and all that is in issue are past events "for which the cause is uncertain"[31]. At least, their cause is uncertain if philosophical or scientific notions are employed. However, that does not mean that their cause is uncertain in law. For the purpose of assigning legal responsibility, philosophical and scientific notions are put aside[32] in favour of a common sense approach which allows that "breach of duty coupled with an [event] of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the [event] did occur owing to the act or omission amounting to the breach"[33]. For that reason, I am of the view that the notion that, in a case such as the present, a plaintiff can recover damages on the basis that what has been lost is a chance of successful treatment must be rejected.

Conclusion

37 The appeal should be allowed, and the order of the Court of Appeal dismissing the appellant's appeal against the judgment in favour of the respondents to this appeal should be set aside. In lieu of that order, the appeal to that Court should be allowed as against those respondents and, to that extent, the judgment of Harper J set aside and a new trial ordered. The respondents should pay the appellant's costs of the appeal as it related to them in the Court of Appeal. They should also pay his costs of the appeal to this Court. The costs of the first trial should abide the outcome of the second.

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30 These statements notwithstanding, his Lordship would have adopted a loss of chance approach in *Hotson v East Berkshire Area Health Authority*.

31 *Lawson v Laferrière* (1991) 78 DLR (4th) 609 at 632 per Gonthier J referring to Savatier, "Le droit des chances et des risques, dans les assurances, la responsabilité civile dans la médecine, et sa synthèse dans l'assurance de responsabilité médicale" (1973) 44 Rev gén ass terr 457 and "Une faut peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?" D 1970 Chron 123.

32 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 509 per Mason CJ (with whom Toohey and Gaudron JJ agreed); *Chappel v Hart* (1998) 72 ALJR 1344 at 1346 per Gaudron J, 1349 per McHugh J, 1356 per Gummow J; 156 ALR 517 at 519, 523, 533-534.

33 *Betts v Whittingslowe* (1945) 71 CLR 637 at 649 per Dixon J.

38 McHUGH J. The facts of this matter are set out in the judgment of Callinan J. I agree with his Honour that this appeal should be allowed.

39 Whether a defendant has been negligent is a question of fact[34], proof of which lies on the plaintiff. In a trial by jury that question is decided by the jury. But, before the trial judge can leave the question to the jury, the judge must be satisfied that the plaintiff has tendered evidence which, if believed, *could* induce a reasonable person to conclude that the defendant was guilty of the negligence alleged. At one stage in the development of the common law, an issue of fact would be left to the jury to determine where there was some evidence - even "a scintilla of evidence" - in support of the fact[35]. That doctrine applied to issues of negligence as well as to other issues of fact[36]. By the middle of the last century, however, it had become settled doctrine that a "scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence."[37] So, when the defendant asks the judge to take away an issue of negligence from the jury on the ground that there is no evidence of negligence, the question is, as Willes J said[38] in a non-negligence context, "not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

40 When the defendant submits that there is no evidence to go to the jury, he or she raises a question of law for the judge to decide[39]. The question for the judge is not whether a verdict for the plaintiff would be unreasonable or perverse but whether the plaintiff has adduced evidence which, if uncontradicted, would justify and

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34 *Tobin v Murison* (1845) 5 Moo 110 at 126 [13 ER 431 at 438]; *The Municipal Tramways Trust v Buckley* (1912) 14 CLR 731 at 737 per Isaacs J.

35 *Wheelton v Hardisty* (1857) 8 El & Bl 232 at 262 [120 ER 86 at 98].

36 *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193 at 207 per Lord Blackburn.

37 *Toomey v The London, Brighton, and South Coast Railway Company* (1857) 3 CB (NS) 146 at 150 per Williams J [140 ER 694 at 696].

38 *Ryder v Wombwell* (1868) LR 4 Ex 32 at 39; see also *Jewell v Parr* (1853) 13 CB 909 at 916 [138 ER 1460 at 1463]; *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193 at 207 per Lord Blackburn; *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339 at 353 per Dixon J.

39 *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193 at 200 per Lord Cairns; *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339 at 359 per McTiernan J.

sustain a verdict in his or her favour[40]. An appellate court may later be able to set aside the verdict on the ground that it is unreasonable or against the weight of the evidence. But the function of the trial judge is more circumscribed.

41 In determining whether there is evidence upon which the jury could properly find for the plaintiff, the trial judge must consider those parts of the evidence which, if accepted, could reasonably establish negligence - whether directly or inferentially. If such evidence has been tendered, it matters not that other evidence has been tendered that may contradict it even if the contradictory evidence comes from a witness, part of whose evidence is relied on to prove the negligence. It has long been established that a plaintiff is entitled to ask the jury to accept part - even a small part - of the evidence of a witness and to reject the rest of the witness's evidence[41]. In *Richards v Morgan*[42], Cockburn CJ said "that the party ... calling the witness ... may do so not only without the intention of abiding by all the witness may say, but with the deliberate intention of calling on the Court or jury to disbelieve so much of the evidence as makes against him." Moreover, it makes no difference whether "the evidence as makes against him" emerges in evidence-in-chief or in cross-examination. It is for the jury to determine what evidence is worthy of belief[43]. Consequently, a plaintiff may have a case to go to the jury even though the evidence of each witness as a whole does not support the plaintiff's case and may even deny it.

42 Furthermore, evidence given by a witness including the plaintiff in support of the claim of negligence will ordinarily have to be taken into account on a no case submission even if that evidence may appear to be contradicted or qualified, as a result of cross-examination. A jury which has heard and watched the witness give evidence may regard such apparent contradictions or qualifications as not having the weight that they might appear to have from a mere perusal of the transcript. The fact that the defendant has proved that the plaintiff has made out-of-court statements inconsistent with his or her claim does not entitle the defendant to a verdict[44]. Similarly, the effect of apparent concessions or qualifications by the plaintiff or other witnesses under cross-examination are matters for the jury to

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40 *Dublin, Wicklow, and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1168 per Lord Hatherley.

41 *Dublin, Wicklow, and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1168 per Lord Hatherley; *Barker v Charley* [1962] SR (NSW) 296 at 303-304; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 669 per Murphy J; 9 ALR 437 at 450.

42 (1863) 4 B & S 641 at 663 [122 ER 600 at 608].

43 *Hocking v Bell* (1945) 71 CLR 430 at 443 per Latham CJ.

44 *Barker v Charley* [1962] SR (NSW) 296.

evaluate. The jury might reasonably conclude, for example, that the "contradictions" or "qualifications" were the result of confusion, or of the domination of the witness by counsel for the defendant, or of an attempt to assist the defendant, rather than a true concession or admission. Unless in cross-examination, the plaintiff or other witness withdraws his or her evidence supporting a conclusion of negligence, the trial judge will ordinarily have to regard that evidence as uncontradicted in determining whether there is a case to go to the jury. As Dixon J pointed out in *Hocking v Bell*[45]:

> "There is no question in a trial that is regarded as so clearly within the exclusive province of the jury to decide as the reliance to be placed upon the evidence of a witness whom they have seen and heard. The fact must therefore be faced, that however little faith we as judges may have in all this, yet before the defendant can be entitled as a matter of law to a verdict he must so utterly destroy the plaintiff's narrative as to place it outside the competence of a jury to give any credence to the material parts of it, a thing which in my experience I have never seen done with reference to direct oral testimony given upon a civil issue."

43 Moreover, it is for the jury to determine not only what evidence they accept but also what inferences should be drawn from the evidence that they accept. The Full Court of the Supreme Court of New South Wales erred, therefore, in *Watt v S G White Pty Ltd*[46] when it held that, where a plaintiff relies on inference and not direct evidence to prove negligence, "all the evidence for the plaintiff must be considered as a whole to see if it is capable of supporting the inference contended for by the plaintiff.[47]" In *Watt*, Else-Mitchell J said, "if more than one inference or interpretation is open the Court is bound to adopt the most favourable to the plaintiff's case, but that does not mean that the plaintiff can select only such isolated passages in the evidence as are favourable to the inference for which he contends and disregard the rest[48]." Applying this proposition, his Honour said[49]:

> " ... I do not think that for this purpose the plaintiff can select, in support of the inference of voluntary action and consequent negligence, only those parts of the evidence adduced by him which are favourable to that inference, but

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45 (1945) 71 CLR 430 at 490.

46 (1961) 79 WN (NSW) 137.

47 (1961) 79 WN (NSW) 137 at 140 per Else-Mitchell J.

48 (1961) 79 WN (NSW) 137 at 140.

49 (1961) 79 WN (NSW) 137 at 141.

> he is bound to take the whole of the evidence some of which negatives that view and shows that the action of Bennett was accidental."

44 What is remarkable about this statement is that the evidence relied on to prove the inference of negligence came from the plaintiff and that relied on to negative the inference came from another witness called in the plaintiff's case. No authority was cited for the proposition laid down by Else-Mitchell J and, with respect, it is wrong in principle. It assumes that the jury cannot reasonably disregard the evidence which supports the unfavourable inference.

45 Once the evidence in support of the plaintiff's case is isolated in accordance with these principles, the question for the judge is whether, directly or inferentially, that evidence might satisfy a reasonable jury that, on the balance of probabilities, the defendant was negligent. In considering that question, the judge is bound to bear in mind that a conclusion may be reasonable although other reasonable persons may draw an opposite or inconsistent conclusion from the same body of evidence. In *Bradshaw v McEwans Pty Ltd*[50], this Court pointed out that when a question arises as to whether there is evidence of negligence to go to a jury:

> "All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

Unless the jury cannot reasonably say that one conclusion is more probable than the opposite conclusion, it is for them to say which is the more probable.

46 Upon the evidence in this case, it was reasonably open to the jury to accept the evidence of Mr Klug that the plaintiff's subarachnoid haemorrhage, which was diagnosed on admission, was the result of a posterior fossa aneurysm. It was also reasonably open to the jury to conclude from Mr Klug's evidence that only by performing a cerebral angiogram was there any "way of defining whether or not there was another intracranial abnormality such as an aneurysm or other vascular malformation", that such an angiogram would have shown the presence of the aneurysm, and that a reasonably competent neurosurgeon would have considered performing an angiogram for that purpose. Moreover, I think that it was also open to the jury to find that, having regard to the history of the plaintiff's injuries and symptoms, a reasonably competent neurosurgeon *would* have performed an angiogram. In cross-examination, Mr Klug said:

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50 Unreported (27 April 1951) but reproduced in *Holloway v McFeeters* (1956) 94 CLR 470 at 480-481; see also *Luxton v Vines* (1952) 85 CLR 352 at 358.

> "I think, for instance, if 10 neurosurgeons had faced this problem, a number may have said 'let's do [an] angiogram' and a number may have said it is not necessary. I think there would have been a difference of opinion here. My opinion, from my analysis of the case, I felt that there was a reasonable ground to consider the undertaking of the angiogram."

47 The jury was entitled to conclude from this evidence of Mr Klug that some, but not all, neurosurgeons in Mr Jensen's position would have concluded that an angiogram was required. In my opinion, that evidence of Mr Klug was sufficient to get the plaintiff's case to the jury, irrespective of whether Mr Jensen did or did not consider performing an angiogram. It is not to the point that immediately before giving this evidence Mr Klug said he did not think it careless not to conduct an angiogram. If there is evidence upon which the jury could reasonably find negligence on the part of a doctor, the issue is for them to decide irrespective of how many doctors think that the defendant was not negligent or careless. Nor is it to the point that this evidence of Mr Klug also shows that a respectable body of medical opinion would not have performed an angiogram in the circumstances of this case. To allow that body of opinion to be decisive would re-introduce the *Bolam*[51] test into Australian law. In *Rogers v Whitaker*[52], this Court rejected the *Bolam* test and held that a finding of medical negligence may be made even though the conduct of the defendant was in accord with a practice accepted at the time as proper by a responsible body of medical opinion. To many doctors, judges and lawyers, it must seem unsatisfactory that a doctor can be condemned as negligent by a jury when he or she has acted in accordance with a respectable body of medical opinion. But as long as there is evidence that other respectable practitioners would have taken a different view concerning what should have been done by the defendant, the issue is one for the jury, provided of course the evidence is reasonably capable of supporting all the elements of a cause of action in negligence.

48 It follows therefore that I am unable to agree with the opinion expressed by Hayne JA in the Court of Appeal that the evidence established no more than that consideration should have been given to performing an angiogram. Indeed, I think that it was open to the jury to conclude from the above extract of evidence and other evidence of Mr Klug that, when he said that an angiogram should have been considered, he was intending to say that he himself would have performed one if he had had the plaintiff under his care at the time. That itself would have been

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51 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118.

52 (1992) 175 CLR 479.

enough to leave the case to the jury even if every other medical witness had testified to the contrary.[53]

49 Nothing in the further or earlier cross-examination of Mr Klug could be regarded as utterly destroying the effect of those parts of his evidence favourable to the plaintiff. That being so, the plaintiff's case should have been left to the jury.

Order

50 The appeal should be allowed, the verdict in favour of the defendants should be set aside, and a new trial should be ordered.

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53 *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292.

51 KIRBY J. The point of legal principle in this appeal[54] concerns the approach to be taken to an application, at the close of evidence in a civil trial conducted before a jury, for a verdict by direction in favour of the defendant.

Verdicts by direction in civil jury trials

52 There was a time not so long ago when this was an extremely important subject, examined at length by judges[55] and scholars[56]. The history of non-suits and verdicts by direction was surveyed by Windeyer J in *Jones v Dunkel*[57]. When that opinion was written, applications by defendants for such relief were still common in Australia in trials at common law. This is no longer so. A substantial decline in the use of juries in civil trials has consigned much of the old law to the history books. Where the judge conducts a civil trial alone, the distinction in the functions which were formerly assigned to judge and jury respectively become blurred. Much of the old law and procedure is no longer relevant[58] or at least requires significant modification.

53 Because juries remain in use in some States of Australia for particular categories of civil cases, the issues presented by directed verdicts for the defendant can still arise[59]. A jury was summoned to try the facts in the trial out of which this appeal arises. That jury thus became the "constitutional tribunal"[60] to resolve the disputes of fact in the trial. When, at the end of the evidence, the defendants moved for verdicts in their favour, it became the duty of the primary judge (Harper J) to apply the old law. Mr Paraskevas Naxakis (the appellant) complains that, by the application of that law, his Honour erred in withdrawing his claim against Western General Hospital (the first respondent) and Mr Damien Jensen (the second

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54 From orders of the Court of Appeal of the Supreme Court of Victoria, unreported, 5 September 1997 *sub nom Naxakis v State of Victoria & Ors*.

55 See eg Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 204-217; Glass, "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 *Australian Law Journal* 842.

56 See eg Morison, "The Quantum of Proof in Relation to Motions for Non Suit and Verdicts by Direction" in Glass (ed) *Seminars on Evidence*, (1970) at 22.

57 *Jones v Dunkel* (1959) 101 CLR 298 at 319-332.

58 *Alexander v Rayson* [1936] 1 KB 169 at 175; *The Union Bank of Australia Ltd v Puddy* [1949] VLR 242 at 244 per Fullagar J.

59 For example, the issue can arise in some defamation trials. See *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42.

60 *Hocking v Bell* (1945) 71 CLR 430 at 440 per Latham CJ.

respondent) from the jury and directing the jury to return a verdict in favour of those parties. To evaluate the appellant's complaint, it is necessary to revisit the old law and to test what the primary judge did, and what the Court of Appeal of Victoria confirmed, by the application of that law to the evidence received at the trial.

54 The difficulty of applying the accepted principles to the facts of particular cases has long been acknowledged both by trial and appellate judges[61] and by experienced commentators[62]. To avoid, so far as possible, the intrusion of mere temperamental differences between individual judges[63], it is important that the correct formulations of the test be applied and that all who are involved should understand the purpose of, and correct approach to, an invitation by a defendant that the judge should withdraw the issues of fact from the jury and enter a verdict for the defendant on the court's own authority.

The historical change in the formulae

55 Originally, out of respect for the function of the jury (and possibly out of a feeling that it was beneath the dignity of judges of the common law to be concerned with fact-finding in even the smallest degree[64],) the view developed that, if there were any evidence at all in support of the plaintiff's case, the judge was bound in law to leave the disputed issues of fact to the jury. This was sometimes described as the "scintilla doctrine"[65]. A "scintilla" of evidence, meaning a mere atom or fragment, was enough to warrant taking the verdict of the jury in the cause. If a scintilla existed, the judge had no lawful authority to withdraw the matter from the jury's decision[66].

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61 *Hocking v Bell* (1945) 71 CLR 430 at 442-443 citing *Dublin, Wicklow, and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1168; cf *Jones v Dunkel* (1959) 101 CLR 298 at 313 per Windeyer J.

62 See eg Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 207.

63 See eg Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 207.

64 *State Rail Authority v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306 at 322, par [72]; 160 ALR 588 at 609 citing Lord Holt CJ in *R v Earl of Banbury* (1694) Skinner 517 at 523 [90 ER 231 at 235].

65 *Hocking v Bell* (1945) 71 CLR 430 at 503 per McTiernan J.

66 See discussion *Wheelton v Hardisty* (1857) 8 El & Bl 232 at 262 [120 ER 86 at 98].

56 However, in the latter part of the nineteenth century, the Privy Council[67] and other English courts[68] retreated from the "scintilla doctrine". Those courts established "a more reasonable rule"[69] which was reaffirmed by successive decisions of the Privy Council in 1896[70] and 1918[71]. It was that rule which became part of the law of Australia.

57 It would be interesting to speculate about the influence which nineteenth century reforms of civil procedure in England had on the change of approach just described. Was it, for example, influenced by the expanded power accorded to appellate courts to entertain appeals against decisions on the facts (and to draw inferences therefrom)?[72]. However that may be, the undoubted result was to substitute for the "scintilla doctrine" a rule posing for the judge, where the point was raised[73], the question "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed"[74].

58 The formulae which then came to be used in civil trials varied slightly in the words chosen. But some features of the judicial phraseology were common or standard:

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67 *Giblin v McMullen* (1868) LR 2 PC 317 at 335.

68 *Jewell v Parr* (1853) 13 CB 909 at 916 per Maule J [138 ER 1460 at 1463]; *Ryder v Wombwell* (1868) LR 4 Ex 32 per Willes J.

69 *Commissioner for Railways v Corben* (1938) 39 SR (NSW) 55 at 59; cf *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1 at 5.

70 *Hiddle v National Fire and Marine Insurance Company of New Zealand* [1896] AC 372 at 375-376.

71 *Banbury v Bank of Montreal* [1918] AC 626 at 670 per Lord Atkinson.

72 *Hocking v Bell* (1945) 71 CLR 430 at 441 per Latham CJ.

73 Either by requiring a plaintiff to argue a non-suit or by directing a verdict for the defendant. As in England, the old law on non-suits disappeared in Victoria with the *Judicature Acts*. See *Rees v Duncan* (1900) 25 VLR 520; *The Union Bank of Australia Ltd v Puddy* [1949] VLR 242.

74 *Giblin v McMullen* (1868) LR 2 PC 317 at 335 applied in *Commissioner for Railways v Corben* (1938) 39 SR (NSW) 55 at 59.

- The power of the judge to withdraw the decision from the jury was one to be exercised with considerable caution[75].

- It was to be exercised where the only possible verdict which could reasonably be open on the evidence adduced at the trial was one for the defendant.

- In evaluating the jury's response to the evidence, there was attributed to them not only reasonableness in the finding of facts and the drawing of inferences from those facts[76] but also that they were people of "ordinary sense and fairness"[77] who would bring these qualities to bear in making their findings upon the disputes of fact which the judge left them to decide.

- A distinction was drawn between inferences (which a jury may properly draw from the facts) and mere conjecture or speculation (which is not permissible)[78].

- But the question was never, as such, whether the judge, if he or she were the tribunal of fact, would draw the inferences and make the findings which the plaintiff invited[79]. It was not whether the judge thought the case made for the plaintiff was probable or improbable[80]. It was whether the jury, presumed to be reasonable and accurately instructed on the law, could properly find that every ingredient in the plaintiff's case was established[81].

- In approaching a decision on these questions it must be assumed in the plaintiff's favour that the jury will take a view of the evidence most

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75 *Hocking v Bell* (1945) 71 CLR 430 at 441; *Baird v Magripilis* (1925) 37 CLR 321 at 324.

76 See eg Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 206.

77 *Bridges v Directors of North London Railway Co* (1874) LR 7 HL 213 at 236 per Brett J.

78 *Holloway v McFeeters* (1956) 94 CLR 470 at 484.

79 *Hocking v Bell* (1945) 71 CLR 430 at 498-501.

80 Morison, "The Quantum of Proof in Relation to Motions for Non Suit and Verdicts by Direction" in Glass, *Seminars on Evidence*, (1970) 22 at 23.

81 *Holloway v McFeeters* (1956) 94 CLR 470 at 484; cf *Commissioner for Railways v Corben* (1938) 39 SR (NSW) 55 at 59.

favourable to the plaintiff[82] and will reject all evidence and inferences favourable to the defendant[83]. The judge's role was not that of balancing the weight which he or she would personally attribute to the respective cases of the plaintiff and the defendant. No amount of contradictory evidence, even if it were overwhelming, would warrant the withdrawal of a civil case from the jury[84]. If, approached in this way, the facts could reasonably justify a finding in favour of the plaintiff upon the contested elements in the claim, receiving the jury's verdict was an entitlement of law. The judge had no lawful authority to deprive the plaintiff of it[85].

59 By the 1930s, in England as well as Australia, motions for verdicts by direction for the defendant in civil jury trials became very common. This was doubtless a response on the part of defendants to the expansion of the law of negligence following the decision in *Donoghue v Stevenson*[86]. Experienced judges expressed themselves in favour of taking the verdict of the jury[87], wherever possible, in cases where the motion was determined at the close of the evidence (as would ordinarily be the case[88]). It would remain open to a defendant, on appeal, to challenge the jury's verdict on the ground that there was no evidence which reasonably justified their finding. It was not at all uncommon, after a judge, in the absence of the jury, had refused to direct a verdict for the defendant for the jury to

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82 *Hocking v Bell* (1945) 71 CLR 430 at 441, 497.

83 *Leotta v Public Transport Commission of New South Wales* (1976) 50 ALJR 666 at 669; 9 ALR 437 at 449 ("[I]n order to succeed the appellant-plaintiff had to ask the jury to accept some and reject other parts of the evidence of several witnesses she called. It is clear that a jury may do this"); cf *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339 at 353.

84 *Dublin, Wicklow, and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1168.

85 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 217.

86 [1932] AC 562.

87 *Halliwell v Venables* (1930) 99 LJKB 353 at 355 per Scrutton LJ; cf *The Union Bank of Australia Ltd v Puddy* [1949] VLR 242 at 245 per Fullagar J.

88 *Heydon v Lillis* (1907) 4 CLR 1223 at 1227 per Griffith CJ; *Hocking v Bell* (1945) 71 CLR 430 at 441 citing *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 379 per Dixon J.

return such a verdict as the outcome of their own deliberations[89]. But juries could sometimes "baffle" the courts and defendants by persisting in an opinion about disputed facts which appellate courts had successively concluded that no reasonable jury would find[90]. In such cases the practice of the courts was ordinarily to give way to the repeated findings of juries, as reflected in their verdicts[91].

60 It was to avoid verdicts of juries considered too sympathetic to injured plaintiffs that motions for verdicts for the defendant continued to be common well into the 1970s in those parts of Australia where civil juries were used. Ironically, in the last years of the common use of civil juries, at least in New South Wales, such juries were often summoned by defendants who, by that stage, perceived juries to be more discerning on liability and less generous on damages than some judges. Motions for verdicts in favour of the defendant thus fell away even in advance of the widespread statutory withdrawal of the facility of jury trial in civil cases. It causes no surprise that the problem in this appeal is now but a rare visitor to this Court where once it was quite common. However, when the problem presents, it is necessary to apply the established law.

Matters of controversy

61 Differences and controversies persisted, despite the development over more than a century of the law concerning the judicial role, in deciding a motion for a verdict for the defendant, and applying the formulae devised by appellate courts.

62 The judge's function was traditionally described as one of ruling on a question of law. This description was justified in legal theory on the basis that "the insufficiency of evidence to support an issue is a matter of law, upon which the Court must direct the jury"[92]. Nevertheless, whilst recognising the need to categorise the ruling as one on a question of law (because it was committed to the judge[93]), some commentators disputed that an actual ruling of law was involved[94].

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89 *Jones v Dunkel* (1959) 101 CLR 298 was such a case, although the trial was held (by majority) to be flawed by the erroneous direction on the inference favourable to the plaintiff by reason of the unexplained failure of the defendant to call a witness.

90 See eg the history of *Hocking v Bell* (1945) 71 CLR 430 at 488.

91 *Hocking v Bell* (1945) 71 CLR 430 at 488.

92 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 379 per Dixon J.

93 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 210.

94 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) 204 at 209-210.

According to this view, the examination of the evidence necessary to the resolution of all such contests, and its evaluation according to the reasonableness and wisdom attributed to the jury, made it more logical (even if theoretically inconvenient) to acknowledge that the decision of the judge in question was "in the proper sense a pure question of fact"[95].

63 It is not fruitful, at this late stage of this corner of civil procedure, to resolve that debate. But it does draw attention to the evaluative opinion which the accepted judicial formulae necessarily invoke. Take, for example, the words used by Windeyer J in *Jones v Dunkel*[96]:

> "I think that a jury properly directed *might* - not necessarily *should* - *reasonably infer* [the disputed fact in favour of the plaintiff] … A jury *could*, in my view, *properly* think it more probable that this was *so* than that it was *not*."

Many words in this formulation invite judicial evaluation of the evidence. The distinction between "inference" (which is permissible) and "conjecture" (which is not) is also elusive. It too requires judgment. Upon such matters the best judicial minds may differ and often have.

64 Proof that this is so (if proof is desired) can be found long before the present case came to this Court. In *Hocking v Bell,* the primary judge left the plaintiff's claim to the jury. In the Full Court, two of the three judges concluded that the verdict was not reasonably open to the jury[97]. This Court, by a majority of three Justices to two[98], upheld the Full Court. In the Privy Council[99] all five members of the Board affirmed the approach and conclusion of the minority in this Court. There were similar divisions of opinion in two other leading cases in this field:

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95 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 210.

96 (1959) 101 CLR 298 at 319 (emphasis added); cf *Holloway v McFeeters* (1956) 94 CLR 470 at 484 per Kitto J.

97 (1944) 44 SR (NSW) 468.

98 (1945) 71 CLR 430: Rich, Starke and McTiernan JJ; Latham CJ and Dixon J dissenting.

99 (1947) 75 CLR 125.

Luxton v Vines[100] and *Holloway v McFeeters*[101]. Where such judicial differences are so common, it is important that the judge should strive to avoid the fallacy of reasoning described by Evatt J in these terms[102]:

> "The judge himself does not consider the defendant's conduct unreasonable in the circumstances, therefore no other person should consider it unreasonable, therefore any person who thinks it unreasonable is an unreasonable person."

Such reasoning was criticised by Glass JA and his co-authors in vivid language which, one suspects, was born of bitter forensic experience[103]:

> "[O]n this so-called question of law whether there is evidence fit to go to a jury, it commonly happens that the Bench will divide, and judges evincing equal lack of doubt will feel that there is or is not evidence fit to go to a jury. The explanation may well be that we have at work two entirely different approaches to the problem. On the one hand there is an approach which acknowledges that there is open on any given body of evidence a great diversity of reasonable opinion ranging between widely set limits. This attitude readily accepts that many opinions which have no appeal whatever to the judge can reasonably be entertained. Another type of approach is that of the judge who, as it were, tends to draw tightly around his own feet the circle of reasonable inferences and to disallow as unreasonable an inference or finding which has little appeal to him. ... [This] tendency, of course, never operates at a conscious level. Its practice would be condemned by all judges - no less by those who are prone to yield than by those who are relatively immune."

65 These observations, written when civil trials before juries and verdicts by direction were still common, serve as a reminder of the fact that, difficult and contentious as the judicial task is in such a case, it evokes a proper attitude of modesty and respect for the jury's province. It demands a full realisation of the difference between the "mere ground" of the judge's individual opinion and the

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100 (1952) 85 CLR 352. In the Full Court Barry J dissented. In this Court McTiernan and Webb JJ dissented.

101 (1956) 94 CLR 470. At first instance Gavan Duffy J left the question to the jury. In the Full Court, Lowe, Starke and O'Bryan JJ set aside the judgment based on the jury's verdict. In this Court Dixon CJ and Kitto J dissented.

102 *Davis v Bunn* (1936) 56 CLR 246 at 265-266.

103 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 217. Citations omitted.

determination of what it is open to a jury of citizens reasonably to decide[104]. Wherever the judge becomes diverted into an expression of his or her own opinion on the facts; or a decision as to what the jury *should* find[105]; or the balancing exercise which strictly lies within the province of the jury[106], error will have occurred which requires appellate correction[107].

66 Special caution is needed before withdrawing from the jury the resolution of a dispute of facts where the case is not one of direct proof but of the reasonable and definite inferences which are to be derived from the evidence given[108]. Because claims in negligence quite often depend upon circumstantial evidence and the inferences therefrom, once some evidence is adduced which, if accepted, could found a verdict in favour of the plaintiff, it requires the clearest case to support the conclusion that, for legal purposes there is no evidence at all or that the jury could not reasonably accept such evidence as exists or act upon it.

67 Where inferences may reasonably be drawn within the experience properly attributed to a jury of lay people, it must be assumed for the present purpose that the jury would draw the inferences available in a way favourable to the plaintiff[109]. Although it is sometimes said by judges that the evidence proved is equally consistent with the presence and absence of negligence, experienced judges, with much knowledge of jury trial, have observed that it is "a very exceptional case" in which a judge, upon that ground, would direct a verdict for the defendant and deprive the plaintiff of the jury's verdict[110].

68 If from these authorities the bias of the common law appears to be strongly in favour of receiving the verdict of the jury, this should cause neither surprise nor

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104 *Bridges v Directors of North London Railway Co* (1874) LR 7 HL 213 at 236 per Brett J.

105 *Holloway v McFeeters* (1956) 94 CLR 470 at 480-481. cf *Miller v Minister of Pensions* [1947] 2 All ER 372 per Denning J.

106 *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42 at 51 per Clarke JA.

107 *Hocking v Bell* (1947) 75 CLR 125 at 132 (PC).

108 *Bradshaw v McEwans Pty Ltd* (1951), unreported, High Court of Australia cited and applied in *Luxton v Vines* (1952) 85 CLR 352 at 358; cf Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 207.

109 Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 205; cf *Wiliams v Smith* (1960) 103 CLR 539 at 544-545.

110 *Smith v South Eastern Railway Co* [1896] 1 QB 178 at 188 applied *Jones v Great Western Railway Co* (1930) 144 LT 194.

offence. Centuries of experience before this present age taught the general wisdom and reasonableness of the verdicts of civil juries. In respect of the perverse verdict considered to be against the evidence and the weight of the evidence[111] or for a verdict alleged to rest on an absence of evidence, or on mere speculation[112], conjecture[113] or inadmissible hypothesis[114], appellate relief is now available in the appropriate case. But only in a clear case should the judge assume the responsibility of depriving all parties of the jury's verdict and directing or entering judgment in favour of one party.

69 By these established principles, which were applicable in this case, did the primary judge err in withdrawing the appellant's case from the jury? Did the Court of Appeal err in failing to so conclude and to correct his error?

The evidence, ruling and appeal

70 The facts are described in the reasons of Callinan J. The case presented difficulties to both sides because of the very lengthy interval between the alleged negligence and the trial. In light of the evidence, it was open to the jury to infer from the medical records that, when the appellant was seen by a general practitioner (Dr Brophy), he had apparently been knocked unconscious and vomitus was present. When he was admitted on the same day to the respondent Hospital, he was conscious but later suffered a period of unconsciousness and became unarousable. He did not respond to pain for five minutes. He was suffering from neck tenderness and an abrasion to the left mastoid. Mr Jensen, the second respondent, reached a preliminary diagnosis of subarachnoid haemorrhage caused by a blow to the head. The position of the appellant, a boy then of just 12 years of age, was regarded as sufficiently serious for a CT scan to be ordered, then a relatively new technology. This was performed on 18 July 1980 but without contrast medium. Although in the nine days of his initial admission, the appellant's progress showed improvement in his headaches, slight neck stiffness continued to be present on 22 July 1980. He was discharged from the Hospital the following day.

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111 The difference is explained by Latham CJ in *Hocking v Bell* (1945) 71 CLR 430 at 440. See also *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362.

112 *Fraser v Victorian Railways Commissioners* (1909) 8 CLR 54 at 56 applying *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41.

113 *Bell v Thompson* (1934) 34 SR (NSW) 431; *Jones v Dunkel* (1959) 101 CLR 298 at 319 per Windeyer J; *Luxton v Vines* (1952) 85 CLR 352 at 358; *Holloway v McFeeters* (1956) 94 CLR 470 at 471.

114 *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362.

71 Two days later the appellant collapsed at home. He was immediately admitted to the Royal Children's Hospital where an angiogram was performed. Mr Geoffrey Klug, the attending neurosurgeon, diagnosed the appellant as having had a major intracranial bleed from a burst aneurysm. It is now clear that the symptoms displayed by the appellant when first admitted to hospital, and his later serious physical and intellectual impairments, were not the result of a head injury sustained in the schoolyard, but of an aneurysmal bleed.

72 The question was thus presented whether the respondent Hospital, and those for whom it was vicariously liable (including Mr Jensen), gave proper consideration to the possible presence of an aneurysm or to regard that possible diagnosis with the seriousness which it deserved and to follow it up with investigation and treatment which would have avoided the disaster that soon befell the appellant.

73 In this respect, it was open to the jury to accept the evidence of Mr Klug that, given the state of the matters then known to the Hospital and Mr Jensen, they should have considered the possibility that the appellant's signs and symptoms were attributable to an aneurysm and accordingly they should have given consideration to performing an angiogram upon the appellant. Although Mr Klug conceded that his opinion had the advantage of hindsight, this necessarily had to be so. It would be true of any non-treating medical expert qualified to give evidence in such a case. It was open to the jury to disregard such a concession or to treat it as stemming from professional courtesy or collegial sympathy for Mr Jensen.

74 The jury were thus faced with the question as to whether, in fact, Mr Jensen had considered "any other form of treatment or examination or investigation". To this question he responded: "I cannot be sure. I cannot remember". The Hospital's notes contained no record that a differential diagnosis of aneurysm was entertained by Mr Jensen, although he was the attending clinician with responsibility for the diagnosis, investigation and treatment of the appellant's condition. There were a number of particular considerations which, in the evidence, would have left it open to the jury to conclude that a provisional diagnosis of aneurysm and consequent investigation would have been reasonable in the circumstances. These included the provisional diagnosis of subarachnoid haemorrhage already made; the findings on the CT scan which were not consistent with the given history of a minor blow; the fact that subarachnoid haemorrhage, to be traumatic in origin, usually follows a significant blow to the head which the available history in this case did not support; and the persistence of symptoms throughout the initial admission to hospital.

75 On the foregoing evidence, more fully set out in the reasons of Callinan J, it was open to the jury reasonably to infer, as a matter of fact, that Mr Jensen did not give consideration to an aneurysm being the underlying cause of the appellant's persisting symptoms. Not only could he not remember doing so but the Hospital

records make no mention of it and this in a case with established persistence of symptoms and signs in a young boy whose CT scan demonstrated peculiarities not easy to reconcile with the minor, even trivial, trauma recounted in the history. If the jury concluded, on the basis of the objective evidence and reasonably available inferences, that Mr Jensen did not in fact give due consideration to the possibility that the explanation of the signs and symptoms was an aneurysm and not merely the aftermath of minor trauma (and thus did not consider the need for an angiogram), the first step in establishing the negligence of Mr Jensen, and thus of the Hospital, could reasonably be taken. I do not consider that to so conclude would have been unreasonable or mere speculative conjecture on the part of the jury. Nor did it involve or require expert medical opinion. It was a pure question of fact.

76 Once the jury took the first step, and concluded that Mr Jensen did not, as he should have, consider aneurysm and the need for an angiogram, it would have been a small step for them to conclude that the failure to consider this alternative diagnosis was a cause of the second haemorrhage suffered by the appellant with its grave results[115]. Where, as here, a plaintiff demonstrates that it was open to a jury to conclude that the respondents were in breach of their duty of care to him and this breach was closely followed by his damage, a prima facie causal link is established. It may be displaced and it may be rejected; but it cannot be ignored in considering a motion for judgment for the defendant for want of evidence [116].

77 If the jury accepted that Mr Jensen had negligently failed to diagnose a non-traumatic cause for the appellant's persisting signs and symptoms, had failed to consider the alternative diagnosis of aneurysm and the need for, and advisability of, an angiogram to exclude that possibility, it would have been open to the jury to find a causal connection between the premature release of the appellant from the hospital on 23 July 1980 and the second haemorrhage which occurred two days later. On this basis, I do not need to consider whether an alternative or additional foundation for a verdict in favour of the appellant existed, in terms of his loss of the chance of accurate diagnosis and of prompt treatment and whether this was available in the evidence and in the way the case was pleaded and fought[117].

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115 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Chappel v Hart* (1998) 72 ALJR 1344 at 1367, par [93.8]; 156 ALR 517 at 548; *McGhee v National Coal Board* [1973] 1 WLR 1 at 6; [1972] 3 All ER 1008 at 1012.

116 *Betts v Whittingslowe* (1945) 71 CLR 637 at 649.

117 *Chappel v Hart* (1998) 72 ALJR 1344 at 1368, 1377; 156 ALR 517 at 549, 561; *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47 at 56-57; *Chaplin v Hicks* [1911] 2 KB 786; *Hotson v East Berkshire Health Authority* [1987] 2 WLR 287 at 294; [1987] 1 All ER 210 at 215.

78 When the reasons of the primary judge are examined it seems clear, with respect, that he did not approach his function, at least with regard to the present parties, in the manner required by legal authority. That authority demands, as I have explained, that the judge accept (as the jury reasonably might) all of the evidence favourable to the appellant and disregard all of the evidence favourable to the respondents. In a number of places, his Honour's reasons suggest that he embarked on a weighing of the entirety of the evidence in the manner that would be appropriate to a final judgment in a trial where he was sitting without a jury. Thus, at one stage in his reasons he says:

> "On the other hand, the overwhelming body of evidence points to the conclusion that Mr Jensen was not at fault in persisting with his diagnosis of traumatic subarachnoid haemorrhage."

79 The criterion to be applied is not what the "overwhelming body of evidence" suggests but what those parts of the evidence which the jury might reasonably accept as favouring the appellant, permitted to the jury whose province it was to resolve the disputes of fact.

80 It was "against this evidentiary background", as his Honour described it, that the primary judge concluded that the absence of expert evidence to the effect that an angiogram should have been ordered was fatal to establishing the link between the default that might be found and the damage which certainly ensued. However, unless the provisional diagnosis of aneurysm was made at the critical time, it would have been reasonably open to the jury to conclude that no consideration whatever would be given to the performance of an angiogram. Yet that was the one sure way of discovering the presence of an aneurysm (if one existed) and of proceeding with the treatment that would potentially prevent or reduce the grave risks inherent in the condition which the appellant presented. As a matter of common sense, it would have been open to the jury to reason that a cause of the appellant's damage was the failure of the Hospital and Mr Jensen to take the first step that had the potential of avoiding serious risks to him. The evaluation of such matters was for the jury.

81 Much attention was also paid by the primary judge and the Court of Appeal to certain parts of Mr Klug's evidence, in which he suggested that the diagnosis by Mr Jensen of traumatic subarachnoid haemorrhage was not unreasonable in the circumstances and that, therefore, it was not negligent of Mr Jensen to fail to order an angiogram. To what extent can the opinions of fellow medical practioners be regarded as determinative on the issue of Mr Jensen's alleged negligence? In *Rogers v Whitaker*[118], this Court pointed out that the standard of care owed by persons possessing special skills is not determined "solely or even primarily by reference to the practice followed or supported by a responsible body of opinion

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118 (1992) 175 CLR 479.

in the relevant profession or trade."[119] Instead, whilst evidence of acceptable medical practice is a useful guide for the courts in adjudicating on the appropriate standard of care, the standard to be applied is nonetheless that of the "ordinary skilled person exercising and professing to have that special skill."[120] In light of this decision, the direct suggestion by Mr Klug that Mr Jensen was not negligent cannot be regarded as determinative. By reference to such evidence, the jury might indeed have been persuaded to reject the applicant's claim of negligence. But, so long as there was evidence upon which the jury might reasonably act, that decision belonged by law to the jury. It was not for the trial judge to reach his conclusion based on his evaluation of "the overwhelming body of evidence".

82 Part of the difficulty in the Court of Appeal's approach to the appeal, when it was before that Court, arose, I think, from the application in its reasoning of the authority of the Full Court of the Supreme Court of Victoria in *Protean (Holdings) Ltd v American Home Assurance Co*[121]. The holding in that decision is encapsulated as follows[122]:

> "[T]he question of the sufficiency of evidence upon a no case submission is whether there is any evidence that ought reasonably to satisfy the tribunal of fact that the facts sought to be proved are established".

83 This passage presents a number of difficulties for the present matter. First, *Protean*[123] was a case where the judge was hearing the action without a jury. In such a case some of the considerations and procedures proper to jury trial do not arise, at least in exactly the same way. Secondly, there is a danger in the use of the word "ought" in the passage cited. It may, when applied to a judge sitting with a jury, mislead that judge into believing that his or her function is to weigh up all of the evidence, as the primary judge said he did here. Whatever may be the

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119 (1992) 175 CLR 479 at 487. The decision in *Rogers v Whitaker* amounted to a rejection of the so-called *Bolam* principle (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118). In *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 at 881, the *Bolam* principle was stated by Lord Scarman in the following terms: "The *Bolam* principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."

120 (1992) 175 CLR 479 at 487.

121 [1985] VR 214.

122 [1985] VR 214 at 240; cf *Commissioner for Corporate Affairs v Green* [1978] VR 505 at 514.

123 [1985] VR 214 at 215.

position in response to a no case submission in a civil trial conducted without a jury, the position of the judge in a jury trial is plain. The verbs appropriate to the judge's function in relation to the jury's prerogatives are "may" or "might". They are not "ought" or "should". Thirdly, as the authorities which I have mentioned demonstrate, the approach proper to a jury trial is more complex than that portrayed in the passage taken from *Protean* and relied on by the Court of Appeal. The authorities show that the application for a verdict by direction requires an approach which is properly respectful of the constitutional functions of the jury and of the jury's capacity to resolve all disputed facts that may reasonably be taken into their account.

84 When the proper test is applied, the error of the Court of Appeal in failing to correct the judgment entered by the primary judge against the appellant and in favour of the present respondents is demonstrated. This Court should correct that error.

Orders

85 The appeal should be allowed with costs. The judgment of the Court of Appeal, in so far as it dismissed the appeal of the appellant against the judgment entered in favour of the respondents, should be set aside. In lieu thereof, in those proceedings it should be ordered that the appeal be allowed with costs; the judgment and orders of Harper J set aside insofar as they relate to the respondents, and a new trial had of the action between the appellant and the respondents. The costs of the first trial between the appellant and the respondents should abide the outcome of the second trial.

86 CALLINAN J. This appeal raises a question of the sufficiency of evidence required for the submission of a plaintiff's case in negligence to a jury.

87 The appellant, Paraskevas Naxakis, was the plaintiff in an action for negligence brought against the State of Victoria, the respondent hospital and doctors, and others, for damages in respect of supervision by teachers at his school, and diagnosis and treatment by doctors at the hospital on his admission there.

88 On 14 July 1980, when the appellant was 12 years old, he and some of his class mates left their classroom at Spotswood Primary School at the end of the school day. They walked across a sports oval within the grounds of the school, towards a gap in a fence, giving access to streets to their homes. As they walked across the oval, a fellow student (then aged 11) struck the appellant with a school bag (a largely empty, soft vinyl bag with a cardboard insert in the base), on the back of the appellant's head. One witness, the boy who struck the appellant, described the incident as, "just kids mucking around". The appellant made no complaint of pain at the time, was not visibly affected, and kept walking.

89 After the boys had left the school grounds, the fellow student began "jumping up under a fence and kicking [himself] off the fence and trying to spin around in the air". As he was spinning around, he struck the appellant again on the back of the head with the school bag. Thinking the appellant might retaliate, the fellow student fled. The appellant collapsed.

90 The appellant was taken then to Dr Brophy, a general practitioner who recommended that he be admitted to the Western General Hospital for observation and treatment.

91 At the hospital, the appellant fell into a deep unarousable unconsciousness for five minutes and was unresponsive to painful stimuli. There were traces of vomit around the corners of his mouth and he began to exhibit signs of opisthotonos – spasm in the muscles of the neck, back and legs and backward contortions of the body. A preliminary diagnosis was made of a subarachnoid haemorrhage caused by a blow to the head.

92 For a further nine days, the appellant remained in the hospital under the supervision of the second respondent, Mr Jensen, who was then the senior neurosurgeon at the hospital. A CT scan was undertaken (without the use of a contrast medium) which indicated a subarachnoid (traumatically caused) haemorrhage near the fourth ventricle. The appellant's treatment was based on this diagnosis and he was discharged from the hospital on 23 July 1980.

93 Two days later the appellant collapsed at home and was taken to the Royal Children's Hospital. There he was attended by Mr Klug, director of neurosurgery, given an angiogram and diagnosed as having suffered a major intracranial bleed from a burst aneurysm. On 11 September 1980 an operation was performed to

insert a ventricular peritoneal shunt to drain cerebrospinal fluid. On 14 November a craniotomy was performed to clip the aneurysm. The appellant has suffered serious and permanent physical and intellectual impairment as a consequence of the bursting of the aneurysm.

94 On 16 August 1996, after a trial before a judge and jury lasting 14 days, the respondents made a "no case" application to the trial judge, Harper J. His Honour ruled in favour of all respondents and directed the jury to find for the respondents. His Honour held that no defendant had a case to answer and there is no appeal against that ruling other than with respect to the hospital and those for whom it is vicariously liable. In his ruling, his Honour said:

> "I now turn to the case against the hospital and Mr Jensen. It is that given the plaintiff's symptoms following his admission on 14 July 1980, Mr Jensen should have considered the possibility of a rupture of an aneurysm; and having considered that possibility, should have ordered an angiogram. An angiogram, if undertaken, would have revealed the existence of the aneurysm. Those treating the plaintiff would then have had to decide upon the timing of an operation to prevent any further rupture. A carefully reached decision on that point might not have resulted in any procedure which would have prevented the rupture of 25 July. At least, however, the plaintiff would have had a chance to avoid the effects of that event."

95 His Honour then went on to summarise, accurately in my view, the effect of much of the medical evidence.

> "There is some evidence to support much of this line of reasoning. There were indications that a diagnosis of traumatic subarachnoid haemorrhage, although reasonable, might not be correct. Those indications were consistent with a bleed resulting from a ruptured aneurysm. They were also, however, consistent with other possible diagnoses. One of these, an extradural haematoma, in the posterior fossa, was tested by the taking of the CT scan. The scan eliminated a haematoma as a possibility.
>
> It might be said that, given these circumstances, the jury would be justified in deciding that Mr Jensen had a duty to consider the remaining alternative diagnoses, including that of an aneurysmal bleed; and, having considered the latter, to put it to the test of an angiogram. After all, the CT scan did not of itself explain the disquieting symptoms. It confirmed the presence of an amount of blood which accounted for a slow recovery accompanied by headaches, the opisthotonos and the like. It did not confirm trauma as the cause of the bleeding. Indeed the presence of blood in the fourth ventricle pointed in some other direction."

96 Having said, correctly again in my view, that a jury might be justified in deciding that Mr Jensen may have failed to perform a duty he owed, his Honour

then went on to undertake an evaluative, or qualitative exercise in weighing and assessing the evidence for its ultimate persuasive effect as it appeared to him:

> "On the other hand, the overwhelming body of evidence points to the conclusion that Mr Jensen was not at fault in persisting with his diagnosis of traumatic subarachnoid haemorrhage. That diagnosis was indicated by the plaintiff's history of a blow to the head, followed by a possible loss of consciousness and an abrasion in the left mastoid region. None of the plaintiff's subsequent symptoms were necessarily inconsistent with the preferred diagnosis. At the most, they raised queries about, but certainly did not eliminate, trauma as the cause of the plaintiff's subarachnoid bleed.
>
> In 1980, the effects of trauma to the head were not so well understood as they are now; and that is not to say that, even now, trauma would not be entertained as the most likely cause of the plaintiff's condition. Aneurysms in children of the plaintiff's then age are extremely rare. Even when present, they are not particularly susceptible to trauma. Moreover, the performance of an angiogram on a 12 year old child still carries, as it carried in 1980, a degree of risk which indicates (and indicated) that it not be done unless there be particular reason to think that an aneurysm were present.
>
> It is against this evidentiary background that not one medical witness said that, faced with a patient such as the plaintiff, he (all the witnesses in question were males) would have ordered an angiogram. None suggested that the failure to order an angiogram was in any way open to criticism. In the absence of such evidence from the medical experts, it would, in my opinion, not be open to the jury to find that Mr Jensen was in breach of his duty to the plaintiff in failing so to order."

97 To state the issue, as his Honour does in the last paragraph, as one which may, or should be resolved by reference to the absence or otherwise of criticism by a medical expert, obscures the real question which a trial judge sitting with a jury should ask himself or herself when a submission of "no case" is made. It may well be that his Honour approached the matter in the way in which he did because he was applying *Protean (Holdings) Ltd v American Home Assurance Co* to which he had earlier referred[124]:

> "[T]he question of the sufficiency of evidence upon a no case submission is whether there is any evidence that ought reasonably to satisfy the tribunal of fact that the facts sought to be proved are established."

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124 [1985] VR 187 at 240.

98 The appropriateness of the language used in that test is a matter to which I will return. The Victorian Court of Appeal unanimously refused the appellant's appeal to that Court.

The appeal to this Court

99 The appellant's grounds of appeal to this Court are as follows:

1. The Court of Appeal erred in deciding that:

   (a) the trial judge was correct in withdrawing the case against the respondents from the jury on their submission that there was no case to answer;

   (b) there was no evidence on which a jury could find that the appellant's loss and damage was caused by the negligence of the second respondent;

   (c) there was no evidence which justified a conclusion about when reasonable care would have required reconsideration of the diagnosis;

   (d) there was no evidence that the second respondent did not consider the possibility of ordering an angiogram;

   (e) there was no evidence that the second respondent had failed to diagnose the appellant's condition adequately.

2. The Court of Appeal erred in failing to decide that there was sufficient evidence for a jury to decide that the appellant suffered loss and damage because he lost the chance of proper treatment.

3. The Court of Appeal erred in that it misapplied the proper test to be applied in determining a submission of a no case by a defendant in that it undertook an analysis of the sufficiency of the evidence that was before the jury.

4. The Court of Appeal erred in failing to conclude that on the totality of the evidence led by the parties there was evidence fit to go to the jury on the issue of the negligence of the second respondent.

5. The Court of Appeal erred in failing to decide that:

   (a) a jury was entitled to conclude that the second respondent failed to consider a diagnosis of aneurysmal subarachnoid haemorrhage as a cause of the appellant's bleeding and that by reason of such failure the appellant lost the chance that the second respondent would have undertaken proper tests to establish this as the correct diagnosis;

   (b) a jury was entitled to conclude that the second respondent failed to properly diagnose the appellant's injury.

100 It is necessary to refer to the medical evidence in some detail. Among the medical witnesses was Mr Klug who was called by the appellant and who was in charge of the appellant's treatment at the Royal Children's Hospital from 25 July 1980. Some of Mr Klug's evidence consisted of a repetition orally of what he had earlier written in reports. In one of these he had stated:

> "I am sure that this aneurysm was present prior to the alleged injury. Generally speaking, such aneurysms rupture spontaneously and there is no antecedent history of trauma, nor often of any other associated event. It is true that trauma can act as a precipitating factor in the development of an aneurysm rupture. I would consider that trauma to produce this would have to be at least moderate in degree and I doubt if a blow from a school bag could be a responsible factor. As I have indicated, I do not have an exact description of what happened at school and if you do have additional information it would be appropriate to forward same to me and I may be able to enlarge further on this point."

101 In another report, Mr Klug wrote, and similarly responded to a question from the trial judge in this way:

> "After studying the details in the clinical records from the Western General Hospital there appears to be absolutely no doubt that this child did have evidence of a subarachnoid haemorrhage. All of the symptoms are completely in keeping with such a diagnosis, as were apparently the appearances on a CT scan performed some days after the initial admission."

102 I interpolate that the symptoms and the results of the CT scan must have been known to the respondents throughout the period during which, as Mr Klug says, the appellant was undoubtedly displaying evidence of a subarachnoid haemorrhage. Mr Klug continued:

> "After considering all the information available, I feel it is most probable that the subarachnoid haemorrhage, present during his admission at the Western General Hospital, resulted from rupture of the subsequently demonstrated posterior fossa aneurysm.

HIS HONOUR: What does that mean?

I think there was a haemorrhage in the subarachnoid space, your Honour, resulting from rupture, of the disorder known as a cerebral aneurysm.

…

There is no doubt that following a blow to the head bleeding can take place into the subarachnoid space in the absence of any abnormality of the cerebral vasculature. In my experience such a pattern usually follows a significant blow to the head, this being indicated by an early and often prolonged disturbance of the conscious state."

103 Later, still reading from his report, Mr Klug added:

"As I have indicated in general, a traumatic subarachnoid haemorrhage in the absence of any vascular anomaly usually follows a significant blow to the head. In this particular instance it did not appear that this child suffered such an insult. It was stated that he was hit on the head by a school bag and there was a questionable loss of consciousness."

104 The trial judge asked a further question and the witness responded:

"HIS HONOUR: The evidence which the jury presently has, from one witness only, is that the plaintiff was struck at least once, possibly twice, with an empty school bag made of vinyl with a cardboard base. Would you expect that such a blow, even if delivered with the bag moving at some speed, would qualify as a significant blow in the sense that you used the word significant?

No, I would think that would not qualify to be so described your Honour."

105 Later, after discussing the diagnostic limitations of the CT scan that had been made, Mr Klug said this:

"It appeared to me that this person suffered but a minor head injury. I based that on the information I obtained from the hospital records and I felt that the clinical course indicative of a severe subarachnoid haemorrhage was not in keeping with what appeared to be to me a relatively minor head injury. I also felt that the findings on the CT scan were indicative of a significant haemorrhage within the head. I considered the pattern of the blood on the scan to be a little unusual and because of all of these findings I considered that some consideration should have been given to an alternate diagnosis.

COUNSEL: What is meant by an alternate diagnosis; what is encompassed in that phrase?

> I think one would have to be concerned that there could be some other disorder in the person which has produced a subarachnoid haemorrhage, other than the instance of trauma."

106 His language is quite explicit: "one would *have* to be concerned". (Emphasis added.)

107 Mr Klug then referred to the utility of an angiogram:

> "The only way you could really decide if there was some other abnormality producing the haemorrhage would be by performing an angiogram. There was no other way of defining whether or not there was another intracranial abnormality such as an aneurysm or other vascular malformation. The only way one could really determine if there was such an abnormality there causing the subarachnoid haemorrhage would at that time be by the performance of cerebral angiography.
>
> COUNSEL: After reading those hospital records and nursing notes did you form any belief as to whether it would have been appropriate to perform an angiogram?
>
> I thought that serious consideration should have been given to performing an angiogram at that time, yes.
>
> COUNSEL: What would that have shown?
>
> I believe that an angiogram would have shown the presence of the aneurysm."

108 Mr Klug discussed the risks associated with the procedure, implying fairly clearly that its advantages outweighed the risks:

> "There is always a small risk of a stroke from the technique. There is also the risk of damaging one of the arteries where the catheter or needle is inserted. The risks are small but nevertheless are apparent. The child would also need a general anaesthetic to have such an investigation undertaken and there is always a small risk of something going wrong with an anaesthetic, so it is an invasive procedure not without some risk.
>
> COUNSEL: Was it available at the Royal Children's Hospital in July/August 1980?
>
> Yes, it was.
>
> COUNSEL: How many angiograms did he undertake at the Royal Children's Hospital at your direction, Mr Klug?

I think it was just the one angiogram that was done. It was a four-vessel study to show all the vessels inside the head."

109 In the Court of Appeal, the respondents pointed to some cross-examination of Mr Klug to seek to support the withdrawal of the case against the hospital from the jury:

"COUNSEL: I suggest to you that whilst he might have, there was nothing in any way untoward in his treatment in Mr Jensen deciding not to conduct a angiogram, having regard to the course he followed and to the findings that Mr Jensen himself made?

Yes, I still believe that one should have considered the undertaking of an angiogram after considering all of the pattern.

COUNSEL: But the decision not to perform a angiogram, you would not consider, I suggest, to have been in any way in dereliction of Mr Jensen's duty or anything of that nature?

No, I don't think it is negligent at all. I think it should have been a matter that perhaps should have been considered.

COUNSEL: Yes, but it is certainly not a question, it is not a matter that, on looking at the notes and reviewing the case completely, a decision not to conduct a angiogram would not in the circumstances – you would not regard it as in any way negligent, would you?

I don't believe it is a negligent act, I think as I said it is something which should have been considered calmly at the time in view of the pattern of the whole situation.

…

HIS HONOUR: Did you wish to add to what you have just said, Mr Klug?

What I was saying, your Honour, is I think that after considering all of the information, then as I said before I believe that consideration should have been given to undertaking an angiogram to exclude any other cause of the subarachnoid haemorrhage.

COUNSEL: Yes, but a decision not to conduct a angiogram you wouldn't consider in the circumstances to have been a decision that was in any way careless?

No, no, I don't think it is careless, I think it is a variation of interpretation. I think, for instance, if 10 neurosurgeons had faced this problem, a number

> may have said 'let's do an angiogram' and a number may have said it is not necessary. I think there would have been a difference of opinion here. *My opinion, from my analysis of the case, I felt that there was a reasonable ground to consider the undertaking of the angiogram*." (Emphasis added)

110 I would not regard these passages as utterly destroying[125] the effect of the other evidence which did in my opinion clearly raise a case to go to the jury. At this point I would observe that there is an increasing tendency for counsel to seek to elicit (and their opponents to acquiesce in this endeavour) evidence on the ultimate legal issue. In the absence of a statutory basis[126] for the reception of such evidence, the better view I think is that a court should generally uphold an objection to it[127]. However, as the passage quoted shows, there was no objection to the question and the answer to it. Here, whatever practical difficulties such evidence not objected to and received by the Court might have caused for the appellant had the case been left to the jury, it cannot, for reasons which will appear, be determinative of the issue whether the case should have been permitted to go to the jury.

111 The question is not whether a particular piece of evidence detracts from or equivocates with respect to, or even contradicts, in the opinion of a trial judge sitting with a jury, evidence which is capable of supporting a verdict in favour of a plaintiff. Accordingly, some equivocal evidence given by the neurosurgeon, Mr Cummins, which was referred to by the Court of Appeal, could not, in my opinion, justify the withdrawal of the case from the jury:

> "COUNSEL: In the shoes of those practitioners looking after the patient at the time and with the limited information they then had and to assess whether a diagnosis of traumatic subarachnoid haemorrhage was one that could reasonably have been made?

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125 See *Hocking v Bell* (1945) 71 CLR 430 at 490 per Dixon J.

126 *Evidence Act* 1995 (Cth), s 80.

127 The difficulties associated with such a view adverted to in *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 34 NSWLR 129 at 130-131 are in my opinion overstated. In *Murphy v The Queen* (1989) 167 CLR 94, Mason CJ and Toohey J (at 110) and Deane J (at 127) doubt (without deciding) whether there is such a rule. But see Glass JA in *R v Palmer* [1981] 1 NSWLR 209 at 214; *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 at 675-676 and Glass, "Expert Evidence" (1987) 3 *Australian Bar Review* 43. See also *Thannhauser v Westpac Banking Corporation* (1991) 31 FCR 572 per Pincus J; *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6)* (1996) 64 FCR 79 per Lindgren J who are of the same view as Glass JA. See also *Cross on Evidence*, 5th Aust ed (1996) at par 29105.

It is certainly a reasonable diagnosis. Whether it was reasonably the one that should have come to the top I think is the issue that I would be addressing and I still say that I have got hindsight and it is very difficult for me to ascertain.

COUNSEL: It would be reasonable to make one diagnosis; would it also be reasonable to look at any other diagnosis?

One always should look at other diagnoses but to how far one looks in any one case is limited.

COUNSEL: And on the clues that you saw here, what was the other diagnosis that should have been looked at?

The one that was – I would have thought the one that was looked at was something else going wrong in the posterior fossa of the brain, which it did.

COUNSEL: And in your view, ought the aneurysmal haemorrhage have fitted into that category?

Yes it should. Other causes of subarachnoid haemorrhage could have been fitted into the category, but it is a matter of weighting, by weighting I mean w-e-i-g-h-t, putting weights on decisions one makes in the situation.

COUNSEL: Was this aneurysm in the posterior fossa that you speak of?

I understand, yes, posterior inferior cerebellar artery."

112 And a little later Mr Cummins gave further evidence:

"COUNSEL: Mr Cummins, I want to ask you hypothetically to answer this question: if a differential diagnosis of aneurysmal haemorrhage had been entertained, what method was available to determine whether there was an aneurysm present?

Angiography.

COUNSEL: What is that?

The injection of material into the arteries of the brain that would allow them to be outlined on X-ray.

COUNSEL: And looking at these records that you have looked at, if that diagnosis was entertained was angiography a tool of finding out whether an aneurysm was present?

I'm sorry; I'm not sure …

COUNSEL: On this boy's presentation in hospital, was he capable of being angiogrammed?

Oh yes, he was certainly capable of being angiogrammed.

COUNSEL: If a differential diagnosis of aneurysm had been entertained would you have undertaken an angiogram?

If I had entertained the diagnosis of aneurysmal subarachnoid haemorrhage?

COUNSEL: Yes?

Yes, I believe anyone who would have entertained that diagnosis would have done so.

COUNSEL: Mr Cummins, looking at those notes, was an aneurysm, if it had been detected, capable of being clipped in the period during which this boy was in hospital?

Based on my knowledge that it was clipped, it could have been technically clippable. The first part of your question – the second part …

COUNSEL: Having regard to the boy's condition in hospital, at some stage was that boy capable of undergoing a clipping of the aneurysm?

Certainly capable.

COUNSEL: At what time would that have been?

At any time but whether it would have been wise to do so was a different matter.

COUNSEL: In those days was there a period for it?

In those days we tended to delay clipping aneurysms on people who had a subarachnoid haemorrhage for several days.

COUNSEL: Seven to ten days?

My tendency was seven to ten days.

COUNSEL: As from the first bleed?

As from the bleed." (Emphasis added.)

113 The last answers to which I have referred may have suggested that even had the proper diagnosis been made, the prudent treatment of it may have required a delay in the performance of the subsequent surgical procedure of clipping, such that it would not have been performed in time anyway to ameliorate the appellant's condition. The passage which has been quoted, the Court was told, was the only passage which contained such a suggestion. Its relevance and force, if any, would have been matters entirely for the jury on a consideration of the issue of causation and damages.

114 Whilst discussing Mr Cummins' evidence it is convenient to look at another passage upon which the respondents relied:

> "COUNSEL: Yes, but looking at it – and I must ask you to put aside the question of hindsight, if you can; if you can't, please concede that, and you needn't answer the question, but the fact of the matter is that doing the best you can to put aside hindsight and knowing what Mr Jensen knew on the ground, his overall treatment of this boy was entirely reasonable, wasn't it?
>
> Knowing what he knew and making the interpretations that he did it was entirely reasonable."

115 That evidence, which is only one piece of a large body of evidence, does not avail the respondents on the issue that the Court of Appeal and this Court has to resolve, because it is clearly based on a premise of the reasonableness of the interpretation [diagnosis] which was one of the matters that the jury had to determine.

116 There is another passage, this time in the evidence of Mr Jensen, which should be quoted because, either alone, or taken with other evidence, it constitutes a body of evidence upon which the jury could act to find the respondents liable:

> "COUNSEL: Would you agree that there is in a case such as this room for consideration of a differential diagnosis?
>
> There's always room for consideration of a differential diagnosis in any condition.
>
> COUNSEL: One of those would be to look for the presence of an aneurysmal basis for the subarachnoid haemorrhage, is it not?
>
> When making, sorry …
>
> COUNSEL: Or a spontaneous aneurysm or an aneurysm which produces a subarachnoid haemorrhage; would you agree with that?
>
> When taking a differential diagnosis, one always prepares a list and then it is as if one is a bookmaker preparing a board. You prepare a list of the possibles

and then assign odds to them. So there would be a favourite, perhaps ten to one on, an even money candidate and some other long shots, perhaps at 50 and 100 to one. Having made those considerations in this particular game, the favourite generally wins, and if it is necessary to undertake invasive and potentially hazardous investigations one would not risk a large sum of money on a long shot, as it were.

COUNSEL: If I might use the expression the punt in this instance is the patient, isn't he? He is the one, if anything happens, who has to suffer the loss, doesn't he? Would you agree?

Um, yes, I suppose so.

COUNSEL: *Do you agree that your duty then extends to look at other possible causes of a subarachnoid haemorrhage?*

Yes." (Emphasis added)

117 The true test is that stated by Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd*[128]:

"[I]f the stage is reached that a *prima facie* case has been made out, the question whether the jury should accept that case, or should accept rebutting evidence called for the defendant, is one for them, no matter how overwhelming the rebuttal evidence may be; and the trial Judge must leave it to them."

118 That statement was expressly approved by Latham CJ in *Hocking v Bell*[129]. It has almost universally been acted upon in practice.

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128 (1941) 42 SR (NSW) 1 at 5.

129 (1945) 71 CLR 430 at 442.

119 Even with respect to the evaluative function of assessing a jury verdict based upon very slight evidence which an appeal court (but not a trial judge) may undertake, Dixon J expresses grave reservations[130]:

> "There is no question in a trial that is regarded as so clearly within the exclusive province of the jury to decide as the reliance to be placed upon the evidence of a witness whom they have seen and heard. The fact must therefore be faced, that however little faith we as judges may have in all this, yet before the defendant can be entitled as a matter of law to a verdict he must so utterly destroy the plaintiff's narrative as to place it outside the competence of a jury to give any credence to the material parts of it, a thing which in my experience I have never seen done with reference to direct oral testimony given upon a civil issue."

120 Both Latham CJ and Dixon J dissented in *Hocking v Bell* but their dissent does not diminish the force and authority of the statements I have quoted. Earlier, I referred to the question that the trial judge formulated in this case by reference to *Protean*. The language used was "evidence that ought reasonably to satisfy …". The use of the words "ought" and "reasonably" introduces unnecessary complications and tends to invite the exercise of a non-existent evaluative function, and should not in my opinion be used and applied. The formulation stated by Jordan CJ is much to be preferred.

121 The test propounded by Jordan CJ is much closer to that which has been held to be applicable in criminal proceedings by this Court[131].

122 The importation into the test of the word "reasonably" is likely to give rise to serious difficulties in practice. It is the function of the jury to decide whether the evidence is sufficiently founded in reason for them to conclude that a case has been made out. In *Doney v The Queen* this Court (Deane, Dawson, Toohey, Gaudron and McHugh JJ) said[132]:

> "It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

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130 (1945) 71 CLR 430 at 490.

131 *Doney v The Queen* (1990) 171 CLR 207 at 214-215.

132 (1990) 171 CLR 207 at 214-215.

123 If "reasonableness" is to form part of the test in a civil jury trial it would not be surprising if judges were to differ in their assessments of plaintiffs' cases and some were to regard a case which is, to use the language of this Court in *Doney*, tenuous, inherently weak or vague, as not being such as ought reasonably to satisfy the jury. Yet such a case, may, indeed, must be left to the jury in a criminal trial. Whatever one may think of the appropriateness of the exclusion of the role of a trial judge in such a case in a criminal trial, there can be no warrant for the imposition of a higher threshold for a plaintiff to cross in the case of a civil trial. In a civil trial at common law, unlike in a criminal trial, a judge has no discretion to exclude evidence because its probative value is, in the judge's opinion, outweighed by its prejudicial effect[133]. Nor may a judge in either type of case exclude evidence because he or she might think it weak or vague. So too, tenuousness is not per se a ground for exclusion if the evidence is relevant. Once relevant evidence admissible in form is received in a civil trial (as it must be) then it is entirely for the jury and not the judge to evaluate it for its reasonableness and probative effect.

124 The appellant contends that the evidence in this case, particularly the extracts that I have set out required that the case be left to the jury on the application of the proper test. In a nutshell, the appellant put his case on the facts in this way. The evidence could lead a jury properly to infer that on the basis of the appellant's history and presentation in hospital, there was no reason to infer that the trauma was of moderate to severe force, that other symptoms displayed by the appellant on admission to hospital were consistent with a cause other than trauma, and that the volume of blood shown on the CT scan was not typical of trauma as the cause. By reason of these inferences, the jury were entitled to conclude that the second respondent should have considered an alternative diagnosis of aneurysmal haemorrhage and verified it by performing an angiogram. It was further contended by the appellant that consideration of an alternative diagnosis should have taken place when the results of the CT scan revealed unusually large amounts of blood in the left ventricle. Had this course been followed, the appellant's second haemorrhage would have been prevented by rest and medication, or by the clipping of the aneurysm.

125 I think that the submission, save perhaps for the last matter, is correct. Its acceptance however does not conclude all issues that this Court should consider before determining this appeal. These I will go to shortly. But before I do, some other submissions of the respondents require consideration.

126 It was argued by the respondents that there was no evidence that Mr Jensen for whose conduct the hospital was responsible, did not give consideration to the taking of an angiogram. I do not think it matters whether there was evidence to that explicit effect or not. The evidence was such that a jury would be entitled to

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133 See *CDJ v VAJ* (1998) 72 ALJR 1548 at 1574 n 80 per McHugh, Gummow and Callinan JJ; 157 ALR 686 at 721.

find that a consideration of that procedure was reasonably necessary in the circumstances. Then there is evidence that the risks of such a procedure were relatively slight, and that it would almost certainly have revealed the true condition, as subsequently, when one was done, it did. It is highly unlikely therefore that the doctor did give consideration to the performance of an angiogram. The jury would have been entitled to find for the appellant whether he did or did not consider an angiogram.

127 In *Chappel v Hart*[134], McHugh J was one of two dissentients in a Court of five members of this Court, but I do not take his Honour's observations that I am about to quote and adopt as being in any way affected by that dissent:

> "Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury[135]. In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases[136] the risk of injury to another person. If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring."

128 On the evidence here the jury were entitled to hold that the failure, the treating doctor's omission either to undertake an angiogram or the failure to give any consideration to the undertaking of it, materially contributed to the appellant's condition. They would also be entitled to take an alternative view that the second respondent's conduct, although it might not be possible to say (on the balance of probabilities) that it definitely materially contributed to the plaintiff's final condition, at least caused him to lose a valuable chance (the value of which it was for them to assess) of avoiding being in the condition that he now finds himself. There is still, in my opinion, room for the operation of the loss of chance rule[137] (particularly in cases involving the practice of what is even today said to be an

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134 (1998) 72 ALJR 1344 at 1350; 156 ALR 517 at 524-525.

135 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 614; *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417; *Tubemakers of Australia v Fernandez* (1976) 50 ALJR 720 at 724; *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506.

136 "Increases" in this context includes "creates".

137 *Chaplin v Hicks* [1911] 2 KB 786. See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 349-350 per Mason CJ, Dawson, Toohey and Gaudron JJ.

art[138] rather than a scientific skill), enabling a plaintiff to recover damages to be equated with, and reduced to the value of the chance he or she has lost, rather than the damages which would be appropriate if it has been proved on the balance of probabilities that the plaintiff's condition owes itself to the defendant's acts or omissions.

129 It must be acknowledged that this approach is not without its difficulties. If the chance that has been lost is a 51 per cent or greater chance, why should not the plaintiff be taken to have proved his or her case on the balance of probabilities? I think that in such a situation, the plaintiff has, and should recover his or her damages in full. *Rogers v Whitaker*[139] is, in one sense, such a case. The Court there accepted on the balance of probabilities, that the plaintiff would not have had the operation to which she submitted, and which caused the problems for her that it did, if she had been warned of the risk that the Court thought material there. Perhaps the plaintiff's damages there might have been reduced, and indeed significantly so, if what had been established there, was that she might not have had, as opposed to, would not have had the operation.

130 On the other hand, in other cases, there is a risk, it might be said, that in almost every instance there is a lost chance of some kind, perhaps even a 1 per cent or 5 per cent chance, and on that basis every plaintiff will succeed to some extent. The answer to this must be that the loss of a remote, or very slight chance should not attract an award of damages. The chance lost must be a real one and of some substance, even though less than a 50 per cent chance. In the practice of medicine, usually a definite, successful result will not be able to be guaranteed. Just as the practitioner should not suffer on that account, nor should the plaintiff, who is precluded from saying what the outcome would have been had the procedure or treatment not performed been performed, for the very reason that it has not been performed. Common sense and the other considerations adverted to by Mason CJ (with whom Toohey and Gaudron JJ agreed) in *March v Stramare (E & MH) Pty Ltd* have to be applied to loss of chance cases and the assessment of damages in them as they do to questions of causation generally[140]:

> "The common law tradition is that what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case', in the words of Lord Reid:

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138 "Medicine is the most distinguished of all the arts, but through the ignorance of those who practice it, and of those who casually judge such practitioners, it is now of all the arts by far the least esteemed." Hippocrates, *Law*, bk 1.

139 (1992) 175 CLR 479.

140 (1991) 171 CLR 506 at 515.

Stapley v Gypsum Mines Ltd[141]. That proposition is supported by a long line of authority in the United Kingdom: *Leyland Shipping Co v Norwich Union Fire Insurance Society*[142]; *Admiralty Commissioners v SS Volute*[143]; *Yorkshire Dale Steamship Co v Minister of War Transport*[144]; *Alphacell Ltd v Woodward*[145]; *McGhee v National Coal Board*[146]. It is supported also by this Court's decision in *Fitzgerald v Penn*[147].

It is beyond question that in many situations the question whether Y is a consequence of X is a question of fact. And, prior to the introduction of the legislation providing for apportionment of liability [*Wrongs Act* 1936 (SA), s 27], the need to identify what was the 'effective cause' of the relevant damage reinforced the notion that a question of causation was one of fact and, as such, to be resolved by the application of common sense.

Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact – to be determined by the application of the 'but for' test – and the further question whether a defendant is in law responsible for damage which his or her negligence has played some part in producing[148]. It is said that, in determining this second question, considerations of policy have a prominent part to play, as do accepted value judgments[149]. However, this approach to the issue of causation (a) places rather too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured; and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact. As Dixon CJ, Fullagar and Kitto JJ

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141 [1953] AC 663 at 681.

142 [1918] AC 350 at 363, 369-370.

143 [1922] 1 AC 129 at 144.

144 [1942] AC 691 at 706.

145 [1972] AC 824 at 847.

146 [1973] 1 WLR 1 at 5, 11; [1972] 3 All ER 1008 at 1011, 1017.

147 (1954) 91 CLR 268.

148 See, eg, Fleming, *Law of Torts*, 7th ed (1987) at 172-173; Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 110.

149 See Fleming, *Law of Torts*, 7th ed (1987) at 173.

remarked in *Fitzgerald v Penn*[150] 'it is all ultimately a matter of common sense' and '[i]n truth the conception in question [ie causation] is not susceptible of reduction to a satisfactory formula'[151]."

131 There was in my opinion, a case to go to the jury in this action. I would therefore allow the appeal with costs. The respondents should also pay the appellant's costs of the appeal to the Court of Appeal relative to them. The costs of the trial should abide the outcome of a fresh trial which I would order in this case.

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150 (1954) 91 CLR 268 at 277.

151 (1954) 91 CLR 268 at 278.