"RESTRICTING LITIGIOUSNESS" 13TH COMMONWEALTH LAW CONFERENCE, MELBOURNE, 14 APRIL 2003 THE HON. JUSTICE KENNETH HAYNE, AC

In 2002, the Australian federal government commissioned the Ipp report on negligence. Against that background, this paper considers how litigiousness could be restricted. It discusses the role of the courts in limiting litigation and the role that the predictability of the outcome of litigation plays in doing that. It considers some aspects of recent developments in the law of negligence and suggests four frameworks within which further developments may be considered: incremental development, unifying principle, intuitive or popular response, or recognition of separate, competing values.

'Restricting Litigiousness' is a title for a paper that carries with it a lot of baggage. 'Litigiousness' suggests an eagerness to go to law or even a fondness for the process. Its resonances can be heard in the 17th century example given in the definition of 'litigiousness' in the *Oxford English Dictionary*. In 1668, Sir William Davenant, said by some to be the natural son of Shakespeare[1] wrote[2] 'Farewell the happiness of the Nation when the populousness of the City argues the litigiousness of the Country'. Those resonances become louder when there is reference, as there has been in Australia, in recent months and years, to a 'litigation explosion' and to 'awards of excessive damages'.

These rhetorical devices, for that is all they are, must be looked at with some care. What is meant when it is said that there has been a 'litigation explosion'? Plainly it suggests that something untoward has happened, but what exactly is it that causes concern about what has happened. When it is said that 'excessive' damages have been awarded, against what standard are the damages awarded being judged? Is it said that some error of legal principle has been made? Is it said that, although proper legal principles have been applied, the cost is too heavy for some other reason. What is that reason? Or is the statement a deliberate use of the advertiser's unstated comparison and to be understood as a reference to 37% more protein, or less fat, or fewer cavities? More protein than what? Less fat than what? 'Excessive' by what measure?

In 2002 there was much debate in Australia about limiting one particular kind of litigation – claims for damages for negligently inflicted personal injury. The Federal Government appointed a panel of eminent persons to conduct a 'principles-based review of the law of negligence' and that panel made its final report towards the end of 2002.[3] Legislation has been proposed, or passed, in several States which is legislation evidently intended to limit litigation of the kind described.[4]

Much of the debate to which I have referred took place in connection with discussion of the cost of insuring against liabilities of this kind. The media spoke of a 'public liability insurance crisis'. This discussion of insurance questions took place against the background of the financial collapse of a large Australian insurance group – the HIH group of companies –and public debate about how such an event could occur. Further, it was often couched in terms which referred to 'excessive damages'. Excessive damages were said to be both a cause of the 'insurance crisis' and a concern for those who may be exposed to such claims.

Sometimes, those participating in the debate sought to look across the Pacific Ocean towards the United States, and draw comparisons with some well publicised civil litigation in that country. There was, therefore, some reference to questions about class actions and to contingency fees. All too often however those comparisons, when they were drawn, did not direct attention to relevant differences, or do much more than hint at the nature of the evils said to be revealed by the comparison. If comparisons are to be made with experiences in other jurisdictions it is important to recognise relevant differences. Only then is the comparison useful.

All aspects of the debates that I have identified generated political controversy. Lawyers, and organisations of lawyers, made their contributions to the debates.[5] All this being so, why should a judge now venture upon this subject of 'Restricting Litigiousness'? Is this not a matter now for the legislative branch rather than the judicial branch?

There are many aspects of the debate which are matters for the legislative branch. They include both questions of policy and questions about how a chosen policy is to be effected. Whether some rights of action should be curtailed or abolished is, in the end, a matter to be determined by the legislature. If some rights of action are to be curtailed, it will be for the legislature to choose how that is to be effected. It would be wholly wrong for me to venture into that territory and I will not do so. But there are some issues of legal principle to which reference should be made. It is to those that I intend to direct my attention and to do so by particular reference to some questions that arise in connection with actions for negligence.

Before doing that it is as well to state some obvious and well-accepted propositions about why we should want to restrict litigiousness. Restricting litigiousness, or at least limiting the amount of contested litigation, must be one of the fundamental aims of any developed legal system. Anyone who has had direct experience of litigation knows all too well the costs that it exacts from the participants. Those costs are not limited to time and money. The costs in time and money are real and obvious, but the emotional cost of litigation for those who participate in it is often equally pressing. Very few relish the experience of litigation. Few show or maintain an eagerness to go to law or a fondness for the process. Often, the pendency of litigation affects other activities. If a business is sued, it may have to provide against the possibility of loss and what is provided cannot be applied to other purposes. Pending litigation can therefore limit entirely unrelated activities.

The costs of litigation are not borne by only the immediate participants in the process. The provision of a system of courts for the resolution of disputes between citizens, and between citizens and the State, is a fundamental obligation of the government of any society. The public enforcement of laws, ultimately by the application of the power of the State must, therefore, be effected by a State-organised justice system. In turn that requires the provision of judges, support staff, courtrooms and all the other apparatus of a modern court system. That is expensive. It is a cost that falls on society as a whole, and society, rightly, expects that the justice system will be conducted as efficiently as possible.

Further, the burden of awards of damages will usually be borne, directly or indirectly, by some part or parts of the wider society. The burden of awards is reflected in the level of insurance premiums paid by all who are insured against certain kinds of risk. The burden of awards is often directly or indirectly passed on to consumers in the prices charged for goods or services provided. These burdens can be very large. It is for all these reasons that I say that limiting litigation must be a fundamental aim of any developed legal system. But saying that the burden of awards of damages is 'too large' or 'excessive', presupposes that some useful comparison is being made and that an 'acceptable' level of cost not only can be but has been identified.

I emphasise the need for efficiency in the justice system in order to draw attention to two quite different ways in which a proposal to restrict litigiousness might be effected. Litigation in aid of enforcing particular kinds of rights might be limited by modifying, even abolishing, the right concerned. But that is not the only way to restrict the amount of litigation that particular kinds of claim may generate. Litigation of a particular kind, at least contested litigation of that kind, will also be reduced if the outcome of the litigation is readily predictable and quickly obtained. The more predictable the outcome of litigation, and the more efficient the processes by which that outcome can be obtained, the more likely it is that rational and informed participants in the process will compromise their dispute on terms that give effect to the predicted outcome without resort to the courts, or at least without pursuing the case to judgment.

Many aspects of court procedure must be understood in this light. General rules that the losing party pays some or all of the costs of the successful party, court rules about offers of compromise, statutory provisions for damages by way of interest, all find their rationale in promoting the compromise of civil litigation. The close attention that has been given, over at least the last 10 or 15 years, to improving the way in which civil litigation is conducted in the courts is underpinned by the evident necessity of making the judicial system more efficient. These procedural changes are important tools for restricting litigiousness. I do not seek to diminish the importance that should be attached to them if I say no more about them in this paper.

Of course, it is necessary to recognise that the uncertainties of litigation cannot be eliminated entirely. To be able to predict the outcome of a dispute about a factual matter it is necessary to know what evidence each party will have available. Even if that is known, it is often difficult to predict what evidence will prove to be more credible than evidence to the contrary effect. Many of the recent developments in civil procedure have been directed to preventing trial by ambush and reducing the unpredictability to which I refer. As I say, the importance of this work should not be underestimated. But for present purposes I want to direct attention to considerations affecting the predictability of decisions about applicable legal principle. It is convenient to do that by focusing on negligence but the points to be made must be understood as having more general application both to other fields of private law and in areas of public law as well.

It may be thought that this is not a subject that bears directly upon matters of recent controversy. After all, are not the principles governing recovery of damages for negligently inflicted personal injury reasonably well established? If there has been uncertainty about the outcome of such litigation, has not that uncertainty stemmed from the difficulty of predicting the outcome of a dispute about what happened, rather than a difficulty about predicting the legal consequences that follow from the facts once they are found?

The number of cases concerning claims for damages for negligently inflicted personal injury which have come before the High Court of Australia over the last 5 to 10 years suggests that the principles to be applied have been undergoing some change. The index to volumes 185 to 206 of the Commonwealth Law Reports, for the years 1995-2001, lists 12 cases, under the heading 'Negligence', in which claims for damages for negligently inflicted personal injury had been made. They have included cases about causation – *Chappel v Hart*[6] and *Rosenberg v Percival*.[7] More than half, however, have been cases about duty of care – *Northern Sandblasting Pty Ltd v Harris*,[8] *Romeo v Conservation Commission (NT)*,[9] *Crimmins v Stevedoring Industry Finance Committee*,[10] *Agar v Hyde*,[11] *Jones v Bartlett*,[12] *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[13] as well as the highways case, *Brodie v Singleton Shire Council*.[14] Since that index was published there have been the decisions of the Court in the nervous shock cases – *Tame v New South Wales; Annetts v Australian Stations*

Pty Ltd.[15] The number of cases in the Court about duty of care suggests that applicable principles continue to evolve.

Continued evolution of principle in a common law system is inevitable and desirable. It is inevitable and desirable because law reflects the society in which it operates and society continues to change and develop. The process of development of the common law has often been examined[16] and is a process which, I think, is well understood by those who have examined the subject. But not all public debate reflects an appreciation of the limits that are inherent in it. Nearly 50 years ago, Lord Radcliffe described[17] the common law as 'a body of law which develops in process of time in response to the developments of the society in which it rules'. As Gummow J pointed out in *Wik Peoples v Queensland*,[18] this suggests 'improvement by consensus ... continuity rather than rupture'. But, as Gummow J went on to say,[19] 'Movement also may plainly be perceptible, and there may be an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted to modern circumstances.' Sometimes, then, there will be perceptible movements in the common law and there will be definite points at which the move is significant. That is not to say, however, that the judges are unconstrained in developing the common law. As Gaudron and McHugh JJ said in *Breen v Williams*:[20]

> 'Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles. The judges of Australia cannot, so to speak, "make it up" as they go along. It is a serious constitutional mistake to think that the common law courts have authority "to provide a solvent"[21] for every social, political or economic problem. The role of the common law courts is a far more modest one.
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> In a democratic society, changes in the law that cannot logically or analogically be related to existing common rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions.'

These considerations have particular relevance in relation to the law of negligence. Conventionally, the modern law of negligence is traced to Lord Atkins' biblical allusion in *Donoghue v Stevenson*.[22] For the last 70 years, common lawyers around the world have sought to translate that biblical allusion, 'who is my neighbour?', into principles of law sufficiently certain to make the operation of the law workable and predictable. In the last half of the 20th century the tort of negligence dominated the work of the civil courts and its imperial march continues, in some cases now supplemented by resort to statutes dealing with misleading or deceptive conduct. So effective has the march of negligence been, however, that many lawyers tend to see all forms of damage as potentially compensable through an action for negligence. Some have become so mesmerised by this tort, that events which plainly give rise to other causes of action are forced into a mould of negligence. No doubt there are many reasons why this is so. I do not seek to explore them.

The elements of a cause of action for negligence – duty, breach, damage – are elements which can be stated at a high level of abstraction. Did the plaintiff suffer damage as a result of a breach of a duty to take

reasonable care which was a duty which the defendant owed to protect others against unreasonable risks?[23] At each level of that inquiry, reference is made to foreseeability and what it is reasonable to foresee. A duty of care is owed to those whom it is reasonably foreseeable may suffer injury if reasonable care is not taken. What is reasonable care must be assessed by asking whether a reasonable person would foresee that that person's conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff.[24] Risks which are not 'far-fetched or fanciful' are held to be real and therefore foreseeable.[25] The damage for which the defendant is to be held liable is damage that is not too remote and since *The Wagon Mound*[26] that too has been limited by reasonable foreseeability.

In hindsight there are few consequences which cannot be said to have been reasonably foreseeable. It is, after all, a very bold conclusion to say that something that has actually happened could not have been foreseen as a possible outcome of the chain of events which evidence demonstrates occurred.[27] If an external observer directs attention only to questions of reasonable foreseeability, and the general propositions about duty, breach and damage are taken as the premises for argument, there appear to be few limits to the availability of an action for negligence. It is only when the problem is examined more carefully that the truth in Fleming's observations that 'it is misleading to speak of a tort of negligence' and that '[n]egligence is a basis of liability rather than a single nominate tort'[28] becomes apparent. Only then is it apparent that much of the focus of the courts, over many years, has been on limiting or control devices. For present purposes, however, I want to focus not on the detail of these control devices, but on one deep-seated difficulty in the development of the law of negligence which is a difficulty to which too little attention has sometimes been paid. It is a difficulty which may well be thought to lie beneath all of the control devices upon which the courts have focused in recent years.

The difficulty to which I refer is that courts in Australia have not yet succeeded in identifying a single principle unifying the development of the law relating to negligence. The joint reasons of the Court in *Sullivan v Moody*[29] pointed out that:

> 'As Professor Fleming said,[30] "no one has ever succeeded in capturing in any precise formula" a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. The formula is not "proximity". Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court in this area of discourse, and despite some later decisions in this Court which emphasised that centrality,[31] it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established.[32] It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited.'

Scholars have expressed the same view: Professor Stapleton has said,[33] 'There is no "test" for the duty of care. There can be no "duty test" given what it is that judges do under the cloak of this analytical label.' Rather, Professor Stapleton suggests that some of the attempts that have been made to develop tests or principles have served only to hide the bases on which particular conclusions are reached. As she says:[34]

> 'What is needed is the unmasking of whatever specific factors in each individual case weighed with judges in their determination of duty. ... Judgment should focus explicitly on why this plaintiff is proximate, why the relationship was special, why reliance was reasonable, and so on.'

In some common law jurisdictions,[35] but not in Australia,[36] the dominant approach to determining the existence of a duty of care in negligence is now said to be whether it is 'fair just and reasonable' to find that such a duty exists. Often, both in Australia and elsewhere, reference is made to 'policy' considerations in determining whether a duty of care should be found to exist.[37] All too often, however, what makes a particular conclusion 'fair just and reasonable' or what 'policy' considerations are taken into account is not made perspicuously clear. Rather, a conclusion is asserted, unaccompanied by an explicit dissection of the reasons that support it or the 'policies' to which effect is thus given. As McHugh J pointed out in *Perre v Apand Pty Ltd*:[38]

> '[A]ttractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities.'

Concepts of fairness and justice may be illuminated a little by references to such notions as 'assumption of responsibility'[39] but labels like 'distributive justice'[40] or 'corrective justice'[41] do not readily reveal their content. What recent debates about restricting litigiousness may serve to demonstrate is that there may be no common agreement about the purposes that are to be fulfilled by the law of negligence or about how the balance between conflicting aspects of those purposes is to be struck. If there is agreement, it appears not to be reflected in judicial or academic writing and it is certainly not reflected in public debate.

Lord Atkins' resort to biblical analogy reveals that there appears to be a moral dimension to the law of negligence. Professor Stoljar described negligence as law's most patent experiment in 'applied morality'.[42] Negligence is an action based on fault. Has the law strayed too far from generally accepted notions of fault? Some recent legislation[43] appears to proceed from the premise that the rules have become too lax. If we accept that the action is properly based in fault, it is inevitable that there are some persons who will suffer injury and who will not be entitled to compensation because their injury is not caused by the fault of another. It seems that not all would see that as an acceptable conclusion.

No less importantly, if the action is based in fault, what role is duty of care to play? Why should recovery from those who were at fault be limited to only those to whom a duty is held to have been owed? Why is the remedy not available in any and every case in which a person suffers damage as a result of another's failure to take reasonable care?

On an altogether different tack, if negligence is intended to foster better loss distribution, why do the courts shut their eyes to whether parties are insured? What role should fault play in distributing the losses sustained by persons who were injured and, as a result of their injury, by society at large? Why should society bear the consequences of some injuries and not others?

I am not to be taken as suggesting any particular answer to any of these questions. I am, however, intending to emphasise the need to consider the questions. At least some are questions for legislators not

lawyers. But lawyers must also look to some of these questions because they affect the way in which legal principle should develop.

In that connection, it may be useful to identify the frameworks within which such consideration might be given. I will refer to four, but there may well be other ways in which the problems can be examined. The first approach is well known to the common law. It focuses on incremental development by analogical reasoning. Frequent reference has been made to this approach in connection with the law of negligence.[44] Over recent years, much of the focus of developments in the law of negligence has been related to various control devices intended to limit those who may recover (e.g., 'proximity'), the circumstances in which a plaintiff may recover (e.g., various aspects of the nervous shock rules) or the persons against whom action may be brought (e.g., the highway rule). Incremental development may be thought to offer a means by which principle can develop. It may be said, however, that incremental development presupposes the existence of some set of underlying principles which will inform particular decisions about taking steps along a path. If the latter view is right, incrementalism does not develop principles; it presupposes their existence.

The second framework gives chief place to the identification of unifying principles. But if those principles are stated at the level of generality in which propositions about duty, breach and damage are commonly stated, and if reasonable foreseeability is the chief criterion being applied at each stage of inquiry, the imposition of other control devices may be said to lack logical coherence. If the guiding principle is whether persons and consequences were reasonably foreseeable, what justification is there for imposing some further limitation restricting the application of that principle?

The third framework, which as I have said has been adopted in the United Kingdom but rejected in Australia, is to ask what is 'fair just and reasonable'. As I have already sought to point out, 'fair just and reasonable' is a statement of conclusion not a statement of the considerations that lead to the conclusion. It may indicate that the response is intuitive rather than reasoned or that the response depends upon estimates of the weight of public opinion.[45] To put the matter another way, a losing party draws little comfort from being told that the outcome is 'fair just and reasonable' unless the considerations that have led to that conclusion have been identified. Similarly, to say that courts need to make a policy decision does no more than state the existence of a problem; it gives no guidance on how to resolve it.

The last framework I offer assumes that there is no single unifying principle that will inform the law of negligence. It assumes that those suffering injury as a result of careless conduct will recover damages in some but not all circumstances. If that approach (an approach by category of liability) is adopted it will be necessary to identify why some cases are singled out for different treatment from others in which careless conduct has caused damage. It assumes that there are several considerations that bear on the ultimate question. If there are, they must be identified. If they are identified, it is likely, probably inevitable, that they pull in opposite directions. If that is so, how is the conflict to be resolved? Why is it to be resolved in one sense rather than the other?

It is only if questions of this kind are asked and answered that the difficulties we now confront will be resolved. Only then will 'litigiousness' be 'restricted'. Further, only if we ask and answer questions of this kind can the courts decide whether 'a previously understood principle of the common law has become ill adapted to modern circumstances'[46] or whether it is necessary 'to re-formulate existing legal rules and principles to take account of changing social conditions'.[47]

The steps I have identified are therefore important to the proper development of the common law. Their identification is no less important, some would say it is even more important, for maintaining a proper balance between the legislative and judicial functions.

Subject to applicable constitutional restraints, it will be the legislatures of Australia which ultimately determine the course that is to be taken in restricting litigiousness. It will be for the parliaments to say what kinds of litigation are to be restricted and how that restriction is to be effected. That is not to deny the importance of the roles of the courts in promoting efficient and predictable disposition of litigation. But if those legislatures choose to modify, or even abolish, legal rights of a kind which those legislatures consider give rise to too much litigation or litigation which is costing too much, that, subject to applicable constitutional restraints, will be a matter for them. If the debate about such proposals is to be conducted rationally, it is of the first importance not only that the reasoning which underpins particular legal conclusions should be there for all to see and examine but also that beneath the polemical rhetoric there can be seen to be a defined set of policy objectives.

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[1] Margaret Drabble & Jenny Stringer (eds), *Concise Oxford Companion to English Literature* (1993), 143 sub nom 'D'Avenant'

[2] *Declamations at Rutland House* (1673), 346

[3] Commonwealth, *Review of the Law of Negligence, Final Report* (2002)

[4] e.g., *Civil Liability Act 2002* (NSW), *Personal Injuries Proceedings Act 2002* (Q), *Civil Law Wrongs Act 2002* (ACT)

[5] e.g., Law Council of Australia, Submission to Negligence Review Panel, Review of the Law of Negligence (2 August 2002)

[6] *(1998) 195 CLR 232*

[7] *(2000) 205 CLR 434*

[8] *(1997) 188 CLR 313*

[9] *(1998) 192 CLR 431*

[10] *(1999) 200 CLR 1*

[11] *(2000) 201 CLR 552*

[12] *(2000) 205 CLR 166*

[13] *(2000) 205 CLR 254*

[14] *(2000) 206 CLR 512*

[15] *(2002) 76 ALJR 1348; 191 ALR 449*

[16] e.g., William Blackstone, *Commentaries on the Laws of England* reprint 1st ed (1966) 63; Herbert Broom, *Commentaries on the Common Law* 6th ed (1880) 3; Patrick Parkinson, *Tradition and Change in Australian Law* (2001)

[17] *Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, 591-592*

[18] *(1996) 187 CLR 1, 179*

[19] *(1996) 187 CLR 1, 179-180*

[20] *(1996) 186 CLR 71, 115*

[21] *Tucker v US Department of Commerce (1992) 958 F 2d 411, 413*

[22] *[1932] AC 562*

[23] John Fleming, *The Law of Torts*, 9th ed (1998) 115

[24] *Wyong Shire Council v Shirt (1980) 146 CLR 40, 47*

[25] *Wyong Shire Council v Shirt (1980) 146 CLR 40, 48*

[26] *[1961] AC 388*

[27] *Chapman v Hearse (1961) 106 CLR 112, 115*

[28] John Fleming, *The Law of Torts*, 9th ed (1998) 115

[29] *(2001) 207 CLR 562, 578-579 [48]*

[30] John Fleming, *The Law of Torts*, 9th ed (1998) 151

[31] e.g., *Jaensch v Coffey (1984) 155 CLR 549 esp 584-585 per Deane J*; *Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16, 52 per Deane J*

[32] *Hawkins v Clayton (1988) 164 CLR 539, 555-556 per Brennan J*; *Hill v Van Erp (1997) 188 CLR 159, 210 per McHugh J*; *Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1, 96-97 [270]-[274] per Hayne J*

[33] Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 60

[34] Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 62

[35] *Caparo Industries v Dickman [1990] 2 AC 605*

[36] *Sullivan v Moody (2001) 207 CLR 562*

[37] *Anns v Merton London Borough [1978] AC 728, 751-752*

[38] *(1999) 198 CLR 180, 211 [80]*

[39] cf *Smith v Eric S Bush [1990] 1 AC 831, 847, 870*

[40] *Frost v Chief Constable of South Yorkshire Police [1999] 2 AC 455*

[41] *McFarlane v Tayside Health Board [2000] 2 AC 59*

[42] Samuel Stoljar, 'Concerning Strict Liability' in Paul Finn (ed), *Essays on Torts* (1989) 267

[43] e.g., *Civil Liability Act 2002* (NSW)

[44] e.g., *Sutherland Shire Council v Heyman (1985) 157 CLR 424, 481 per Brennan J*

[45] *McFarlane v Tayside Health Board [2000] 2 AC 59, 82 per Lord Steyn*

[46] *Wik Peoples v Queensland (1996) 187 CLR 1, 180*

[47] *Breen v Williams (1996) 186 CLR 71, 115*