Hargrave v Goldman - [1963] HCA 56

HIGH COURT OF AUSTRALIA

Taylor, Windeyer and Owen JJ.

HARGRAVE v. GOLDMAN
(1963) 110 CLR 40
22 November 1963

Negligence

*Negligence—Nuisance—Rule in Rylands v. Fletcher—Fire caused by lightning striking tree—Fire not adopted or continued by occupier of land—Fire capable of being extinguished by exercise of reasonable care—Failure of occupier to extinguish—Statutory duty to extinguish fire—Breach—No civil right of action created—Bush Fires Act, 1954-1958 (W.A.), s. 28 (1) (a).**

Decisions

November 22.
The following written judgments were delivered:-
TAYLOR AND OWEN JJ. This is an appeal by two parties in a consolidated action from an order of the Supreme Court by which the claim of the appellants in respect of fire damage to their property was dismissed: Hargrave v. Goldman (1963) WAR 102 . The facts are that the respondent was the owner and occupier of a lightly developed grazing property, some six hundred acres in extent, near Gidgegannup in Western Australia. On Saturday 25th February 1961 there was an electrical storm in

this area and a tall tree with a branchy-top, which stood about the centre of the respondent's property and relatively close to his dwelling, was struck by lightning between 5 p.m. and 6 p.m. It was observed shortly afterwards that a fork of the tree, more than eighty feet above the ground, was on fire. The tree was about two hundred and fifty yards from the western boundary of the respondent's property and a somewhat lesser distance from the eastern boundary. On either side the paddocks were sparsely timbered but they contained a quantity of dry grass and dead tree tops. It was impossible for the respondent to extinguish the fire whilst the tree was standing and early on the following morning he telephoned the fire control officer for the district - a local farmer appointed pursuant to the Bush Fires Act, 1954-1958 (W.A.) - and asked that a "tree faller" be sent out to cut the tree down. This was done about midday but, in the meantime, the respondent had by means of a tractor and dozer blade cleared the area in the vicinity of the tree of all readily combustible material. In addition, he used a mounted six hundred gallon tank of water to spray the surrounding area so as to minimize the risk of the fire escaping. (at p47)

2. When Coombes, the tree faller, arrived the tree was burning fiercely in the fork and the bark from the ground up was on fire. The fire near the base of the tree was damped out and the tree was cut down. It is unnecessary to elaborate the details of what then happened for the learned trial judge found - and his finding was not challenged - that up to this point the respondent's conduct in relation to the fire was not open to question. But his Honour also found that if the respondent had exercised reasonable care he could, on the Sunday evening or on the following morning, have put out the fire by the use of water. This, the respondent claimed, he did on the Monday morning. His evidence was to the effect that he doused the fire thoroughly, rolled the logs over and then inspected them on the Monday night, on the Tuesday morning and night, and again on the Wednesday morning. In particular, he said that he spent two hours extinguishing the fire immediately after the departure of two visitors to his property on Monday morning - Mr. and Mrs. Jones. But Mrs. Jones' evidence was that the respondent left the property in his car immediately behind the car in which she was travelling and this evidence was accepted by the learned trial judge. How long the respondent was away from the vicinity of the fallen tree that day does not appear. But it is clear that there was an abundance of evidence fully justifying the finding that he did not, as he alleged, spend any time immediately after the departure of the Jones in extinguishing the fire. It was also established that the respondent was away from the property for a substantial part of the following day, Tuesday. On Wednesday morning the respondent went to work on a part of his property about a quarter of a mile or so distant from the vicinity of the fallen tree and about 12.30 p.m. Jones, who was working with him, drew his attention to smoke visible in a westerly direction. The respondent at once drove to his home and found that fire had burnt out most of the paddock to the west of where the tree had stood and that it had then extended two and one-half miles further to the west. In the course of the afternoon it extended further to the west and in the course of so doing it caused damage to the appellants' property. (at p48)

3. It is, we think, unnecessary to traverse the evidence in great detail but it is of some importance to notice the weather conditions which prevailed over the relevant period. An officer from the Perth weather bureau was called to give evidence of observations made at Guildford airport which, it was said, would reflect the conditions as they prevailed in the vicinity of the respondent's property. Particulars of these observations were as follows:

> Date Wind Direction Force Temperature Sunday N.W. till noon 94 deg. 26th then a little February S. of W. till 6 p.m. - then calm

Monday 8 a.m. S. 8 a.m. - 4-6 m.p.h. 86 deg. 27th 10 a.m. S.W. 12 noon - 10-13 m.p.h. February 3 p.m. S.W. 8 p.m. - 7-8 m.p.h. 8 p.m. S.

Tuesday Between S.E. 10 m.p.h. at 9 a.m., 97 deg. 28th to E. all day freshening to 20 m. p.h. at February 3 p.m., then easing. Wednesday E.N.E. 9 a.m. - 19 m.p.h. 105.2 deg. 1st March 12 noon - 21-22 m.p.h. 1 p.m. - 24 m.p.h. 1-2 p.m. - 25-26 m.p.h. (at p48)

Following paragraph cited by:

Blackburn v Logos Research Institute Pty Ltd (23 December 2015) (Slattery J)

4. The fire risk on these days was said to be severe and at some times dangerous. In particular it seems to have become dangerous on Wednesday 1st March as both the temperature and the velocity of the wind increased. It will be seen, therefore, that the fire caused by the striking of the tree created a very considerable risk not only to the respondent's property but also to the surrounding countryside. But it is also clear that the fire in the fork of the tree could not be extinguished without felling the tree and there is no question that the respondent was guilty of any lack of care in causing this to be done. Nor, as we have already said, did the learned trial judge find any fault in any of the steps which the respondent took on Sunday 26th February and which were discussed in his Honour's reasons. However he has found explicitly that on the Monday morning he could, by the exercise of reasonable care, have extinguished the fire and he rejected the respondent's evidence that he had taken adequate or reasonable steps to accomplish this. On the contrary he referred to evidence which indicated that the respondent's method of extinguishing a fire of this character was "to burn it out" and that this was inconsistent with his evidence that he had used water to extinguish it immediately after the departure of Jones. We think that there was abundant evidence to justify the finding of the learned trial judge that the respondent might by the exercise of reasonable care have extinguished the fire by the morning of Monday 27th February, and that he did not attempt to do so. Further we are of the opinion that the evidence clearly demonstrates that he did not, at any time thereafter, take any steps which could be regarded as reasonable in the circumstances then prevailing to prevent the fire from spreading. (at p49)

5. Before proceeding to consider the questions of law which were debated we should mention that the respondent challenged the finding of the learned trial judge that the fire which caused the damage had spread from or found its origin in the fallen tree. Upon this point counsel for the respondent said all that could be said but we think that the evidence leaves only one conclusion open. It is, in our view, beyond question that the fire spread from the fallen tree and we shall proceed to consider the case on that basis. We add that in reaching this conclusion we have, because of its unsatisfactory character in some respects, disregarded the evidence to the effect that early on the morning of Thursday 2nd March the respondent lit a number of fires on land immediately to the north of his property. (at p49)

6. In the circumstances to which we have briefly referred his Honour held that the respondent was under no liability to compensate the appellants for the damage which they sustained. In particular he held that there was no liability in nuisance because the fire had been caused by lightning and the respondent could not be said to have thereafter "adopted" or "continued" it. In his opinion the appellants' claim was not supported by the views expressed in Sedleigh-Denfield v. O'Callaghan (19

40) AC 880 or by the dissenting judgment of Scrutton L.J. in Job Edwards Ltd. v. Birmingham Navigations (1924) 1 KB 341 which received the approval of a number of members of the House of Lords in the former case. Further, he was of the opinion, that the occurrence of the fire, caused, as it was, by lightning, did not impose upon the respondent any duty of care with respect to his neighbours. In stating this proposition his Honour referred to Batchelor v. Smith (1879) 5 VLR (L) 176 and Havelberg v. Brown (1905) SALR 1 and he rejected the decision in the New Zealand case of Boatswain v. Crawford (1943) NZLR 109 . The proposition, his Honour said, accorded with the "broader rule that a landowner is under no liability for anything which happens to or spreads from his land in the natural course of affairs, if the land is used naturally" (1963) WAR, at p 108 . (at p50)

Following paragraph cited by:

Goldman v Hargrave (13 June 1966) (Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson.)

7. The case of Batchelor v. Smith (1879) 5 VLR (L) 176 was decided upon demurrer and the precise question which it decided was that the law did not impose upon the occupier of land any duty to extinguish a fire on the land which had been caused by spontaneous combustion. "No duty" it was said, "is cast on the defendant; he does nothing; he remains passive" (1879) 5 VLR (L), at pp 178, 179 . But it was added "Had he interfered in any way, he might possibly have rendered himself liable" (7). The decision in Havelberg v. Brown (1905) SALR 1 expressly followed that in the earlier case but we doubt whether the broad proposition upon which these cases rest can stand consistently with the relatively modern development of the concept of negligence. In particular, it is inconsistent in principle with the dissenting observations of Scrutton L.J. in Job Edwards Ltd. v. Birmingham Navigations (1924) 1 KB 341 . He said (1923) 1 KB, at p 357 : "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has 'permitted it to continue', and become responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under Rylands v. Fletcher (1868) LR 3 HL 330 . I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours" (1924) 1 KB, at pp 357, 358 . And at a later stage he expressed his agreement with a passage from the 5th ed. (1920) of Salmond on Law of Torts - "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement" (1924) 1 KB, at p 360 . This passage and the observations of Scrutton L.J. received the express approval of Viscount Maugham, Lord Wright and Lord Romer in the Sedleigh-Denfield Case (1940) AC, at pp 893, 894, 910, 913 . Further, the proposition advanced in that case - namely, that if a trespasser comes on to land and creates a nuisance the occupier of the land is not liable unless he either adopts the act of the trespasser or does something in the nature of ratification after he becomes aware of its existence - was unanimously rejected. On the contrary, the effect of their Lordships' reasons was that an occupier, with knowledge or presumed knowledge of the existence of a state of affairs on his land which is a potential nuisance but which has been created by a trespasser, is, nevertheless, liable in

the event of damage resulting therefrom to the lands of his neighbours if by the exercise of reasonable care the damage would have been avoided. This proposition, stated as it is, relates, in terms, only to potential nuisances brought into existence by a trespasser and no doubt it was so stated in order to deal with the particular facts of that case. But we can see no distinction relevant to the question of liability between potential nuisances created by trespassers and potential nuisances coming into existence "otherwise without the act, authority, or permission of the occupier". Indeed, in the passage already cited from Salmond the test of liability is propounded as a common one for nuisances of either character and the same notion is apparent in the final proposition as stated by Rowlatt J. in Noble v. Harrison (1926) 2 KB 332 when he said:"The result . . . is that a person is liable for a nuisance constituted by the state of his property: (a) if he causes it; (b) if by the neglect of some duty he allowed it to arise; and (c) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it" (1926) 2 KB, at p 338 . These propositions were referred to with evident approval by Dixon J., as he then was, in Torette House Pty. Ltd. v. Berkman (1940) 62 CLR 637, at p 657 . Again, the test of liability propounded in the Sedleigh-Denfield Case (1940) AC 880 was applied in Slater v. Worthington's Cash Stores (1930) Ltd (1941) 1 KB 488; (1941) 3 All ER 28 where the Court of Appeal held the occupier of premises liable for damage caused by a heavy fall of snow which had accumulated on the roof of premises during a severe snow storm which had come to an end some four days previously. The same test has also been applied by the Supreme Court of New Zealand in two cases concerning fires on country properties - Boatswain v. Crawford (1943) NZLR 109 and Landon v. Rutherford (1951) NZLR 975 . In neither case was it alleged or proved that the defendant had originated the fire; the basis upon which the occupier in each case was held liable was that the damage complained of by the plaintiff could have been avoided by the exercise of reasonable care on the former's part. These later decisions were in accordance with the test of liability which we think has been authoritatively established and which is correctly stated in the brief passage we have quoted from Salmond and, accordingly, we think the learned trial judge erred on this branch of the case. We notice in passing, however, that in the lastmentioned case the occupier admitted that he made no attempt to contain the fire and that Fell J. held that, in those circumstances, it was for him "to prove that it was impossible to do anything by taking reasonably prompt and efficient means to stop it spreading" (1951) NZLR, at p 978 . We do not agree with this observation for in order to establish liability for negligence the plaintiff must always prove that the damage of which he complains was caused by the breach of duty alleged. (at p52)

8. In the present case the learned trial judge referred to a number of cases relating to such things as the natural growth and spread of wild thistles (Giles v. Walker (1890) 24 QBD 656) and prickly pear (Sparke v. Osborne (1908) 7 CLR 51) and the spread of rabbits (Anderson v. Lockyer (1950) 52 WALR 60) but we do not think that these cases throw any light on the problem in this case. No principle was enunciated in the first case, in the second the plaintiff's claim rested, not upon any allegation of negligence, but upon an assertion of strict liability whilst in the third the claim, which failed, was that there had been a breach of a statutory duty on the part of the defendant giving rise to private right of action. (at p52)

Following paragraph cited by:

New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

9. This is enough to dispose of the case but it should be observed that the claim of the appellants does not rest merely upon the allegation that there was on the part of the respondent a failure to take reasonable steps to extinguish or prevent the spread of the fire in its original location in the fork of the tree. The respondent did, in fact, take some steps and these were initially taken as much for the preservation of his own property as of that of his neighbours. Indeed the taking of these steps was a measure which any prudent occupier would have adopted in the ordinary management of his property. It is, of course, a matter of general knowledge that trees in country areas are not infrequently set on fire by lightning and that, when observed, steps are taken to extinguish them or to contain them where possible as a matter of course. But when the tree in question here was cut down a hazard of a different character was created and it is beyond doubt that the respondent was under a duty to use reasonable care to prevent it causing damage to his neighbours in the countryside. The finding that, in the circumstances prevailing, he failed to discharge this duty with the result that the appellants sustained the damage of which they complain is we think unassailable. We add that on this view it is of no consequence whether his liability rests in negligence or nuisance. (at p53)

10. For these reasons the appeal should, in our opinion, be allowed and the case remitted to the Supreme Court for the purpose of assessing damages. Having reached this conclusion it is unnecessary for us to consider the further ground upon which the appellants based their claim, that is to say, liability for the breach of a statutory duty imposed upon the respondent by s. 28 of the Bush Fires Act, 1954-1958. We are, however, inclined to the view that the decision of the learned trial judge on this point was correct. It seems to us that it is impossible to regard a breach of s. 28 as giving rise to a cause of action for damages. It will be observed that the obligation imposed by that sub-section upon the occupier of land to "take all possible measures at his own expense to extinguish" a bush fire burning on his land applies only to fires burning on any land during "the restricted burning times" and during the "prohibited burning times" and only where the "bush fire is not part of the burning operations being carried on upon the lands in accordance with the provisions" of the Act. "Restricted burning times," by definition, means the period of time from the first day of October in any year to the next following thirty-first day of May and "prohibited burning times" are those times declared by the Governor by notice published in the Gazette (s. 17). However, the operation of a declaration under this section may be suspended by the Minister so far as it extends to any particular land and the suspension may be subject to any conditions specified by the Minister. Further, it should be observed that many classes of burning operations may during the prohibited burning times be carried on "in accordance with the provisions of the Act". We mention as instances the provisions of ss. 22(2), 23, 24, 24A, 25 and 26. Accordingly, the suggestion that it was intended that a breach of s. 28 resulting in damage should give rise to a private right of action involves the notion that the right of action should, in part, be seasonal in character, in part, dependent upon the existence of a declaration under s. 17 and no relevant suspension thereof, and upon the fire in question not constitution "burning operations in accordance with the provisions of the Act". We would find it difficult to discover in legislation of this character an intention that s. 28 was intended to create rights inter partes in relation to the control of fires or that a breach of its provisions should give rise to a private right of action. (at p54)

11. After these reasons were prepared the respondent sought leave to reopen the appeal on the ground that fresh evidence had been discovered relating to the condition of the fallen tree and the immediate surroundings on the evening of Monday 27th February 1961. It was submitted that this evidence could not with reasonable diligence have been available at the trial and that the principles which, in the circumstances, we should apply, are those which would guide an appellate court in a motion for a new trial on the ground of the discovery of fresh evidence. Accordingly, we were asked

to direct a general new trial should the judgment in favour of the respondent be set aside. On a mere reading of the affidavits filed in support of the application we are not greatly impressed by the evidence said to have been discovered or the reason advanced why it was not forthcoming at the trial and think there is a great deal of substance in the submissions made on behalf of the appellants. Nevertheless, since the existing judgment must be set aside and the issue of damages remains to be determined, we think that in the circumstance the appropriate course for us to follow is to leave it to the trial judge to determine whether at this late stage-issues of fact relating to liability having been litigated and pronounced upon-he should permit the respondent to reopen his case in order to adduce the fresh evidence. The reason why it was not available at the trial and the character and cogency of the evidence will, of course, be material matters for his consideration. That being so we think that we should set aside the order and judgment of the Supreme Court and remit the case to the Supreme Court for the assessment of damages if an application made to the trial judge by the respondent to reopen his case on the issue of liability be rejected or, if, notwithstanding the reception of the fresh evidence in question, or otherwise, the decision of the Court on the issues of fact relating to liability remains unchanged. (at p55)

WINDEYER J. I agree in the conclusions of my brothers Taylor and Owen. But, as the well-considered arguments that we heard raised some fundamental questions, I shall state my reasons for myself. (at p55)

2. The respondent is an elderly man who lived alone on his grazing property of some six hundred acres of lightly timbered country near Gidgegannup. On Saturday, 21st February 1961, a tall red gum tree on his land was struck by lightning, and set on fire in a fork some eighty feet or more up from the ground. The respondent became aware of this next morning. Appreciating the danger of the fire spreading, he took prompt action. He telephoned the fire control officer under the Bush Fires Act, 1954-1958 (W.A.), the Road Board secretary and others. Through them he obtained assistance to fell the tree, so that the fire could be brought under control. While awaiting the arrival of the tree feller he cleared the ground near the tree with a bulldozer. The tree was cut down. As it fell sparks ignited another tree, which then fell down. As a result, there were two logs burning on the ground. Action was taken to contain both fires. Inflammable material, branches and debris lying nearby, was thrown upon them. This no doubt increased them temporarily; but it diminished the risk of their spreading, and was done for that purpose. For that purpose too, the respondent, with the help of a visitor, watered the ground near the fires from a six hundred gallon tank mounted on a trailer until, unfortunately, the stopcock became broken, rendering this equipment no longer serviceable as a sprinkler. The respondent apparently thought that the logs could then safely be left to burn themselves out. But on the next day they were still burning. The respondent said that he then put water on them and put them out. But his Honour did not accept his evidence that he did this. There was evidence from which his Honour could infer that in fact the logs were, to the knowledge of the respondent, still alight on the Tuesday, when he went off to Perth for the day, apparently thinking that there was no risk in leaving, or taking the risk of doing so. A Western Australian red gum, once alight, may burn or smoulder for a long time by reason of the resinous gum from which it derives its name. Tuesday and Wednesday were very hot days. On Wednesday the temperature reached 105 degrees, and a strong easterly wind was blowing. In the afternoon of that day the respondent, while away from his homestead on another part of his property, had his attention drawn to smoke. He returned to find a large bush fire. Part of his land was burnt out; and the fire had already gone about a mile and a half towards the west, and was travelling fast. In the ultimate result hundreds of acres, over many miles of the countryside, were devastated. The appellants are landowners, whose house and other property were destroyed. His Honour found, and on the evidence the finding was clearly justified, that the bush fire began from the burning logs on the respondent's land. He found too that

until Sunday afternoon, and probably until late on that day, the measures that the respondent took to control the fire that the lightning had started were "unexceptionable, taking into account all the circumstances and the fire-fighting equipment available". But his Honour considered that thereafter the respondent was at fault. He said: "I am satisfied that had he taken reasonable care he could, on the Sunday evening, or at latest early on the next morning, have put out the fires . . . by using water on them". Nevertheless, he held that he had committed no breach of duty to the plaintiffs, the appellants, and dismissed the action. (at p56)

3. The appellants' case is that on his Honour's findings they are entitled in law to damages. From their point of view it matters not under what rubric of the law of torts their claim should be placed. But the case is not one which can be decided without regard to legal categories and classifications of wrongdoing. In the argument the case for the plaintiffs was discussed as depending, alternatively or cumulatively, upon the common law as modified by the Fires Act of 1774, upon nuisance, negligence, the rule in Rylands v. Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330 , and breach of a statutory duty under the Bush Fires Act. The several theorems of law thus propounded may be considered separately. But, in considering each, it is necessary to bear in mind that the law of torts is developing to-day, as the common law has developed in the past: new situations are being subsumed under rules and principles that are proving extensive rather than restricted. This is largely the result of the expansive scope of the tort of negligence to-day. (at p56)

Following paragraph cited by:

Burnie Port Authority v General Jones Pty Ltd (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

(Metropolis) Act 1774, s.86.). The English legislation was subsequently adopted by a number of Australian legislatures ((9) See, generally, Higgins, Elements of Torts in Australia, (1970) at 209; Fleming, The Law of Torts, 8th ed. (1992) at 349-350.). A settled, and perhaps surprising, course of judicial decisions in England, and later in this country, has established that, contrary to the views of (amongst others) Blackstone ((10) Commentaries on the Laws of England, 10 th ed. (1787), Bk 1 at 431.) and Bacon ((11) A New Abridgment of the Law, 5th ed. (1789), vol.1 at 85. See also, Viscount Canterbury v. Attorney-General (1843) 1 Ph 306 at 315-319 per Lord Lyndhurst LC (41 ER 648 at 652-653).), any fire caused (or allowed to spread) through negligence is not, for the purposes of that legislation, an accidental one ((12) See Filliter v. Phippard (1847) 11 QB at 355-358 (116 ER at 510); Musgrove v. Pandelis (1919) 2 KB 43 at 47 ; Spicer v. Smee (1946) 1 All ER 489 at 495 ; Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947) 75 CLR 59 at 67 ; Hargrave v. Goldman (1963) 110 CLR 40 at 58 ; Goldman v. Hargrave (1967) 1 AC 645 at 665.). The result is that the rule survived, and arguably still survives ((13) See, e.g., Balfour v. Barty-King (1957) 1 QB 496 ; Mason v. Levy Auto Parts of England Ltd. (1967) 2 QB 530 at 540-541 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER 835 at 838-839 . But note, for the view that it has been absorbed by more general principles, Jones v. Festiniog Railway Co. (1868) LR 3 QB 733 at 736, 738 ; Powell v. Fall (1880) 5 QBD 597 at first instance at 599 per Mellor J; affd by Bramwell, Baggallay and Thesiger L.JJ in the Court of Appeal; Gunter v. James (1908) 24 TLR 868 ; Mansel v. Webb (1918) 88 LJKB 323 at 324-325.), in England as a special rule imposing liability upon an occupier of premises for the escape of a fire on the premises caused by the negligence of the

occupier or his or her invitee or licensee ((14) Balfour v. Barty-King (1957) 1 QB at 504-505 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER at 838 .). If the ignis suus rule, as qualified by the Tasmanian equivalent of the English legislation ((15) See Supreme Court Civil Procedure Act 1932 (Tas.), s. 11(15).) , survives in the law of Tasmania as a special rule applicable to damage caused by fire, it will, as Neasey J held at first instance, suffice to impose liability upon the Authority for the damage sustained by General in the present case since it would render the Authority liable for the damage caused by the spread from the Authority's premises of a fire caused by the negligence of the Authority's independent contractor.

Burnie Port Authority v General Jones Pty Ltd (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)
Burnie Port Authority v General Jones Pty Ltd (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)
Burnie Port Authority v General Jones Pty Ltd (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)
Burnie Port Authority v General Jones Pty Ltd (01 December 1992)

4. (i) The common law and the Act of 1774: The early common law, or custom of the realm, made a man responsible in an action of case if his fire spread and burnt his neighbour's house. Much that appears in the cases collected in Comyn's Digest under the heading "Action upon the Case for Negligence: in keeping his fire" is now obsolete, but the main principles of the common law concerning fire still stand in the background of the law to-day. The earliest case, and the one often referred to in later reports, is Beaulieu v. Finglam (1401) YB 2 Hen 4 f 18 p 16 . That it still has vitality appears from the quotation of the Year Book made by Lord Goddard C.J. in Balfour v. Barty-King (1957) 1 QB 496 , and recently by McGregor J. in Eriksen v. Clifton (1963) NZLR 705 . The averment was that the defendant had so negligently kept his fire (ignem suum tam negligenter custodivit) that the goods of the plaintiff were burnt. What weight should be put upon the word negligenter there, and whether it was traversable, are questions that have been debated by very learned writers. We do not have to decide the issue between Wigmore and Winfield; for, whatever it meant, the word did not import the modern idea of tortious negligence. It is therefore enough to say that, as Sir Percy Winfield showed, it is not correct that the spread of a fire created at common law an absolute liability altogether irrespective of any fault of the man from whose land it spread. The rule seems rather to have been that a householder was responsible for his fire - and that meant any fire lighted by an inmate of his house: but he was not responsible for a fire started by a trespasser. Although not absolute, this liability was rigorous; and counsel feelingly protested in Beaulieu v. Finglam (1401) YB 2 Hen 4 f 18 p 16 : "the defendant will be undone and impoverished all his days if this action is to be maintained against him, for then twenty other such suits will be brought against him for the same matter". To which Thirning C.J. replied: "What is that to us. It is better that he be utterly undone than that the law be changed for him". And for three hundred years it continued virtually unchanged, as can be seen from Turberville v. Stampe (1697). That case, important in the development of the law of vicarious liability for the acts of a servant as well as in relation to fire, is reported in many places: by Lord Raymond, Salkeld, Comyns, Comberbach, Carthew, Skinner, and elsewhere. Lord Raymond (1697) 1 Ld Raym 264 (91 ER 1072) gives the best report of the argument; but the record is set out in full by Salkeld (1697) 2 Salk 726 (91 ER 607) . A fire had been lit to burn off stubble in a field. The majority of the court said "a man ought to keep the fire in his field, as well from the doing of damage to his neighbour, as if it were in his house, and it may as well be called suus the one as the other": but it would be relevant to prove that "a wind and tempest

arose and drove it into his neighbour's field". The ideas of remoteness of damage, and of unforeseen occurrences breaking the sequence of cause and consequence, were coming into the law. But the general principle remained: every man was liable for damage caused by his fire whether it was lit by him or by his servant. Parliament at last took a hand. The Act 6 Anne c. 31 (1707), continued by 10 Anne c. 14, provided that no action should be had against any person "in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby, any law usage or custom to the contrary notwithstanding". Blackstone stated the reason and policy of this as "for their own loss is sufficient punichment for their own or their servants' carelessness". The provision was continued in later enactments, culminating in the Fires Act, 1774, s. 86, which provided that no action shall be against any person "in whose house, chamber, stable, barn or other building or on whose estate any fire shall accidentally begin . . . ". This Act, it has generally been accepted, became part of the law of Western Australia on the foundation of the Colony; and it has not been repealed there. In terms it might seem to apply to this case, as it has been construed as applying to country lands as well as to houses in cities and towns. But, although some reliance was put upon it in the argument, I do not think it directly affects the question here. True, the fire in the tree did "accidentally begin"; for that phrase has been held to mean a fire that begins by inevitable accident, as distinct from one caused intentionally or by the negligence of someone for whom the landowner was responsible: Filliter v. Phippard (1847) 11 QB 347 (116 ER 506) . But the effect of the statute is narrowed by the decisions that it does not apply when a fire, although beginning without negligence, spreads as the result of negligence: Musgrove v. Pandelis (1919) 2 KB 43 , and see Job Edwards Ltd. v. Birmingham Navigations (1924) 1 KB 341 and Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners (1951) 83 CLR 353 per Fullagar J. (1951) 83 CLR, at pp 393, 394 . And that, according to the finding of the learned trial judge was what happened here. But putting the statute aside does not mean that we are thrown back to the rigorous rule of the mediaeval common law. This Court has held that the old rules have been absorbed into the principle of Rylands v. Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330 ; and that the strict liability of the common law is subject to the qualifications of and exceptions to that principle: Bugge v. Brown (1919) 26 CLR 110, at pp 114, 115 ; Hazelwood v. Webber (1934) 52 CLR 268 . (at p58)

Following paragraph cited by:

The Owners - Strata Plan No 7114 v Northern Beaches Council (28 August 2025) (Ward P, Stern and Free JJA)

Higgins v Brinkworth; Justin v Brinkworth; Trimboli v Brinkworth; Copping v Brinkworth (26 June 2025) (Stein J)

1158. The tort of nuisance is constituted by an unreasonable or unlawful interference with a person’s use or enjoyment of land or of some right over or in connection with it, or material damage caused to land or other property on the land affected by the interference. [281] The proof of fault required to establish nuisance on the part of the landowner from whose premises the nuisance emanates generally involves foreseeability. [282] If foreseeability is established, it is then a question of whether the interference was reasonable. [283] Whether the respondents’ use of the land is non-natural is relevant in determining reasonableness. [284]

via
[281] *Marsh v Baxter* [2015] WASCA 169; (2015) 49 WAR 1 at [244]-[248] (McLure P); *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 59 (Windeyer J); *Kraemers v Attorney-General (Tas)* [1966] Tas SR 113 at 122 (Burbury CJ).

Higgins v Brinkworth; Justin v Brinkworth; Trimboli v Brinkworth; Copping v Brinkworth (26 June 2025) (Stein J)

1159. The respondents contended that in cases in which physical damage is caused, there is almost complete overlap between nuisance and negligence such that there will be very few cases of liability in nuisance which would also not constitute liability in negligence. [285]

via
[285] *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 59 , as affirmed in *Goldman v Hargrave* [1966] UKPC 12; (1966) 115 CLR 458.

Meadth v Nye (06 December 2024) (Elkaim AJ)
Rifai v Woods (04 April 2024) (Peden J)

24. A private nuisance is a continuous or recurrent state of affairs: *Hargrave v Goldman* (1963) 110 CLR 40 at 59 (Windeyer J) . To establish private nuisance, the state of affairs must amount to or involve a material and unreasonable interference with a plaintiff's use and enjoyment of their land: *Brown v Tasmania* (2017) 261 CLR 328 at [385] (Gordon J); *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514 at [138] (Emmett JA, Leeming JA and Sackville AJA agreeing) (*Gales*). A material and unreasonable interference can include both physical damage to property and non-physical damage: *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [167] (Ward J).

Hunt Leather Pty Ltd v Transport for NSW (19 July 2023) (Cavanagh J)
Coleman v Bicknell (03 December 2021) (Jarro DCJ)

12. For Mr Coleman to succeed in his claim for nuisance against Mr and/or Mrs Bicknell, he must prove the following:

    (a) he has title to sue in respect of the nuisance; [5]

    (b) that Mr and/or Mrs Bicknell has/have interfered with his right to use and enjoy his land; [6] and

    (c) the interference must be material or unreasonable. [7]

via
[6] *Bridlington Relay Ltd v Yorkshire Electricity Board [1965]* Ch 436 at 447; *Hargrave v Goldman* (1963) 110 CLR 40 at 59 quoting from Winfield on Torts, 6 lh ed (1954) p 536; *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319, 327 [22] ; *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514, 545 [138] .

Davies v Gold Coast City Council (09 July 2021) (Jarro DCJ)
Davies v Gold Coast City Council (09 July 2021) (Jarro DCJ)
De Gruchy v The Owners - Units Plan No. 3989 (27 March 2020) (McWilliam AsJ)

> 16. A nuisance has been described as an 'unlawful interference with a person's use or enjoyment of land or a right in connexion with it': *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 (***Hargrave***) at 59 per Windeyer J .

The Owners Strata Plan No 2245 v Veney (27 February 2020) (Darke J)

> 55. The presence of a vehicle within Lot 51 reduces the area otherwise able to be used for the manoeuvring of a vehicle either into or out of Lots 85, 86 or 87. However, Lot 51 is not truly an area available for that purpose. It is the property of Mr Veney, not part of the common property. The evidence given by Ms Shill about the "turning circle" and the evidence given by Mr Rinn about crossing Lot 51 establishes that parts of Lot 51 are routinely employed by at least some of the occupiers of the garages to assist in the effecting of entry to or exit from their garages. Of course, in the absence of the consent or agreement of Mr Veney, those occupiers have no legal right to make use of Lot 51 in that way. To the extent that parking on Lot 51 prevents or impedes such use, I do not think it can be said to be a substantial interference with another owner or occupier in the enjoyment of that person's land or of some right over or in connection with it (see *Hargrave v Goldman* (supra) at 59).

The Owners Strata Plan No 2245 v Veney (27 February 2020) (Darke J)
Jarosz v State of New South Wales (11 June 2019) (Darke J)

> 44. Earlier, in *Hargrave v Goldman* (1963) 110 CLR 40, Windeyer J (at 59) cited with approval the definition of nuisance found in the Sixth Edition of *Winfield on Tort*, namely, an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". Windeyer J continued (at 62):
>
> > In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.
>
> See also *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514; [2013] NSWCA 382 at [131]-[132] per Emmett JA, with whom Leeming JA and Sackville AJA agreed.

Australian Unity Retirement Living Management Pty Ltd v Karimbla Properties (No. 10) Pty Limited (31 May 2019) (Slattery J)
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd (27 July 2018) (Morrison and McMurdo JJA and Jackson J)
Marketform Managing Agency Ltd v Amashaw Pty Ltd (11 April 2018) (Meagher and Leeming JJA, Emmett AJA)

52. For present purposes, a nuisance may be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it": WVH Rogers, *Winfield and Jolowicz on Tort*, (6th ed 1954, Sweet & Maxwell) at 712 [14-4], quoted in *Hargrave v Goldman* (1963) 110 CLR 40 at 59 (Windeyer J) . Such interference may take several forms, including the infringement of rights constituting an easement, from which interference "the law presumes damage": *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 at 349–350 (Lord Wright MR). Whether by analogy with that position or otherwise, Marketform conceded that the presence of petrol in the sewer was capable of constituting a nuisance against Sydney Water, which enjoyed statutory rights to operate and maintain its sewer in land: see *Sydney Water Act 1994* (NSW) ss 37, 38 . Thus, both Marketform and Amashaw accepted that the state of affairs in the sewer could substantially interfere with Sydney Water's enjoyment of rights in land, an actionable loss expressly included within the definition of "Damage".

Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia (12 February 2016) (KENNETH MARTIN J)
Matthews v AusNet Electricity Services Pty Ltd (23 December 2014) (Osborn JA)
Onus v Telstra Corporation Limited (10 February 2011) (Price J)
Leichhardt Municipal Council v Montgomery (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

143. As noted earlier, the liability of highway authorities was originally rooted in the law of public nuisance. Interference with the safe enjoyment of a public right of way over a highway might constitute a public nuisance [191]. And it was in the context of one particular aspect of the law of nuisance (namely, that aspect of the law of private as distinct from public nuisance which concerned the rights of support from adjoining land) that two unduly influential generalisations were uttered. First, in 1876, Cockburn CJ said [192] that:

> "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is *b ound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else* – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise

unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." (emphasis added)

The second generalisation was that of Lord Blackburn in *Dalton v Angus* [193] th at:

"Ever since *Quarman v Burnett* [194] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, *a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor*. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it". (emphasis added)

On their face, these statements that a person cannot "escape" from responsibility by "delegating" responsibility to a contractor or by "employing someone else" are propositions that deny a central tenet of the law that has developed about vicarious liability – that a person may be liable for the negligence of an employee but, at least generally, will not be liable for the negligence of an independent contractor.

via

[191] *Hargrave v Goldman* (1963) 110 CLR 40 at 59.

Deepcliffe Pty Ltd v Council of the City of Gold Coast (31 August 2001) (McMurdo P, Williams JA and Helman J,)
Brodie v Singleton Shire Council (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)
Warne v Nolan (02 March 2001) (Muir J)

5. (ii) Rylands v. Fletcher: The attempt made at the trial to base the plaintiffs' claim on the rule in Rylands v. Fletcher (1866) LR I Ex 265; (1868) LR 3 HL 330 failed; and the argument before us virtually conceded that it rightly failed. Fire is a thing likely to do mischief if it escapes. Therefore, fire can come within the rule in the form in which it was enunciated by Blackburn J.; although the complexity of the distinctions between a natural and non-natural user of land, that has resulted from the words Lord Cairns used, and between dangerous and non-dangerous things, makes the application of the rule uncertain in some cases of fire and explosion: see Read v. J. Lyons &Co. Ltd. (1947) AC 156 , and Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947) 75 CLR

59 . In the present case none of those uncertainties arises directly; but Rylands v. Fletcher (1866) LR I Ex 265; (1868) LR 3 HL 330 is excluded simply because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies. And he did nothing to make its presence there more dangerous to his neighbours. Therefore the appellants could only use the principle of Rylands v. Fletcher (1866) LR I Ex 265; (1868) LR 3 HL 330 as somewhat distantly akin to this case, and by way of an approach to the proposition that their cause of action was in nuisance. To this I turn. (at p59)

Following paragraph cited by:

Woodhouse v Fitzgerald (09 April 2021) (Basten, Meagher and Payne JJA)
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating (16 July 2020) (Hatzistergos DCJ)
Woodhouse v Fitzgerald and McCoy (No 2) (27 April 2020) (Schmidt AJ)
De Gruchy v The Owners - Units Plan No. 3989 (27 March 2020) (McWilliam AsJ)

> 22. Whether an interference with land is unreasonable will very much depend on the circumstances in which it occurs: *Sturges v Bridgman*; *St Helen's Smelting Co v Tipping* (1865) 11 H.L.Cas 642 at 650. The interference must be substantial: *Walter v Selfe* (1851) 4 DeG & Sm 315 (***Walter***) at 322, 344; *Hargrave* at 60.

Murillo v SKM Services Pty Ltd (07 October 2019) (John Dixon J)
Herridge v Electricity Networks Corporation t/as Western Power [No 4] (27 March 2019) (: LE Miere J)

> 396. In ***Hargrave v Goldman*** Windeyer J said [98] that it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant. Windeyer J further said [99] that in nuisance liability is founded upon a state of affairs, created, adopted or continued by one person which, to a substantial degree harms another person and his enjoyment of his land.

via

[98] ***Hargrave v Goldman*** (1963) 110 CLR 40, 60.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] (27 March 2019) (: LE Miere J)

> 396. In ***Hargrave v Goldman*** Windeyer J said [98] that it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant. Windeyer J further said [99] that in nuisance liability is founded upon a state of affairs, created, adopted or continued by one person which, to a substantial degree harms another person and his enjoyment of his land.

via [107] ***Hargrave v Goldman*** (1963) 110 CLR 40, 60.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] (27 March 2019) (: LE Miere J)
Weber v Greater Hume Shire Council (14 May 2018) (Walton J)

421. A nuisance is an unreasonable interference with the use and enjoyment of land: an "invasion of the common law rights of an owner or occupier of land": *Hargrave v Goldman* (1963) 110 CLR 40 at 60 (per Windeyer J).

Quinn v The Body Corporate of Sanctuary Bay CTS 6523 (08 February 2013) (Dr J R Forbes, Member)

8. In the present case the Adjudicator had to apply to concrete facts and real life activities the elusive concept of '*substantial and unreasonable interference*', with no more accurate compass than a direction to make '*an order that is just an equitable in the circumstances ... to resolve [the] dispute*' [7] – a task that would no doubt attract the sympathy of Mr Justice McHugh. The criteria that the Adjudicator had to apply are derived not from his '*personal and subjective assumptions*'[8] but to the '*proper basis in law*' [9] to which the Quinns' repeatedly refer. These unsuccessful litigants may regret that the relevant ' *basis*' is hardly precise, while they '*acknowledge that in general they are tolerant people*'[10] who '*have been able to reach an informed and enlightened opinion*' in their own cause[11], but litigants and adjudicators must make the best of the law as it is.

via

[9] E.g. submissions page 26. As to the inescapable uncertainty of the law of nuisance see *Hargrave v Goldman* (1963) 110 CLR 40 at 60 per Windeyer J .

Onus v Telstra Corporation Limited (10 February 2011) (Price J)
Quick v Alpine Nurseries Sales Pty Ltd (29 October 2010) (Ward J)

162 In *Melaleuca* , Giles JA (with whom McColl JA and Hunt AJA agreed) said (at [22]):

> For the legal wrong of (private) nuisance, a nuisance is an unreasonable interference with the use and enjoyment of land: an "invasion of the common law rights of an owner or occupier of land" (*Hargrave v Goldman* (1963) 110 CLR 40 at 60 per Windeyer J). Preferably used, the word denotes the result of the defendant's conduct, or perhaps the state of affairs created by the conduct and bringing about the result. Thus in *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637, in which water discharged from the defendant's premises onto the plaintiff's premises, Dixon J said (at 657) that there was "no nuisance or other wrongful act on the part of anyone of which the plaintiff could complain until the water began actually to flow onto the plaintiff's

premises". Also preferably used, finding a nuisance does not mean legal liability for the result of the defendant's conduct. *In some circumstances there may be an unreasonable interference with the use and enjoyment of the plaintiff's land without liability in the defendant* . (my emphasis)

Melaleuca Estate Pty Ltd v Port Stephens Council (01 March 2006) (Giles and McColl JJA, Hunt AJA)
Fennell v Robson Excavations Pty Ltd (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

(1963) 110 C.L.R. 40 , at p. 60.

Fennell v Robson Excavations Pty Ltd (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

(1963) 110 C.L.R. 40 , at p. 60.

Fennell v Robson Excavations Pty Ltd (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

6. (iii) Nuisance: A nuisance has been defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". This compendious description from Winfield on Tort 6th ed. (1954) p. 536 states the essence of nuisance as a tort. But some particularity is required to give content to the phrase "unlawful interference". Generally speaking the term "nuisance" denotes a state of affairs that is either continuous or recurrent. It is, therefore, somewhat misleading to use the word "nuisance" of a situation from which harm may occur if care be not exercised, but from which no actual harm is currently occurring. A thing that dangerously overhangs a highway, and which may fall at any moment, is however commonly called a nuisance. It currently and continuously interferes with the safe enjoyment of a public right of way and is thus a public nuisance. But in the present case what the appellants relied upon was the law of private nuisance. And a fire that is presently harmless is not a nuisance, although it may be fraught with danger and arouse apprehensions of harm. It is not that the law ignores prospective nuisances or threatening dangers. It does not, for their existence may be a ground for an injunction: Attorney-General v. Corporation of Manchester (1893) 2 Ch 87 . And there can be no objection to speaking of a "potential nuisance", as was done in this case, provided that it be remembered that the invasion of the common law rights of an owner or occupier of land does not occur until he suffers harm: cf. Torette House Pty. Ltd. v. Berkman (1940) 62 CLR 637 , per Dixon J. (1940) 62 CLR, at pp 657, 658 . The matter may seem to be one of classification and terminology, rather than of substance; but the boundaries of the law of nuisance are indefinite enough without allowing the word to beg the question. It is nearly a hundred years since Erle C.J. said of nuisance, in a judgment which, because of his resignation, was never delivered: "This cause of action is immersed in undefined uncertainty . . . The maxim, 'sic utere tuo ut alienum non laedas', is no help to decision, as it cannot be applied till the decision is made; and the use of the word 'nuisance' in the discussion prolongs the dispute, because it means both annoyance that is actionable, and also that which is not actionable; and where the question is whether an annoyance is actionable, the word 'nuisance' introduces an equivocation which is fatal to any hope of a clear settlement.": Brand v. Hammersmith and City Railway Co. (1867) LR 2 QB 223, at p 247 . (at p60)

7. One argument addressed to the learned trial judge, as it was to us, was that, whether the fire be considered as a present annoyance or as prospectively harmful, this case was altogether outside the law of nuisance, because, it was said, an action of nuisance arises out of some active use that a man makes of his land, liability being commonly attributed to the maxim sic utere tuo . . . : and, it was said, the spread of the fire in this case was not the result of any use by the respondent of his land. This is too narrow a view. An occupier of land who passively suffers a nuisance to continue may be liable although he did not originally create it. Moreover it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant, although commonly it does: Esso Petroleum Co. Ltd. v. Southport Corporation (1953) 2 All ER 1204, at p 1207 ; affirmed (1956) AC 218 . (at p60)

Following paragraph cited by:

Brodie v Singleton Shire Council (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

8. The respondent had, however, a stronger answer to the case in nuisance. It was that the fire was not something for which he could be held responsible: he did not start it: he did not increase the danger of it: he did nothing to make himself responsible for it: all that he did was done with a view to making it harmless. The appellants sought to meet this by saying that, although the respondent had not created the nuisance, or potential nuisance, he had continued it. They relied upon the well-known statement by Viscount Maugham in Sedleigh-Denfield v. O'Callaghan (1940) AC 880 , that "an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so" (1940) AC, at p 894 . There an artificial structure, a drain which was in a defective state, gave rise to a nuisance when it rained. The defendant had not constructed the drain. But he suffered it to remain defective. He did not take any steps to remedy it. He thus adopted or continued it. But here the respondent did take steps to eliminate the potential nuisance. They proved ineffectual it is true. But does that mean that he adopted or continued the fire so as thereby to become responsible for it and liable for the harm it might do? The appellants rely heavily upon the remarks of Scrutton L.J. in Job Edwards Ltd. v. Birmingham Navigations (1924) 1 KB 341 , in his judgment which was approved by the House of Lords in Sedleigh-Denfield's Case (1940) AC 880 . He said: "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; and then if he does nothing, he has 'permitted it to continue', and become responsible for it" (1924) 1 KB, at p 357 . The Supreme Court of South Australia has suggested that the rationale of this is that "the risk might be so plain, and the remedy so easy and so obvious, that anyone would say that the failure to deal with the situation was equivalent to approval, and that, by failing to take this step, the landowner had continued or adopted the fire": How v. Jones (1953) SASR 82, at p 87 . That may explain a case where nothing of any significance was done. But it seems artificial in the case of a man who takes steps, although in the result ineffectual, to eliminate the danger. Trying to get rid of a thing can hardly be evidence of approval of it. Instead of imputing to the respondent an intention contrary to his real intent, the straightforward approach, in a case such as this, seems to me to be to ask: was he not liable in negligence? The essential question then is not: did the respondent continue the fire as a nuisance? It

is : was he negligent in not rendering it harmless? (at p61)

Following paragraph cited by:

Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW (18 September 2024) (Bell CJ, Leeming and Mitchelmore JJA)

51. That approach accords with authority. It is sufficient if the defendant "created, adopted or continued" the nuisance: *Hargrave v Goldman* (1963) 110 CLR 40 at 62 ; [1963] HCA 56 . *Torette House Pty Ltd v Berkman* (1939) 39 SR (NSW) 156 arose from a directed verdict for the defendant in an action for negligence and nuisance. A contracted plumber had gone onto the premises and mistakenly turned on a stopcock which caused water to flow into the plaintiff's neighbouring land. It was admitted that the defendant did not create it, and was not shown to have known of its existence or allowed it to continue: at 160. Howe ver, Jordan CJ was at pains to emphasise that "[a] person who procures the doing of an act is liable for its actual consequences and for anything necessarily involved in its being done whomsoever he may have procured to do it. He is liable for the acts of any agent of his acting within the scope of his employment" at 170; see also at 165. The High Court dismissed an appeal: (1940) 62 CLR 637; [1940] HCA 1, with each of Latham CJ, Starke and Dixon JJ confirming there could be no liability for nuisance from the unanticipated and faultless act of the owner: at 646, 651, 659. This is different from the present facts, and indeed Latham CJ noted at 646 that "the defendant did not employ the plumber to do any act of which the nuisance was the necessary or a natural consequence".

Hunt Leather Pty Ltd v Transport for NSW (19 July 2023) (Cavanagh J)
Hunt Leather Pty Ltd v Transport for NSW (19 July 2023) (Cavanagh J)
Hunt Leather Pty Ltd v Transport for NSW (19 July 2023) (Cavanagh J)
Trist v Glenelg Shire Council (22 March 2023) (Gorton J)

7. A nuisance is committed at common law if a person, other than in the reasonable and convenient use of their land, creates a state of affairs that, to a substantial degree, interferes with another's enjoyment of their land. [3] The emission of sound can be a nuisance [4] and there is no requirement that the conduct injure the other person's health. [5] There are two value judgments that have to be made. The first is as to the extent of the interference arising from the use of the land, and the second is as to whether, having regard to that level of interference, the use is nonetheless reasonable. [6] The fact that the use is otherwise a lawful use for which there is planning permission does not prevent it from creating a nuisance. [7] The test, in the case of noise, has been expressed in the following terms:

To establish a nuisance, the plaintiffs must show that there has been a substantial degree of interference with their enjoyment of their use of [their house]. What constitutes such a substantial degree of interference must be decided according to what are reasonable standards for the enjoyment of those premises. What are

reasonable standards must be determined by common sense, taking into account relevant factors, including what the Court considers to be the ideas of reasonable people, the general nature of the neighbourhood and the nature of the location at which the alleged nuisance has taken place, and the character, duration and time of occurrence of any noise emitted, and the effect of the noise. [8]

via

[3] *Hargrave v Goldman* (1963) 110 CLR 40, 62 (Windeyer J) .

Uren v Bald Hills Wind Farm Pty Ltd (25 March 2022) (Richards J)
Davies v Gold Coast City Council (09 July 2021) (Jarro DCJ)

132. I accept, as submitted on behalf of the plaintiffs, that unless and until the High Court determines that the tort of nuisance has been subsumed into the tort of negligence, I must proceed on the basis that it remains a separate cause of action. [128] I therefore reject the defendant's submission that negligence is a necessary element of nuisance to the extent that it operates in this case. Negligence is not a necessary element of nuisance. In *Hargrave & Ors v Goldman* (1963) 110 CLR 40 at 62 , Windeyer J stated:

> "In nuisance liability is founded upon state of affairs, created, adopted or continued, by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.
>
> In negligence liability is founded upon the negligent conduct of one person causing, to any degree, foreseeable harm to the person or property of another person (not necessarily an owner or occupier of land) to whom a duty of care was owed."

Davies v Gold Coast City Council (09 July 2021) (Jarro DCJ)

133. Regarding the relevant principles, McMurdo JA stated in *State of Queensland v Michael Vincent Baker Superannuation Fund Pty Ltd* [2019] 2 Qd R 146 which involved an overland flow of water from a rail corridor, as follows:

> "[193] In *Hargrave v Goldman* ,[129] Windeyer J said that, in essence, a nuisance could be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". [130] **Not every use of a person's property which interferes with the use or enjoyment of other land is an unlawful interference. In general, an unlawful interference is an *unreasonable* interference with the use or enjoyment of other land. That criterion of reasonableness has been difficult to apply in some cases**, but it is a necessary constraint on the operation of the tort which has been consistently recognised.
>
> [194] Thus, in *Lawrence v Fen Tigers Ltd* ,[131] Lord Neuberger of Abbotsbury PSC said:

"A nuisance can be defined, albeit in general terms, as **an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land**, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O' Callaghan* [1940] AC 880, 903, 'a useful test is perhaps **what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society**'."

That statement by Lord Wright in *Sedleigh-Denfield v O'Callaghan* was described by Gibbs CJ, Wilson and Brennan JJ in *Elston v Dore* as representing "the proper test to apply in most cases". [132] Similarly, in *C ambridge Water Co v Eastern Counties Leather Plc*, Lord Goff of Chieveley said that liability for nuisance is: [133]

> "kept under control by the principle of reasonable user – the principle of **give and take** as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:' see *Bamford v Turnley* (1862) 3 B & S 62, 83, *per* Bramwell B."

And in *Gartner v Kidman*, Windeyer J (with whom Dixon CJ agreed) said: [134]

> "The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the **reasonable use of the lands in question**. In some recent cases there is perhaps a more explicit recognition than there was in some earlier cases that a landowner's duty to his neighbour qualifies his right to do what he likes with his own land and on his own land."

[195] In *Hargrave v Goldman* , Windeyer J compared the torts of nuisance and negligence, by observing that liability in negligence is founded upon the negligent conduct of a person, whereas **liability in nuisance "is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land)** …" [135]

[196] In *Sedleigh-Denfield v O'Callaghan* ,[136] Viscount Maugham described the ways in which an occupier of land may be liable by "continuing" or "adopting" a nuisance created by another, even a trespasser, as follows:

> **"[A]n occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable**

means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance."

[197] Similarly, in *Torette House Pty Ltd v Berkman* ,[137] Dixon J cited with approval the judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations* ,[138] who said:

"In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land: (1) if he or his servants or agents created the nuisance; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment … (3) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it …" (citations and footnotes omitted)

Dixon J also cited, again with evident approval, this passage from the judgment of Rowlatt J in *Noble v Harrison*: [139]

"[A] person is liable for a nuisance constituted by the state of his property: **(1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it**."

[198] In *Hargrave v Goldman* ,[140] Windeyer J observed that "[g]enerally speaking the term 'nuisance' **denotes a state of affairs that is either continuous or recurrent**". **Where a defendant is said to be liable upon the basis that it has continued or adopted the nuisance, there is a tort which is distinct from the original creation of the nuisance**." [141]

via

[135] (1963) 110 CLR 40 , 62.

Davies v Gold Coast City Council (09 July 2021) (Jarro DCJ)
Lorenzato v Burwood Council (23 November 2020) (Fagan J)
Byron v JBG Contractors (NSW) Pty Ltd (21 September 2020) (Fagan J)

4. The proceedings have resolved into an assessment of damages. The defendant does not dispute that the lime escaped onto the plaintiffs' land on three days. It does not dispute that it is liable in nuisance. The elements of the tort of negligence were summarised by Emmett JA in *Gales Holdings Pty Ltd v Tweed Shire Council* [2013] NSWCA 382 in the following paragraphs:

[131] A nuisance is either a continuous or recurrent state of affairs. An occupier of land will be liable for continuing a nuisance if, with knowledge or presumed knowledge of the state of affairs, the occupier fails to take reasonable steps to bring

it to an end despite having had ample time to do so (*Hargrave v Goldman* (1963) 110 CLR 40; [1963] HCA 56 at 59-61). There will be nuisance if a state of affairs created, adopted or continued by an owner or occupier of land harms another person's enjoyment of land occupied or owned by that other person, unless the first person's conduct involves no more than the reasonable and convenient use of its own land (*Hargrave v Goldman* at 62).

[132] That is to say, nuisance is a wrongful interference with another's enjoyment of land by the use of other land occupied or owned by the alleged wrongdoer. However, an owner or occupier of land is not an insurer. There must be more than mere harm being done to another's enjoyment of land. The harm must be caused by the alleged wrongdoer's use of its own land. The word use connotes that a degree of personal responsibility is usually required, even though a deliberate or negligent act is not. A deliberate or negligent act will however be sufficient. A balance must be maintained between an owner or occupier's right to do what it likes with its land and a neighbour's right not to be interfered with. The proper test to apply in most cases is what is reasonable, according to the ordinary usages of a particular society. While negligence is not essential, fault of some kind is almost always necessary (*Elston v Dore* (1982) 149 CLR 480; [1982] HCA 71 at 487-488).

[138] [E]manations of any kind constitute a nuisance if they create an inconvenience materially interfering with the ordinary physical comfort of human existence, according to plain, sober and simple notions among ordinary people. Regard must be had to the character of the locality in which the inconvenience is created and the standard of comfort that those in the locality may reasonably expect. The reasonable use of land may occasionally cause annoyance about which neighbours cannot reasonably complain (see *Don Brass Foundry Pty Ltd v Stead* (1 948) 48 SR (NSW) 482 at 487). In considering whether an inconvenience is unreasonable, allowance must be made for reasonable give and take. […]

[139] Nuisance covers a variety of tortious acts or omissions and the relevant conduct need not be negligent. For example, an occupier of premises may be liable for emitting fumes or noise, even though it used the utmost care in the use of its premises. Since the amount of fumes or noise that can lawfully be emitted is a question of degree, the occupier may simply have miscalculated what was justifiable in the circumstances. On the other hand, nuisance by emission may be the result of negligent conduct. Often the same facts will establish liability both in nuisance and in negligence. Although negligence is not necessary, fault of some kind almost always is. Fault generally involves foreseeability (*Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 at 639).

Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council (18 August 2020) (Richards J)
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating (16 July 2020) (Hatzistergos DCJ)
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating (16 July 2020) (Hatzistergos DCJ)
Woodhouse v Fitzgerald and McCoy (No 2) (27 April 2020) (Schmidt AJ)
Donnelly v Hunter's Hill Council (01 April 2020) (Dicker SC DCJ)

105. In *Michos v Council of the City of Botany Bay* [2012] NSWSC 625 Slattery J stated the principles as follows relating to roots constituting a nuisance at paragraphs [57]-[60] :

> "57. The law of nuisance may be concisely stated. Nuisance is the unreasonable interference with the use and enjoyment of a person's land: *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 62 per Windeyer J ; *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [295] per Bergin CJ in Eq. Whether there has been "unreasonable interference" is an objective test - whether a person of ordinary habits and sensibilities in the plaintiff's position and circumstance would regard the interference with the enjoyment of the land as unreasonable; some "reasonable give and take" is involved; and another way of stating the test is whether there has been "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions" of the community: Jordan CJ in *Don Brass Foundry Pty Ltd v Stead* [1948] NSW St Rp 47; (1948) 48 SR (NSW) 482 at 486 and 487.
>
> 58. In determining whether there has been unreasonable interference, a court will take into account the locality in which the interference occurs: *Sturges v Bridgman* (1879) 11 Ch D 852 (CA) at 865 per Thesiger LJ; the duration, time of day, frequency and extent of the interference: *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683; and, any malice on the part of the person causing the interference: *Christie v Davey* [1893] 1 Ch 316.
>
> 59. Consistently with the notion of give and take, a neighbour may tolerate an interference with the enjoyment of the land for various reasons; but when the interference has reached the stage that the neighbour no longer feels obliged or willing to tolerate it, the neighbour will be entitled to claim that there is an unreasonable interference with the enjoyment of the land, notwithstanding earlier tolerance; but the neighbour will not be entitled to claim damages for the interference that was tolerated prior to the complaint being made: *Orr v Ford* [1989] HCA 4; (1989) 167 CLR 316 at 341 per Deane J.
>
> 60. Although there may be some exceptions, fault of some kind is now usually necessary for liability in nuisance: *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [118] - [119] per Bryson JA; *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [296] per Bergin CJ in Eq."

The Owners Strata Plan No 2245 v Veney (27 February 2020) (Darke J)

45. In broad terms, an actionable nuisance may be described as unlawful interference with a person's use or enjoyment of land, or of some right over or in connection with the land (see *Hargrave v Goldman* (1963) 110 CLR 40 at 59). Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the reasonable and convenient use of the person's own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person's land (see *Hargrave v Goldman* (supra) at 62). In *Elston v Dore* (1982) 149 CLR 480 Gibbs CJ, Wilson and Brennan JJ (with

whom Murphy J agreed) stated (at 487-8) that in most cases the proper test to apply in determining whether a nuisance has been committed is as put by Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 where his Lordship said:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] (27 March 2019) (: LE Miere J)
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd (27 July 2018) (Morrison and McMurdo JJA and Jackson J)
O'Connor v New South Wales (19 May 2017) (N Adams J)
Marsh v Baxter (03 September 2015) (McLure P; Newnes and Murphy JJA)
Gales Holdings Pty Ltd v Tweed Shire Council (18 November 2013) (Emmett and Leeming JJA, Sackville AJA)

131. A nuisance is either a continuous or recurrent state of affairs. An occupier of land will be liable for continuing a nuisance if, with knowledge or presumed knowledge of the state of affairs, the occupier fails to take reasonable steps to bring it to an end despite having had ample time to do so (*Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 59-61). There will be nuisance if a state of affairs created, adopted or continued by an owner or occupier of land harms another person's enjoyment of land occupied or owned by that other person, unless the first person's conduct involves no more than the reasonable and convenient **use** of its own land (*Hargrave v Goldman* at 62).

Dimitrios Michos & Another v Council of the City of Botany Bay (08 June 2012) (Slattery J)

64. The plaintiffs also plead their cause of action in negligence in the alternative. In *Hargrave v Goldman* (1963) 110 CLR 40 at 62 , Windeyer J made the following distinction between nuisance and negligence:

> "In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land. In negligence liability is founded upon the negligent conduct of one person causing, to any degree, foreseeable harm to the person or property of another person (not necessarily an owner or occupier of land) to whom a duty of care was owed".

Dimitrios Michos & Another v Council of the City of Botany Bay (08 June 2012) (Slattery J)
Gales Holdings Pty Ltd v Tweed Shire Council (21 September 2011) (Bergin CJ in Eq)
South East Water Limited v Transpacific Cleanaway Pty Ltd (24 February 2010) (Cavanough J)

Brodie v Singleton Shire Council (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

9. (iv) Negligence: The distinction between nuisance and negligence is not altogether clear cut. Until the recognition in modern times of negligence as a tort in itself, many actions of case which we would to-day say were based on negligence were described as being for nuisances. The cases collected under "nuisance" in the third edition (1868) of Bullen and Leake show this. Negligence is not a necessary element in nuisance, although it may be an ancillary element in some forms of nuisance: see Jacobs v. London County Council (1950) AC 361 per Lord Simonds (1950) AC, at p 374 and Sedleigh-Denfield's Case (1940) AC 880 , per Lord Wright (1940) AC, at p 904 . The distinction between nuisance and negligence as separate torts may be of little, if any, importance for the ultimate decision of this case. But it is of some significance in considering the decisions relied upon in the argument. At the present day, and for present purposes, it may, I think, be stated as follows. (at p62)

10. In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land. (at p62)

11. In negligence liability is founded upon the negligent conduct of one person causing, to any degree, foreseeable harm to the person or property of another person (not necessarily an owner or occupier of land) to whom a duty of care was owed. (at p62)

12. (v) Duty of care: In the present case the learned trial judge found expressly that, had the respondent taken reasonable care, he could have put out the burning logs. I take it that his Honour meant by this that the respondent did not act as a reasonably careful man, who had a duty to extinguish the fires, would have acted in the circumstances. That, the appellants say, is a finding of negligence on which they are entitled to judgment, and again they refer to the illustration that Scrutton L.J. gave, in the passage I have quoted above, of stamping out a fire. His Lordship there recognized that, although the case had been debated as one of the duty to abate a nuisance, his proposition made liability depend on negligence. And he said: "I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours" (1924) 1 KB, at p 358 . (at p62)

Following paragraph cited by:

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

766. The existence of a duty of care is one necessary element of a common law cause of action in damages for negligence, the others being breach, causation, and actionable damage that is within the scope of liability. The question whether a duty of care is recognised is one of a number of analytical tools that place boundaries around liability for negligence: *Harriton v Stephens* [2006] HCA 15; 226 CLR 52 at [257] (Crennan J, Gleeson CJ, Gummow J and Heydon J

agreeing). See also the discussion by Windeyer J in *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 63 and his Honour's reference to the law of negligence having "symmetry, consistency and defined bounds", and that "its application in particular cases is to be reasonably predictable". A duty of care is owed to an individual and must be considered in relation to the facts of that individual's case: *Agar v Hyde* [2000] HCA 41; 201 CLR 552 at [66] (Gaudron, McHugh, Gummow and Hayne JJ). It is "incumbent on a claimant to establish breach of an independent duty to himself as a particular individual": Fleming, *The Law of Torts*, (9th ed) at 160, cited in *Agar v Hyde* at [67] . This feature of a duty of care is demonstrated when one comes to consider questions of issue estoppel, as to which see *Jackson v Goldsmith* [1950] HCA 22; 81 CLR 446.

South East Water Limited v Transpacific Cleanaway Pty Ltd (24 February 2010) (Cavanough J)
Tilba Tilba Stud (WA) (ACN 065 413 747) as trustee for the Tilba Tilba Stud Trust v The Executive Officer of Agriculture Western Australia (03 March 2004) (Barker J)
Tame v New South Wales (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

249. The common law of negligence does not provide for recovery by all who suffer negligently inflicted harm. Nor is reasonable foreseeability the only limit upon recovery. As I have pointed out before [272] , the concept of duty of care has a fundamentally important role to play. "[A]s a prerequisite of liability in negligence, [it] is embedded in our law by compulsive pronouncements of the highest authority." [273] Foresight of harm, even foresight of harm of a particular kind, has not hitherto been found sufficient to warrant finding a duty of care. As Brennan J said in *Sutherland Shire Council v Heyman* [274] , "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered *and in reference to the plaintiff or a class of which the plaintiff is a member*" (emphasis added). (Even that double specification may not suffice in some cases.)

via

[273] *Hargrave v Goldman* (1963) 110 CLR 40 at 63 per Windeyer J .

Brodie v Singleton Shire Council (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)
Modbury Triangle Shopping Centre Pty Ltd v Anzil (23 November 2000) (Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ)
Jaensch v Coffey (20 August 1984) (Gibbs C.j., Murphy, Brennan, Deane and Dawson JJ)
Ramsay v Pigram (14 June 1968) (Barwick C.j., McTiernan, Kitto, Taylor and Windeyer JJ)

13. Counsel for the respondent challenged the validity of this proposition, or at least its application in this case. The respondent, he urged, had no legal duty to the appellants to extinguish the burning logs or render them harmless. His argument led him to some observations concerning the concept of duty of care, as an element in the tort of negligence. This is a subject on which there is now a large body of learned academic literature. We were referred to some of the articles and text-books. I have

read them and others. But it seems to me unnecessary to go far into the matter here. It may be that insistence upon a duty of care as a separate element in liability for negligence is, in theory, unnecessary; for it may be comprehended in the idea of negligence itself, an act or omission being careless only when a reasonable man would appreciate, if he thought about the matter, that it could have harmful consequences. As long ago as 1897 Holmes J. suggested that the idea of a duty of care was a superfluous addition to the requirement of reasonable care: (1897) 10 Harvard Law Review p 47 And Professor Buckland, fittingly enough as a Roman lawyer, thought the duty of care "an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice". He realized, however, that it was "certainly a part of our law": (1935) 51 Law Quarterly Review 637 Sir Percy Winfield took the same view in an article in the (1934) 34 Columbia Law Review, pp. 41-66 reprinted in his Select Legal Essays (1952) pp. 70-95. The matter is now beyond purposeful debate, except as an exercise in juristic philosophy. The concept of a duty of care, as a prerequisite of liability in negligence, is embedded in our law by compulsive pronouncements of the highest authority. And it may well be that it could not be otherwise, if the law of negligence is to have symmetry, consistency and defined bounds, and its application in particular cases is to be reasonably predictable. It is worth noting that, although the duty of care has no place as a separate element in the civil law of fault, Continental courts have had to meet the same problem as the common law courts have; and they have dealt with it in somewhat the same way. Thus it has been said that "French lawyers have been brought to the point of acknowledging the need for something not very far removed from the English duty of care": Lawson, Negligence in the Civil Law (1950) p. 31; and see Millner, Contrasts in Contract and Tort, in Current Legal Problems 1963, at p. 85 cf. Ryan, An Introduction to the Civil Law (1962), pp. 114, 115. (at p63)

Following paragraph cited by:

Tame v New South Wales (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)
Pyrenees Shire Council v Day (23 January 1998) (Brennan Cj,toohey, McHugh, Gummow and Kirby JJ)
Pyrenees Shire Council v Day (23 January 1998) (Brennan Cj,toohey, McHugh, Gummow and Kirby JJ)

14. In the recent, and most important, case of Hedley Byrne &Co. Ltd. v. Heller &Partners Ltd. (1964) AC 465 , Lord Pearce said: "The law of negligence has been deliberately limited in its range by the courts' insistence that there can be no actionable negligence in vacuo without the existence of some duty to the plaintiff" (1964) AC 465 . But it would, I consider, be wrong to conclude from that, and from descriptions, such as a "control device", that appear in textbooks that the controlling element, duty of care, was imposed upon the law of negligence in order to confine its twentieth century expansiveness. Rather, it seems to me, it had an earlier origin and grew up almost inevitably as negligence grew to be a separate tort. For example, in Bacon's Abridgment 6th ed. (1807) it is said under "Action on the Case" that: "In some cases an injury happens to a man in his property, by the neglect of another; yet if by law he was not obliged to be more careful no action will lie". And throughout the nineteenth century the courts held in numerous cases that on particular facts there was a duty on which an action of case could be founded - whether it was then classified as in nuisance or negligence is immaterial. As an illustration, it is enough to refer to Brown v. Mallett (1848) 5 CB 599 (136 ER 1013) . When Lord Esher, then Brett M.R., made his famous generalization in Heaven v. Pender (1883) 11 QBD 503 , his purpose was to state the circumstances

in which "a duty arises to use ordinary care and skill . . ." (1883) 11 QBD, at p 509 . But we cannot, having regard to what has been decided in other cases, decide whether in a given case there is a duty of care simply by resorting to Lord Esher's generalization, even when qualified by the notion of proximity, not in the sense of physical nearness but in the metaphysical sense defined by Lord Atkin in Donoghue v. Stevenson (1932) AC 562, at pp 580, 581 . (at p64)

Following paragraph cited by:

Seale v Perry (11 September 1981) (LUSH, MURPHY and MCGARVIE, JJ)

> Under the second question it is the method of the law to determine for particular categories of relationships whether the duty of care which arises prima facie on an affirmative answer to the first question, or the legal consequences of the existence of that duty of care, ought to be eliminated or restricted. One looks at categories of relationships, not, as under the first question, at the actual situation in the particular case. See: Hargrave v Goldman (1963) 110 CLR 40 , at p. 65 ; the Hedley Byrne Case, [1964] AC 465 , at pp. 524-5 and 531; Mutual Life and Citizens Assurance Company Ltd. v Evatt (1970) 122 CLR 628, at p. 632 ("the MLC Case"); the Willemstad Case (1976) 136 CLR 529, at pp. 565-7 . The categories of relationships are not immutably fixed and new categories come into being. The Hedley Byrne Case [1964] AC, at pp. 524-5 and 531, per Lord Devlin.

Geyer v Downs (21 November 1975) (Hutley, Glass and Mahoney Jj.A)

> (1963) 110 C.L.R. 40 , at pp. 65 , 66.

15. How then are we to decide whether the respondent was under a duty of care in this case? His counsel, having raised the question, answered by quoting du Parcq L.J. in Deyong v. Shenburn (1946) 1 KB 227 : "There has to be a breach of a duty which the law recognizes, and to ascertain what the law recognizes regard must be had to the decisions of the courts" (1946) 1 KB, at p 233 . Thus, the argument ran, if no court has said that there is a duty in a case such as this, then we cannot now say there is such a duty. But that extreme view of the "wisdom of our ancestors" cannot be accepted to-day. Lord Macmillan's words will bear quoting once again: "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed": Donoghue v. Stevenson (1932) AC, at p 619 . And I would respectfully add a reference to Lord Devlin's speech in Hedley Byrne's Case (1964) AC 465 , in particular to two passages. One, the sentence: "English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity" (1964) AC 465 . The other: "Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was 'proximity' between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops" (1964) AC 465 . The warning that is implicit in this is important. We are concerned with categories, not with the special facts of a particular case. (at p65)

16. This case is not one in which the obligation to use care and skill arises from an undertaking to do

some work for the benefit of another. In a case of that kind an obligation to exercise due care and skill arises from the entering upon the work, whether for reward or gratuitously. But here what the respondent did in relation to the fire was not done pursuant to any undertaking to the appellants, nor was it done specifically for their benefit. It did not increase the danger of the fire spreading. Probably it diminished it. It seems to me impossible to say that, because the respondent did something to control the fire, he incurred a liability that he would not have incurred had he done nothing. If that were the law, a man might be reluctant to try to stop a bush fire lest, if he failed in his endeavours, he should incur a liability that he would not incur if he remained passive. The question comes to this: In a case such as this has the occupier of land a duty at common law - I put statutory obligations aside for the moment - to act at all? It was said that we must go to Donoghue v. Stevenson (1932) AC 562 , and that the principle of proximity would supply the answer. Fullagar J. wrote of Donoghue v. Stevenson (1932) AC 562 (in a paper published in the Australian Law Journal (1951) Vol 25 p 278): "It was not, of course, intended to make, and it does not make, everything nice and easy". (at p65)

Following paragraph cited by:

Electricity Networks Corporation v Herridge Parties (07 December 2022) (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ)
Herridge v Electricity Networks Corporation t/as Western Power [No 4] (27 March 2019) (: LE Miere J)
[47] Mr B Dharmananda SC referred to ***Hargrave v Goldman*** (1963) 110 CLR 40, 66.

Ibrahimi v Commonwealth of Australia (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

207. First, the likelihood and extent of the harms suffered are not said to have been directly increased by any positive act of the Commonwealth. As reinforced at [213]– [215] below, the wrongs asserted are better understood as omissions, which engage the general principle stated by Windeyer J in *Hargrave v Goldman* (1963) 110 CLR 40; [1963] HCA 56 at 66 that the common law "casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him". That position has been justified as a recognition of individual autonomy, and historically, as embodying a distinction between misfeasance and nonfeasance: see *Stovin v Wise* [1996] AC 923 at 943–944 (Lord Hoffmann); *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3 at [101] (McHugh J). In *Stuart v Kirkland-Veenstra* , Gummow, Hayne and Heydon JJ explained:

> "[88] ….The coexistence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 596 [145]; [2002] HCA 54. As Dixon J said in *Smith v Leurs* (1945) 70 CLR 256 at 262; [1945] HCA 27, '[t]he general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third' (see also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; [2000] HCA 61) It is, therefore, 'exceptional to find in the law a duty to control another's actions to

prevent harm to strangers': *Smith v Leurs* at 262. And there is no general duty to rescue. In this respect, the common law differs sharply from civil law. The common law has been described as 'individualistic', the civil law as 'more socially impregnated': Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 90.

[89] It may be said that the notion of personal autonomy is imprecise, if only because it will often imply some notion of voluntary action or freedom of choice. And, as Windeyer J pointed out in *Ryan v The Queen* (1967) 121 CLR 205 at 244; [1967] HCA 2 (see also *Tofilau v The Queen* (2007) 231 CLR 396 at 404405, 417418 ; [2007] HCA 39, albeit in a different context, words like 'voluntary' are ambiguous. But expressed in the most general way, the value described as personal autonomy leaves it to the individual to decide whether to engage in conduct that may cause that individual harm: *Agar v Hyde* (2000) 201 CLR 552 at 583584 [88][90]; [2000] HCA 41. As Lord Hope of Craighead put it in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 379380, '[o]n the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury'."

Smith v State of Victoria (27 August 2018) (John Dixon J)

63. The defendant emphasised that the High Court has consistently drawn a distinction between a positive act causing damage and a failure to act. [24] Save for certain exceptional relationships, [25] the common law does not impose a duty on a person to act where no positive conduct of that person created the risk of injury. [26] As McHugh J observed in *Pyrenees Shire Council v Day*, [27] the common law does not 'generally impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another', [28] recognising an exception only 'when some special relationship exists between the person harmed and the person who fails to act'. [29]

via

[28] Ibid 368 ; see also *Hargrave v Goldman* (1963) 110 CLR 40, 66 ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 478 ; *Stuart v Kirkland–Veenstra* (2009) 237 CLR 215, 258 ('*Kirkland-Veenstra*').

Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

265. In *Stovin v Wise* [1996] AC 923 the House of Lords considered the liability of a road authority for an accident which resulted from reduced vision at an intersection, where a mound of earth on adjoining private land obstructed the view of road users. The road authority was aware of the problem and had power to require the landowner to remove the mound, but had not done so. Lord Hoffmann, speaking for the majority, made two points which are relevant in the present case. He noted, first, that the case involved an omission, rather than positive conduct and, secondly, that the common law did not treat omissions in the same way as positive acts, referring to Windeyer J in *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 66. Lord Hoffmann continued at 943G -H:

"There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties ... or natural causes."

Stuart v Kirkland-Veenstra (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
Chivers v Perron Investments Pty Ltd (07 November 2003) (Williams DCJ)
McClean v General Service Board of Alcoholics Anonymous Australia (03 November 2003) (Kennedy DCJ)

80. In ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424 at 501 502, Deane J said:

"... The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury: cf per Windeyer J, ***Hargrave v Goldman*** (1963) 110 CLR 40 at 66. Th at being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or 'exceptional': cf per Dixon J, ***Smit h v Leurs*** (1945) 70 CLR 256 at 262 and ***Dorset Yacht Co v Home Office*** [19 70] AC 1004 at 10381039, 10451046, 1055, 1060 ff. Apart from those cases where the circumstances disclose an assumption of a particular obligation to take such action or of a particular relationship in which such an obligation is implicit, they are largely confined to cases involving reliance by one party upon care being taken by the other in the discharge or performance of statutory powers, duties or functions or of powers, duties or functions arising from or involved in the holding of an office or the possession or occupation of property."

Graham Barclay Oysters Pty Ltd v Ryan (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

91. The powers and functions of the government of a polity are generally invested for the benefit of the general public. In the absence of a statutory direction, the mere existence of such a power in that government imposes no duty to exercise it for the protection of others. In that respect, its situation is analogous to a private citizen who, absent special circumstances, has no duty to take affirmative action to protect another person from harm [57] . Nor does the bare fact that the Executive government has exercised its powers from time to time create any

> duty to exercise its powers. Such exercises of power do not constitute "control" of an activity in the sense that that expression is used in the law of torts. They are merely particular exercises of powers that were invested in the Executive government for the benefit of the general public to be exercised at the discretion of the Executive government. Unless a particular exercise of power has increased the risk of harm to an individual, the Executive government of a polity does not ordinarily owe any common law duty to take reasonable care as to when and how it exercises its powers. No doubt circumstances may arise where conduct of the government, short of increasing a risk of harm, creates a duty of care. But such cases are less likely to arise than in the case of other public authorities. In particular, knowledge of specific risks of harm or the exercise of powers in particular situations is less likely to be a factor in creating a duty than in the case of an ordinary public authority. This is because the powers and functions of the Executive government are conferred for the benefit of the public generally and not for the benefit of individuals.

via

[57] *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J ; ***Stovin v Wise*** [1996] AC 923 at 943-944 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing.

Ashrafi Persian Trading Co Pty Ltd v Ashrafinia (27 July 2001) (Mason P, Handley and Heydon JJA)

62 Further, neither the stress by Gleeson CJ, Gaudron J and Hayne J on the limited scope of positive duties to act, nor the stress by Gaudron and Hayne J on the relevance of control, can be regarded as idiosyncratic over-reactions to the extreme nature of the plaintiff's claim in *Modbury's* case. In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [101]-[102] , for example, McHugh J said:

> "As I pointed out in [*Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 326], from the time of the Year Books, the common law has drawn a distinction between causing damage by a positive act and 'causing' damage by a failure to act. The early forms of action gave no remedy for failure to prevent harm. The writ of trespass, historically the most important of the early writs for remedying wrongs, was available only for direct or forcible injury. Not until the action on the case was developed did the common law provide a remedy for omissions. Initially, both contractual and tortious wrongs were remedied by the action on the case because the distinction between 'rights ex contractu and ex delicto was by no means clear' [Sutton, *Personal Actions at Common Law* (1929), p 26]. When tort and contract separated, contractual wrongs came to be identified with actions in assumpsit while tortious wrongs came to be identified with the action on the case. Speaking generally, remedies for omissions were henceforth seen as remediable

by the action in assumpsit, not case. Absent consideration or its equivalent, the common law generally imposed no obligation on a person to protect or help another. As Windeyer J pointed out in *Hargrave v Goldman* [(1963) 110 CLR 40 at 66], 'the common law does not require a man to act as the Samaritan did'. For that reason in most cases, the occupier of property owes no duty to a neighbour to secure the property so as to prevent thieves gaining access to the property for the purpose of robbing the neighbour's premises [*P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342]. The 'general rule' said Dixon J in *Smith v Leurs* [(1945) 70 CLR 256 at 262], 'is that one man is under no duty of controlling another man to prevent his doing damage to a third'. Nor does the common law generally impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another. … The careless or malevolent person, who stands mute and still while another heads for disaster, generally incurs no liability for the damage that the latter suffers. Harsh though the common law may seem to be, there are nevertheless strong political, moral and economic arguments that justify its approach, as Lord Hoffmann pointed out in *Stovin v Wise* [[1996] AC 923 at 943-944].

In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act. By a person's failure to act, I mean that person's failure to act divorced from positive conduct by that person that causes damage such as the failure to brake while driving a car. A special relationship may arise from the ownership, occupation or control of land or chattels, from the receipt of a benefit or from an undertaking, assumption of responsibility or invitation which might induce the person harmed to act or to refrain from acting."

Ashrafi Persian Trading Co Pty Ltd v Ashrafinia (27 July 2001) (Mason P, Handley and Heydon JJA)
TC v State of New South Wales (11 February 1999) (Studdert J)
W D & H O Wills (Australia) Ltd v State Rail Authority of New South Wales (03 April 1998) (Mason P, Priestley and Beazley JJA)

> "… Absent consideration or its equivalent, the common law generally imposed no obligation on a person to protect or help another. As Windeyer J pointed out in Hargrave v Goldman (1963) 110 CLR 40 at 66 , 'the common law does not require a man to act as the Samaritan did'. For that reason in most cases, the occupier of property owes no duty to a neighbour to secure the property so as to prevent thieves gaining access to the

property for the purpose of robbing the neighbour's premises. The 'general rule' said Dixon J in Smith v Leurs (1945) 70 CLR 256 at 262, 'is that one man is under no duty of controlling another man to prevent him doing damage to a third'."

Pyrenees Shire Council v Day (23 January 1998) (Brennan Cj,toohey, McHugh, Gummow and Kirby JJ)
CSR Ltd v Wren (18 December 1997) (Powell, Beazley and Stein JJA)
David Securities P/L v Commonwealth Bank of Australia (11 May 1989) (Hill J.(1))
Hawkins v Clayton (08 April 1988) (Mason C.j., Wilson, Brennan, Deane and Gaudron JJ)
Sutherland Shire Council v Heyman (04 July 1985) (Gibbs C.j., Mason, Wilson, Brennan and Deane JJ)

9. There is much to be said for the view that Lord Atkin's inclusion of "omissions" in his formulation of the requirement of proximity in Donoghue v. Stevenson (at p 580) was intended to be read as referring not to mere failure to act to prevent injury to another but to an omission in the course of positive conduct, such as a failure to apply the brakes of a motor vehicle while driving it on a public road or a failure adequately to inspect a product in the course of manufacturing it for sale on the open market, which results in the overall course of conduct being the cause of injury or damage (see Professor J.C. Smith and Professor Peter Burns, "Donoghue v. Stevenson - The Not so Golden Anniversary", Modern Law Review, vol.46 (1983), 147, at pp 155-156). Be that as it may however, the clear trend of authority has been to accept the principles of common law negligence enunciated in cases such as Donoghue v. Stevenson as being of general application (see, generally, the more recent cases cited by Professor Smillie in "Principle, Policy and Negligence", New Zealand Universities Law Review, vol.11 (1984), 111 and, in this Court, Jaensch v. Coffey; Hackshaw v. Shaw (1984) 59 ALJR 156, 56 ALR 417; Papantonakis v. Australian Telecommunications Commission (1985) 59 ALJR 201, 57 ALR 1). In my view, that trend should continue to be accepted in this Court and those principles should be recognized as governing liability in negligence for omissions as well as for acts of commission. That does not mean that the distinction between mere omission and positive act can be ignored in identifying the considerations by reference to which the existence of a relationship of proximity must be determined in a particular category of case. To the contrary, the distinction between a failure to act and positive action remains a fundamental one. The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury (cf. per Windeyer J., Hargrave v. Goldman (1963) 110 CLR 40 , at p 66). That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or "exceptional" (cf. per Dixon J., Smith v. Leurs (1945) 70 CLR 256, at p 262 a nd Dorset Yacht Co. Ltd. v. Home Office, at pp 1038-1039, 1045-1046, 1055 and 1060ff.). Apart from those cases where the circumstances disclose an assumption of a particular obligation to take such action or of a particular relationship in which such an obligation is implicit, they are largely confined to cases involving reliance by one party

upon care being taken by the other in the discharge or performance of statutory powers, duties or functions or of powers, duties or functions arising from or involved in the holding of an office or the possession or occupation of property.

Sutherland Shire Council v Heyman (04 July 1985) (Gibbs C.j., Mason, Wilson, Brennan and Deane JJ)
Sutherland Shire Council v Heyman (04 July 1985) (Gibbs C.j., Mason, Wilson, Brennan and Deane JJ)

17. Lord Atkin's well-known generalization explains the scope of a duty of care, that is to say it states who can complain of a lack of care when an obligation of care exists. But I venture to think that it is a mistake to treat it as providing always a complete and conclusive test of whether, in a given situation, one person has a legal duty either to act or to refrain from acting in the interests of others. The very allusion shows that it has not this universal application. The priest and the Levite, when they saw the wounded man by the road, passed by on the other side. He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did. The lawyer's question must therefore be given a more restricted reply than is provided by asking simply who was, or ought to have been, in contemplation when something is done. The dictates of charity and of compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him. The call of common humanity may lead him to the rescue. This the law recognizes, for it gives the rescuer its protection when he answers that call. But it does not require that he do so. There is no general duty to help a neighbour whose house is on fire. (at p66)

18. The question in this case, however, is not whether a man must aid another who is in distress or rescue him from a peril. It is whether he must try to forestall and prevent a peril. A man who, while travelling along a highway, sees a fire starting on the adjacent land is not, as far as I am aware, under any common law duty to stop and try to put it out or to warn those whom it may harm. He may pass on, if not with a quiet conscience at least without a fear of legal consequence. Has the occupier of land a legal duty to his neighbour in respect of a fire that he finds on his side of the boundary fence, but none in respect of a fire that he sees on his neighbour's land just across the boundary, assuming in each case that he realized what might be the consequences to his neighbour of his own inaction? If so, on what principle of the law of negligence does the distinction depend? I do not find such questions easy. The doctrine of proximity does not give the answer, because the question assumes both physical proximity and the metaphysical proximity of Lord Atkin's doctrine. But we may, I think, push such troublesome problems into the background. The trend of judicial development of the law of negligence has been, I think, to found a duty of care either in some task undertaken, or in the ownership, occupation, or use of land or chattels. The occupier of land has long been liable at common law, in one form of action or another, for consequences flowing from the state of his land and of happenings there, not only to neighbouring occupiers, but also to those persons who come upon his land and those who pass by. And, as I have remarked elsewhere, the tendency of the law in recent times has been to lessen the immunities and privileges of landowners and occupiers and to increase their responsibilities to others for what happens upon their land. To hold that the respondent had a duty to his neighbours to take reasonable care to prevent the fire on his land spreading would be in accordance with modern concepts of a land occupier's obligations. If it be a new step in the march of the law - and I do not think that really it is - then it is not a step which we need hesitate to take if nothing stands in the way. New precedents must accord with old principles: but as Lord Abinger C.B. once said, of an action for which no precedent was adduced,

"We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other": Priestley v. Fowler (1837) 3 M &W 1 at p 5 (150 ER 1030, at p 1032) . (at p67)

19. But this is not a case that is bare of all authority. The learned trial judge based his conclusion on certain earlier decisions. The one most directly in point is Batchelor v. Smith (1879) 5 VLR (L) 176 , a judgment of the Supreme Court of Victoria (Stawell C.J. and Stephen J.) allowing a demurrer to a declaration alleging damage by spread of fire from the defendant's land. The Chief Justice in giving his reasons said: "It is the duty of any person who originates or brings any matter, animate or inanimate, attended with danger, on his ground, to keep it within due bounds; but there is no authority for the proposition for which the plaintiff contends, that, not having brought it, he must remove it" (1879) 5 VLR (L), at p 178 . Stephen J. concurred, saying: "The foundation of the whole case is that no duty was cast on the defendant to extinguish the fire" (1879) 5 VLR (L), at p 179 . But the declaration had expressly alleged that the defendant, although aware of the danger to his neighbour, allowed the fire to remain burning on his land for the purpose and with the intention of burning and destroying certain stubble, reeds, sawdust, and refuse. In the face of that, it is hard to see why the demurrer was allowed or what answer there was to counsel's argument that the defendant had adopted the fire as his own, and become responsible for any injury resulting from it, just as if he had lighted it himself. The case seems to have been argued on the basis of Rylands v. Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330 and strict liability, and the decision, when analysed, cannot be regarded as of much weight in the present case. But its dogmatic denial of a duty has not been without effect. It was relied upon in the Supreme Court of New Zealand in Hunter v. Walker (1888) 6 NZLR 690 , where it was held that the defendant was not liable for the spread of a fire that he had not lighted, although he could have put it out or checked it had he taken timely action. In 1905 it was again relied upon, this time in the Supreme Court of South Australia in Havelberg v. Brown (1905) SALR 1 . But when the judgments in that case are studied in the light of the facts, it appears that all that was decided was that there was no absolute duty upon the defendant there to extinguish or control a fire of unknown origin that he had discovered on his land; and that there was no evidence that, in doing what he did in regard to it, he had acted otherwise than as a prudent man would act. That decision really carries the present matter no further. Neither does Black v. Christchurch Finance Co. (1894) AC 48 . That case and also McInnes v. Wardle (1931) 45 CLR 548 and the very recent case in New Zealand of Eriksen v. Clifton (1963) NZLR 705 all turned upon the responsibility of a landowner for the acts of an independent contractor who lit a fire. None of them was concerned with a negligent failure to extinguish or render harmless a fire of unknown origin. However, that question arose directly in Boatswain v. Crawford (1943) NZLR 109 . There a landowner, although told of a fire on his land, negligently failed to take reasonable steps to extinguish it, as in its early stages he could have done. Johnston J. held that he was liable for the consequences of its spreading beyond his land. He based his conclusion on Job Edwards Ltd. v. Birmingham Navigations (1924) 1 KB 341 and on the approval of it in Sedleigh-Denfield's Case (19 40) AC 880 . (at p68)

20. The learned trial judge, after a careful review of the cases, came to the conclusion that he should not follow Boatswain v. Crawford (5). He considered that the correct rule was laid down in Batchelor v. Smith (1879) 5 VLR (L) 176 . He was influenced in this view because he said it "accords with the broader rule that a landowner is under no liability for anything which happens to, or spreads from, his land in the natural course of affairs if the land is used naturally" (1963) WAR, at p 108 . To that proposition I now turn. (at p68)

21. (vi) Things naturally on land: His Honour's statement echoes, but adds some words to, what

Lord Goddard C.J. said in Neath Rural District Council v. Williams (1951) 1 KB 115, at p 122 , where a miscellany of illustration appears. But, like all propositions of a general character, the difficulty is not in its statement but in its application. Is country land in Australia "used naturally" if the occupier, aware of the risk of a bush fire that may cause a disaster to himself and his neighbours, does not act as a reasonably prudent man would act with a view to preventing this? Speaking generally, it is no doubt true that the law does not impose a duty upon anyone to arrest the processes of nature. But we are not concerned with generalities, but with the question whether the occupier of land must take care in the interests of his neighbours to prevent, if by reasonable measures he can, a small fire upon his land spreading and becoming a bush fire. That an answer to that question, arising in Australia to-day, should be sought for in a case about thistledown in England would surely surprise anyone who was not a lawyer. Are we - by examining what courts have said in cases about thistles, prickly pear, the roots of trees and the branches of trees, trees deliberately planted and trees growing naturally, rolling rocks, rabbits, weeds in watercourses, silt in streams, seaweed, snow and surface water - to abstract some general principle, to add qualifications to it, and then to try to apply it to a fire which lightning lit? I do not think so. If this were the way by which to proceed, I would be content to say that I see more resemblance between snow - see Slater v. Worthington's Cash Stores (1930) Ltd (1941) 1 KB 488; (1941) 3 All ER 28 - and fire than I do between fire and thistledown; and that I cannot choose between growing prickly pear and dead seaweed as analogies with fire, and am prepared to discard both. But I do not think this is the way by which we must proceed. Therefore, although I shall refer to some of the cases that were cited, I shall not examine all of them. (at p69)

22. In some of the cases concerning things naturally on land the plaintiff's claim was based on nuisance: in some on negligence: in some on the doctrine of Rylands v. Fletcher (1866) LR 1 Ex 265 ; (1868) LR 3 HL 330 . The foundation-stone of the doctrinal edifice appears to be Giles v. Walker (1890) 24 QBD 656 , the case of the thistles. The action was in negligence. Lord Coleridge C.J. disposed of it by saying: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed" (1890) 24 QBD, at p 657 . Lord Esher agreed. Recently the decision has come in for some criticism. The thistles, although no doubt a natural growth, had only grown on the defendant's land after he had turned it from forest into ploughed land. And in Davey v. Harrow Corporation (1958) 1 QB 60 , Lord Goddard C.J., in delivering the judgment of the Court of Appeal, quoted (1958) 1 QB, at p 71 a remark that Lord Esher had made during the argument, as reported in the Law Times: "This damage is not caused by any act of the defendant. Can you show us any case which goes so far as to say that, if something comes on a man's land for which he is in no way responsible, that he is bound to remove it, or else prevent its causing injury to any of his neighbours?" (1890) 62 LT 933, at p 934 : Lord Goddard's judgment, in which he acknowledged his indebtedness to an article by Doctor Goodhart (Liability for Things Naturally on the Land (1930) 4 Cambridge Law Journal 13), went on, quoting directly from that article: "Apparently counsel did not reply, but had he known of Margate Pier and Harbour Proprietors v. Margate Town Council (1869) 20 LT 564 , it would have been a complete answer" (1958) 1 QB, at p 72 . In that case seaweed had been cast ashore by the sea. Left to lie, it became a nuisance to the neighbourhood. It was held that the landowner on whose land it was could be compelled to remove it. (at p70)

Following paragraph cited by:

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

23. The only other case to which I need make particular reference is Sparke v. Osborne (1908) 7 CLR 51 , the prickly pear case. The decision influenced the American Restatement of the Law of Torts. The facts are well known. An injunction was granted by the Supreme Court of New South Wales to restrain the defendant from allowing prickly pear growing on his land to overhang, and in parts to break down, nine miles of dog-proof fence, thus allowing dingoes to get at the plaintiff's sheep and also causing prickly pear to spread in his land. On the appeal to this Court counsel for the respondent sought to uphold the injunction by a contention that "every owner of land on which there is prickly pear is bound at his peril to prevent its growing on his boundary in such a way as to overhang his neighbour's land": see (1908) 7 CLR, at p 66 . It was this absolute proposition that the Court rejected. Griffith C.J. said: "Anyone who has seen prickly pear growing as it grows in some parts of Queensland, for instance, knows that it would be casting an intolerable burden upon the owner of the land if he were compelled to warrant all his neighbours from its spreading into their land" (1908) 7 CLR, at p 59 : Doctor Goodhart seems to have thought that this statement of Sir Samuel Griffith, who knew more about Queensland than most men, was inconsistent with his later reference to the Prickly Pear Acts, which require a person to take precautions against the spread of the pest; for in his article he said: "Apparently the burden is not so intolerable when imposed by legislation". It is not, for the legislature recognized that what must be done in a given case depends upon what is practicable, and provided an elaborate administrative control with discretionary power "to endeavour to ensure the common benefit without causing special injustice to the individual", as Griffith C.J. expressed it (1908) 7 CLR, at p 60 . The legislative requirements were inconsistent with the absolute common law duty contended for. The case occurred in 1908 when many millions of acres were infested by the rapidly-spreading pear, in many places so heavily infested as to be quite useless. The pest could only be eradicated at a cost which made the task unprofitable. It was not until later that the cactoblastus recovered this "lost province". A learned writer in the Harvard Law Review (1943), vol. 56, p. 772, recognized the ground of the decision: "On ordinary nuisance principles the practical basis for the decision in Sparke v. Osborne would rest on the fact that it would be an 'intolerable burden' on the landowner to require him to check this particular pest, so that failure to do so would not constitute an unreasonable use of land, even though considerable injury resulted to the plaintiff and the prickly pear lacked any utility". All the members of the Court in their judgments gave, as reasons for not imposing this burden on the defendant, the facts that the prickly pear had not been brought on to his land by him; that its presence there, and its spread therefrom were the work of nature; that he could not in the circumstances be held liable for a mere non-feasance. They put some reliance on Giles v. Walker (1890) 24 QBD 656 and they distinguished the cases of trees overhanging a boundary. But the observations in the judgments concerning exoneration for the consequences of things coming naturally on land should be read in relation to the topic under discussion, that is growing things, trees and noxious plants. Bush fires were not in the mind of the Court at all. And the question of a duty of care did not arise, for the plaintiff did not base his claim on negligence, but on an allegation of strict liability. I therefore put the prickly pear case aside. (at p71)

24. In the result no more, I think, emerges from the cases than one would have expected, namely that liability for negligence depends ultimately upon a concept of fault and that no man can be held at fault, morally or legally, simply for a happening not caused by any human agency: and that often the law does not hold a man at fault because he does not take any steps to arrest the consequences of such a happening, although he knows they may be harmful to other persons: but that sometimes it

does. (at p71)

25. (vii) Conclusions: In my opinion a man has a duty to exercise reasonable care when there is a fire upon his land (although not started or continued by him or for him), of which he knows or ought to know, if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished. Of course, if the fire were brought by him upon his land - in the sense of being started or intentionally kept alight there by him or anyone for whose acts he was responsible - his duty would not be merely to take reasonable care: it would be the strict duty of Rylands v. Fletcher (1866) LR 1 Ex 265; (1868) LR 3 HL 330 . (at p72)

26. Strong support for the existence of a duty of care to prevent the spread of fire is to be found in the House of Lords' approval in Sedleigh-Denfield's Case (1940) AC 880 of the judgment of Scrutton L.J. in Job Edwards' Case (1924) 1 KB 341 . We do not have to consider what things other than fire might come within his Lordship's general words "a thing which may, if not rendered harmless, cause damage to his neighbours" (1924) 1 KB, at p 358 . The dangers of fire have, from the earliest days of the common law, given rise to special responsibilities; and not only in the common law. In Roman law negligence in watching a fire lit by another was an exception, or apparent exception, to the general rule that mere omissions were outside the Lex Aquilia: see Digest IX, 2, 27. Coming back to modern times: In the United States, although the rule does not seem to be uniform, it is well established in some jurisdictions that a person on whose premises an accidental fire starts must exercise reasonable care to prevent it from spreading after he has notice of the fact, although he has no connexion with its origin: see American Law Reports Annotated, vol. 42, p. 821, vol. 111, p. 1149, vol. 18, 2nd, p. 1097. And that a negligent failure to prevent the spread of a fire of unknown origin creates liability seems to be the rule in Canada also: see Des Brisay v. Canadian Government Merchant Marine Ltd. (1941) 2 DLR 209 ; Mainella v. Wilding (1946) 2 DLR 749 . (at p72)

Following paragraph cited by:

Prestage v Barrett (02 July 2021) (Estcourt J)

27. The New Zealand decision in Boatswain v. Crawford (1943) NZLR 109 is, I respectfully think, correct. But I would not myself treat the liability which arises in a case such as this as involved in any way with nuisance. One way of stating the ground of liability is that a land occupier is liable if, by his negligence, a potential nuisance is permitted to become an actual nuisance. But I do not think that the liability arising from a negligent failure to extinguish or confine a fire is a liability only to neighbouring landowners or occupiers. Liability in negligence extends to other persons who may be harmed, that is to say, to those who are neighbours in the lawyer's sense as well as those who dwell in the neighbourhood. The grave and widespread consequences of a bush fire may make the liability of a careless individual ruinous for him; but this only emphasizes the seriousness of the duty of care. (at p73)

28. (viii) The Bush Fires Act: The Bush Fires Act of Western Australia, s. 28(1)(a), provides that, where a bush fire is burning on any land in the circumstances set out (and these would, it seems, include the fire in this case): "the occupier of the land shall forthwith, upon becoming aware of the bush fire, whether he has lit or caused the same to be lit or not, take all possible measures at his own expense to extinguish the fire". Failure to do so is punishable by a fine not exceeding 100 pounds. It

may be that "all possible measures" means all reasonably practicable measures; but, whatever it means, I agree with the learned trial judge in thinking that this provision does not of itself create any civil right. But neither in my opinion does it supplant or limit the common law duty: cf. Edwards v. Blue Mountains City Council (1961) 78 WN (NSW) 864; 6 LGRA 263 . The bush fire legislation takes different forms in the different States. But the general effect in all States is, I think, that as it was put by Gavan Duffy C.J. and Starke J. in McInnes v. Wardle (1931) 45 CLR 548 , it "brings into relief the dangers to be foreseen and provided against" (1931) 45 CLR, at p 550 . Here the respondent foresaw the dangers. He took some measures to provide against them, and notified the fire control officers. But his Honour held that he negligently left the fires when he could have extinguished them. (at p73)

29. I would allow the appeal. (at p73)

30. Since I wrote what appears above, affidavits have been filed on behalf of the respondent to the effect that there is evidence, not called at the trial, tending to show that the respondent did in fact extinguish the fires in the logs. The parties have forwarded to us their written submissions in relation to the admissibility of this material. I need say no more of it than I entirely agree with what has been said by Taylor and Owen JJ. and with the order they propose. (at p73)

Orders

Appeal allowed with costs. Order and judgment of the Supreme Court of Western Australia of 9th January 1963 set aside. Case remitted to the Supreme Court. Costs of the parties up to the time of the entry of the judgment appealed from to abide the order of the Supreme Court.

Cited by:

The Owners - Strata Plan No 7114 v Northern Beaches Council [2025] NSWCA 197 -
The Owners - Strata Plan No 7114 v Northern Beaches Council [2025] NSWCA 197 -
McElhone v Artemisia Nominees Pty Ltd [2025] NSWCATCD 65 -
Higgins v Brinkworth; Justin v Brinkworth; Trimboli v Brinkworth; Copping v Brinkworth [2025] SASC 104 (26 June 2025) (Stein J)

> 1158. The tort of nuisance is constituted by an unreasonable or unlawful interference with a person's use or enjoyment of land or of some right over or in connection with it, or material damage caused to land or other property on the land affected by the interference. [281] The proof of fault required to establish nuisance on the part of the landowner from whose premises the nuisance emanates generally involves foreseeability. [282] If foreseeability is established, it is then a question of whether the interference was reasonable. [283] Whether the respondents' use of the land is non-natural is relevant in determining reasonableness. [284]
>
> *via*
>
> [281] *Marsh v Baxter* [2015] WASCA 169; (2015) 49 WAR 1 at [244]-[248] (McLure P); *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 59 (Windeyer J); *Kraemers v Attorney-General (Tas)* [1966] Tas SR 113 at 122 (Burbury CJ).

Higgins v Brinkworth; Justin v Brinkworth; Trimboli v Brinkworth; Copping v Brinkworth [2025] SASC 104 (26 June 2025) (Stein J)

1159. The respondents contended that in cases in which physical damage is caused, there is almost complete overlap between nuisance and negligence such that there will be very few cases of liability in nuisance which would also not constitute liability in negligence. [285]

via

[285] *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 59 , as affirmed in *Goldman v Hargrave* [1966] UKPC 12; (1966) 115 CLR 458.

Higgins v Brinkworth; Justin v Brinkworth; Trimboli v Brinkworth; Copping v Brinkworth [2025] SASC 104 -
Higgins v Brinkworth; Justin v Brinkworth; Trimboli v Brinkworth; Copping v Brinkworth [2025] SASC 104 -
Allen v Yarra Valley Railway Incorporated [2024] VSC 796 (18 December 2024) (Quigley J)

27. Commonly, undue interference with the use and enjoyment of a plaintiff's land will be caused by an activity or state of affairs on a defendant's land so that the tort is often described as one dealing with the respective rights of neighbouring landowners or occupiers. [4]

via

[4] *Hargrave v Goldman* (1963) 110 CLR 40 .

Meadth v Nye [2024] NSWSC 1567 -
Humm v Faulkner [2024] VCC 1535 (04 October 2024) (Wise J)

Cases Cited: *Hyams & Wallena Pty Ltd v Blythe* [2024] VCC 499, *Hargrave v Goldman* [1963] 110 CLR 40 , *JNM Pty Ltd v Adelaide Banner Pty Ltd* [2011] VSCA 428, *Clarke v Elphinstone & Anderson* [1880] 6 App Cas 164, *Break Fast Investments v PCH Melbourne Pty Ltd* (2007) 20 VR 311, *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, *Manderson v Wright* (No 2) [2018] VSC 162, *Whittlesea City Council v Abbatangelo* [2009] VSCA 188, *Hungry Jack's Pty Ltd v The Trust Company (Australia) Pty Ltd (No. 3)* [2021] WASC 231, *Bayport Industries Pty Ltd v Watson* [2002] VSC 206, *Ben-Pelech v Royle* [2020] WASCA 168, *March v Baxter* (2015) WAR 1

Humm v Faulkner [2024] VCC 1535 -
Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW [2024] NSWCA 227 (18 September 2024) (Bell CJ, Leeming and Mitchelmore JJA)

51. That approach accords with authority. It is sufficient if the defendant "created, adopted or continued" the nuisance: *Hargrave v Goldman* (1963) 110 CLR 40 at 62 ; [1963] HCA 56 . *Torette House Pty Ltd v Berkman* (1939) 39 SR (NSW) 156 arose from a directed verdict for the defendant in an action for negligence and nuisance. A contracted plumber had gone onto the premises and mistakenly turned on a stopcock which caused water to flow into the plaintiff's neighbouring land. It was admitted that the defendant did not create it, and was not shown to have known of its existence or allowed it to continue: at 160. However, Jordan CJ was at pains to emphasise that "[a] person who procures the doing of an act is liable for its actual consequences and for anything necessarily involved in its being done whomsoever he may have procured to do it. He is liable for the acts of any agent of his acting within the scope of his employment" at 170; see also at 165. The High Court dismissed an appeal: (1940) 62 CLR 637; [1940] HCA 1, with each of Latham CJ, Starke and Dixon JJ confirming there could be no liability for nuisance from the unanticipated and faultless act of the owner: at 646, 651, 659.

> This is different from the present facts, and indeed Latham CJ noted at 646 that "the defendant did not employ the plumber to do any act of which the nuisance was the necessary or a natural consequence".

Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW [2024] NSWCA 227 -
Rifai v Woods [2024] NSWSC 374 (04 April 2024) (Peden J)

> 24. A private nuisance is a continuous or recurrent state of affairs: *Hargrave v Goldman* (1963) 110 CLR 40 at 59 (Windeyer J) . To establish private nuisance, the state of affairs must amount to or involve a material and unreasonable interference with a plaintiff's use and enjoyment of their land: *Brown v Tasmania* (2017) 261 CLR 328 at [385] (Gordon J); *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514 at [138] (Emmett JA, Leeming JA and Sackville AJA agreeing) (*Gales*). A material and unreasonable interference can include both physical damage to property and non-physical damage: *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [167] (Ward J).

Vojkovic v Savva [2023] NSWCATCD 141 -
Hunt Leather Pty Ltd v Transport for NSW [2023] NSWSC 840 -
Hunt Leather Pty Ltd v Transport for NSW [2023] NSWSC 840 -
Hunt Leather Pty Ltd v Transport for NSW [2023] NSWSC 840 -
Hunt Leather Pty Ltd v Transport for NSW [2023] NSWSC 840 -
Shaw v Euen [2023] NSWCATCD 68 -
O'Riordan v Chu [2023] NSWCATCD 61 -
Trist v Glenelg Shire Council [2023] VSC 128 (22 March 2023) (Gorton J)

> 7. A nuisance is committed at common law if a person, other than in the reasonable and convenient use of their land, creates a state of affairs that, to a substantial degree, interferes with another's enjoyment of their land. [3] The emission of sound can be a nuisance [4] and there is no requirement that the conduct injure the other person's health. [5] There are two value judgments that have to be made. The first is as to the extent of the interference arising from the use of the land, and the second is as to whether, having regard to that level of interference, the use is nonetheless reasonable. [6] The fact that the use is otherwise a lawful use for which there is planning permission does not prevent it from creating a nuisance. [7] The test, in the case of noise, has been expressed in the following terms:
>
> > To establish a nuisance, the plaintiffs must show that there has been a substantial degree of interference with their enjoyment of their use of [their house]. What constitutes such a substantial degree of interference must be decided according to what are reasonable standards for the enjoyment of those premises. What are reasonable standards must be determined by common sense, taking into account relevant factors, including what the Court considers to be the ideas of reasonable people, the general nature of the neighbourhood and the nature of the location at which the alleged nuisance has taken place, and the character, duration and time of occurrence of any noise emitted, and the effect of the noise. [8]

via

> [3] *Hargrave v Goldman* (1963) 110 CLR 40, 62 (Windeyer J) .

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -

30. In *Chehelnabi v Gourmet and Leisure Holdings Pty Ltd* [2020] NSWCATAP 102 at [54]-[60], [73]-[75] the Appeal Panel further considered the meaning of nuisance in s 153(1)(a) of the SSM Act:

> "[54] In broad terms, the Court in Veney found that an actionable nuisance may be described as an unlawful interference with a person's use or enjoyment of land, or of some right over or in connection with the land. Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the "reasonable and convenient use" of their own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person's land, citing *Hargrave v Goldman* (1963) 110 CLR 40 at [59]-[62] .
>
> [55] The Court also referred with approval, at [45] to the comments of Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, where his Lordship said:
>
> > A balance has to be maintained between the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.
>
> [56] That statement is consistent with the submissions of the parties here and so we will, with respect, adopt that meaning. We are satisfied that there is no need to hear further from the parties prior to doing so.
>
> [57] The parties also referred us to *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, where Ward J framed the question for determination in relation to a claim for nuisance as:
>
> > ...whether there has been a substantial and unreasonable interference by the defendants with the rights of Mr and Mrs Quick in relation to or in connection with the use of their land.
>
> [58] Ward J considered the principles relating to establishing whether a defendant has created or maintained a nuisance. Her Honour quoted from the judgment of Preston CJ in *Robson v Leischke* [2008] NSWLEC 152, from [47], relevantly as follows:
>
> > Where the defendant created the nuisance, the fault element varies depending on the nature of the defendant's conduct and his or her state of knowledge. Clerk & Lindsell on Torts identify three situations where the defendant has created the nuisance:
> >
> > > (a) "if the defendant deliberately or recklessly uses his land in a way which he knows will cause harm to his neighbour, and that harm is considered by a judge to be an unreasonable infringement of his neighbour's interest in his property, and therefore an unreasonable use by the defendant of his property, the defendant is liable for the foreseeable consequences. This proposition covers all those cases of obvious or "patent" nuisances, and they are peculiarly the cases which call for prevention or prohibition by injunction. It is no defence that the defendant believed he was entitled to do as he did or that he took all possible steps to prevent

> his action amounting to a nuisance": Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-39], p 1184;
>
> (b) "if the defendant knew or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide": Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-40], p 1185; and
>
> ...
>
> Where the defendant continues or adopts a nuisance, different conduct is required before liability will be imposed on the defendant. An occupier of land "continues" a nuisance or a potential nuisance if, with actual or constructive knowledge of its existence, he or she fails, within a reasonable period of time, to take reasonable measures to bring it to an end: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894, 904-905, 913 ; *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 657-658 ; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 62 ALJ 282 at 284, (1986) 62 LGRA 46 at 50 ; *City of Richmond v Scantelbury* [1991] 2 VR 38 at 41, 42 ; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 484 ; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 at 332 [29] .

[59] Ward J, at [158], said that unreasonable interference required a determination of whether the events in question interfered with the comfortable and convenient enjoyment by the plaintiffs of their land, and that "this turns on whether there has been an excessive use by the defendants of their land resulting in what is considered to be an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society; (Robson, at [84])."

[60] In considering this question, her Honour went on to refer to the decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea* [1961] NSWLR1002 (‘*Bayliss*’) in which the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961at 400-1:

> The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners each of whom is claiming the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for that adjustment is reasonable use. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the Defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the Defendant using his property in what would be a reasonable manner if he had no neighbour? The question is: Is he using it reasonably, having regard to the fact that he has a neighbour?”

“[73] As can be seen from the cases referred to above, for an actionable nuisance in respect of noise to be established, there are two primary elements which need to be satisfied.

> [74] The first is that there must be some noise that can be heard by the complainant (here the appellants) in the use of their lot which emanates from the respondents' lot, allegedly causing damage or interference. This may readily be established by the subjective evidence of the appellants as to what they hear or experience.
>
> [75] The second element, though, is that there must be evidence to establish to the satisfaction of the Tribunal that the noise is caused by a use of the respondents' land which is excessive or unreasonable and "causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place" (*Bayliss*), or that what is experienced by the appellants is not "reasonable according to the ordinary usages of mankind living in ... [our] society": *Sedleigh-Denfield v O'Callaghan* ibid. This is an objective test: *Marsh v Baxter* [2015] WASCA 169 at [247] , referred to with approval in *Weber v Greater Hume Shire Council* [2018] NSWSC 667 at [427] ."

The Owners - Strata Plan No. 58615 v Almin [2022] NSWCATCD 91 -
Uren v Bald Hills Wind Farm Pty Ltd [2022] VSC 145 (25 March 2022) (Richards J)

15. A person commits a private nuisance if that person interferes with another person's use or enjoyment of their land in a way that is both substantial and unreasonable. In *Hargrave v Goldman* , [2] Windeyer J described the basis of liability for nuisance in this way:

> In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.

Uren v Bald Hills Wind Farm Pty Ltd [2022] VSC 145 -
Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

766. The existence of a duty of care is one necessary element of a common law cause of action in damages for negligence, the others being breach, causation, and actionable damage that is within the scope of liability. The question whether a duty of care is recognised is one of a number of analytical tools that place boundaries around liability for negligence: *Harriton v Stephens* [2006] HCA 15; 226 CLR 52 at [257] (Crennan J, Gleeson CJ, Gummow J and Heydon J agreeing). See also the discussion by Windeyer J in *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 63 and his Honour's reference to the law of negligence having "symmetry, consistency and defined bounds", and that "its application in particular cases is to be reasonably predictable". A duty of care is owed to an individual and must be considered in relation to the facts of that individual's case: *Agar v Hyde* [2000] HCA 41; 201 CLR 552 at [66] (Gaudron, McHugh, Gummow and Hayne JJ). It is "incumbent on a claimant to establish breach of an independent duty to himself as a particular individual": Fleming, *The Law of Torts*, (9th ed) at 160, cited in *Agar v Hyde* at [67] . This feature of a duty of care is demonstrated when one comes to consider questions of issue estoppel, as to which see *Jackson v Goldsmith* [1950] HCA 22; 81 CLR 446.

Eaton v Hamilton [2021] NSWDC 731 (17 December 2021) (Dicker SC DCJ)

15. In relation to the question of a private nuisance, in order to be actionable, the interference by a party must be both unreasonable and substantial: *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 5153 and 61-62 . In *Malliate v Sharpe* [2001] NSWSC 1057, Campbell JA stated the principles at paragraphs [39]-[44] . At [39] his Honour stated:

> "The tort of private nuisance aims to protect an occupier's interest in the beneficial use of his or her land, and of his other interests in land. It occurs when activities of

the defendant interfere to a greater extent than is reasonable with the plaintiff's use of his or her land."

Coleman v Bicknell [2021] QDC 302 (03 December 2021) (Jarro DCJ)

12. For Mr Coleman to succeed in his claim for nuisance against Mr and/or Mrs Bicknell, he must prove the following:

(a) he has title to sue in respect of the nuisance; [5]

(b) that Mr and/or Mrs Bicknell has/have interfered with his right to use and enjoy his land; [6] and

(c) the interference must be material or unreasonable. [7]

via

[6] *Bridlington Relay Ltd v Yorkshire Electricity Board [1965]* Ch 436 at 447; *Hargrave v Goldman* (1963) 110 CLR 40 at 59 quoting from Winfield on Torts, 6 lh ed (1954) p 536; *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319, 327 [22]; *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514, 545 [138].

Davies v Gold Coast City Council [2021] QDC 135 (09 July 2021) (Jarro DCJ)

133. Regarding the relevant principles, McMurdo JA stated in *State of Queensland v Michael Vincent Baker Superannuation Fund Pty Ltd* [2019] 2 Qd R 146 which involved an overland flow of water from a rail corridor, as follows:

> "[193] In *Hargrave v Goldman*, [129] Windeyer J said that, in essence, a nuisance could be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". [130] **Not every use of a person's property which interferes with the use or enjoyment of other land is an unlawful interference. In general, an unlawful interference is an *unreasonable* interference with the use or enjoyment of other land. That criterion of reasonableness has been difficult to apply in some cases**, but it is a necessary constraint on the operation of the tort which has been consistently recognised.
>
> [194] Thus, in *Lawrence v Fen Tigers Ltd*, [131] Lord Neuberger of Abbotsbury PSC said:
>
> > "A nuisance can be defined, albeit in general terms, as **an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land**, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, 'a useful test is perhaps **wh at is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society**'."
> >
> > That statement by Lord Wright in *Sedleigh-Denfield v O'Callaghan* w as described by Gibbs CJ, Wilson and Brennan JJ in *Elston v Dore* as representing "the proper test to apply in most cases". [132] Similarly, in *Cambridge Water Co v Eastern Counties Leather Plc*, Lord Goff of Chieveley said that liability for nuisance is: [133]

> "kept under control by the principle of reasonable user – the principle of **give and take** as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:' see *Bamford v Turnley* (1862) 3 B & S 62, 83, *per* Bramwell B."

And in *Gartner v Kidman*, Windeyer J (with whom Dixon CJ agreed) said: [134]

> "The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the **reasonable use of the lands in question**. In some recent cases there is perhaps a more explicit recognition than there was in some earlier cases that a landowner's duty to his neighbour qualifies his right to do what he likes with his own land and on his own land."

[195] In *Hargrave v Goldman* , Windeyer J compared the torts of nuisance and negligence, by observing that liability in negligence is founded upon the negligent conduct of a person, whereas **liability in nuisance "is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) ...**" [135]

[196] In *Sedleigh-Denfield v O'Callaghan* ,[136] Viscount Maugham described the ways in which an occupier of land may be liable by "continuing" or "adopting" a nuisance created by another, even a trespasser, as follows:

> "**[A]n occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so.** He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance."

[197] Similarly, in *Torette House Pty Ltd v Berkman* ,[137] Dixon J cited with approval the judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations* ,[138] who said:

> "In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land: (1) if he or his servants or agents created the nuisance; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment ... (3) or if being a tenant, or successor

> in title, he took the land from his landlord or predecessor with an artificial nuisance upon it ..." (citations and footnotes omitted)

Dixon J also cited, again with evident approval, this passage from the judgment of Rowlatt J in *Noble v Harrison*: [139]

> "[A] person is liable for a nuisance constituted by the state of his property: **(1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.**"

[198] In *Hargrave v Goldman* ,[140] Windeyer J observed that "[g]enerally speaking the term 'nuisance' **denotes a state of affairs that is either continuous or recurrent**". **Where a defendant is said to be liable upon the basis that it has continued or adopted the nuisance, there is a tort which is distinct from the original creation of the nuisance.**" [141]

Davies v Gold Coast City Council [2021] QDC 135 (09 July 2021) (Jarro DCJ)

132. I accept, as submitted on behalf of the plaintiffs, that unless and until the High Court determines that the tort of nuisance has been subsumed into the tort of negligence, I must proceed on the basis that it remains a separate cause of action. [128] I therefore reject the defendant's submission that negligence is a necessary element of nuisance to the extent that it operates in this case. Negligence is not a necessary element of nuisance. In *Hargrave & Ors v Goldman* (1963) 110 CLR 40 at 62 , Windeyer J stated:

> "In nuisance liability is founded upon state of affairs, created, adopted or continued, by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.
>
> In negligence liability is founded upon the negligent conduct of one person causing, to any degree, foreseeable harm to the person or property of another person (not necessarily an owner or occupier of land) to whom a duty of care was owed."

Davies v Gold Coast City Council [2021] QDC 135 (09 July 2021) (Jarro DCJ)

133. Regarding the relevant principles, McMurdo JA stated in *State of Queensland v Michael Vincent Baker Superannuation Fund Pty Ltd* [2019] 2 Qd R 146 which involved an overland flow of water from a rail corridor, as follows:

> "[193] In *Hargrave v Goldman* ,[129] Windeyer J said that, in essence, a nuisance could be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". [130] **Not every use of a person's property which interferes with the use or enjoyment of other land is an unlawful interference. In general, an unlawful interference is an *unreasonable* interference with the use or enjoyment of other land. That criterion of reasonableness has been difficult to apply in some cases**, but it is a necessary constraint on the operation of the tort which has been consistently recognised.

[194] Thus, in *Lawrence v Fen Tigers Ltd* ,[131] Lord Neuberger of Abbotsbury PSC said:

> "A nuisance can be defined, albeit in general terms, as **an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land**, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, 'a useful test is perhaps **wh at is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society**'."

That statement by Lord Wright in *Sedleigh-Denfield v O'Callaghan* w as described by Gibbs CJ, Wilson and Brennan JJ in *Elston v Dore* as representing "the proper test to apply in most cases". [132] Similarly, in *Cambridge Water Co v Eastern Counties Leather Plc*, Lord Goff of Chieveley said that liability for nuisance is: [133]

> "kept under control by the principle of reasonable user – the principle of **give and take** as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:' see *Bamford v Turnley* (1862) 3 B & S 62, 83, *per* Bramwell B."

And in *Gartner v Kidman*, Windeyer J (with whom Dixon CJ agreed) said: [134]

> "The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the **reasonable use of the lands in question**. In some recent cases there is perhaps a more explicit recognition than there was in some earlier cases that a landowner's duty to his neighbour qualifies his right to do what he likes with his own land and on his own land."

[195] In *Hargrave v Goldman* , Windeyer J compared the torts of nuisance and negligence, by observing that liability in negligence is founded upon the negligent conduct of a person, whereas **liability in nuisance "is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) ..."** [135]

[196] In *Sedleigh-Denfield v O'Callaghan* ,[136] Viscount Maugham described the ways in which an occupier of land may be liable by "continuing" or "adopting" a nuisance created by another, even a trespasser, as follows:

> "[A]n occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance."

[197] Similarly, in *Torette House Pty Ltd v Berkman* ,[137] Dixon J cited with approval the judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations* ,[138] who said:

> "In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land: (1) if he or his servants or agents created the nuisance; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment ... (3) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it ..." (citations and footnotes omitted)

Dixon J also cited, again with evident approval, this passage from the judgment of Rowlatt J in *Noble v Harrison*: [139]

> "[A] person is liable for a nuisance constituted by the state of his property: **(1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.**"

[198] In *Hargrave v Goldman* ,[140] Windeyer J observed that "[g]enerally speaking the term 'nuisance' **denotes a state of affairs that is either continuous or recurrent**". **Where a defendant is said to be liable upon the basis that it has continued or adopted the nuisance, there is a tort which is distinct from the original creation of the nuisance.**" [141]

via

[135] (1963) 110 CLR 40 , 62.

314. The trial judge also accepted that ***Hargrave v Goldman*** [280] is binding authority that nuisance constituted by fire following from an accident requires that a defendant must have acted in breach of duty to be liable. [281] The trial judge concluded: [282]

> Claims in nuisance may not involve fault. However, in this case the claims against both Thiess and Mrs Campbell involve fault. The plaintiffs' cases against Thiess and Mrs Campbell rest upon a failure to take reasonable care. They are apportionable claims.

Plaintiffs' submissions

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

316. The plaintiffs say that the trial judge erred in regarding ***Hargrave*** as authority to the contrary. They say that, in ***The Wagon Mound (No 2)*** , [284] the Privy Council held that negligence is not an essential element in nuisance, but that 'fault of some kind is almost always necessary and fault generally involves foreseeability'. However, the plaintiffs submit that foreseeability is neither negligence, nor even synonymous with, a duty of care in negligence. They submit that the element of 'fault' required for private nuisance translates to the creation of, or failure to abate, a cause of unreasonable interference in others' interests in private land, in circumstances where the unreasonable interference is foreseeable. The plaintiffs say that, since the element of 'fault' required for cases of creation of private nuisance does not require proof of a breach of a duty of care, claims for damages in actions for private nuisance are not claims in actions arising from a failure to take reasonable care. Therefore, the nuisance claims are not apportionable claims within the meaning of s 5AI of the *Civil Liability Act* , so that Thiess and Mrs Campbell are jointly and severally liable for damages in nuisance.[285]

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

741. I set out, again in full, as they are not readily susceptible to narration, the balance of the first defendant's written closing submissions on the present issue:

> "Davies A-J gave consideration to when an action should be pursued in nuisance or in negligence in *Bonic v Fieldair (Deniliquin) Pty Ltd.* [17] His Honour referred to the reasoning in *Burnie Port* and noted the following:
>
> *'The principles of negligence are entirely apposite to the situation, there having been an unintended harm to the Bonics' property arising from a one-off circumstance ... The principles of nuisance, insofar as they are different from those of negligence, are more appropriate to cases of intentional harm and to cases where damages or an injunction are sought in relation to an ongoing situation where issues of an environmental nature have to be considered'.* [18]
>
> The acts creating the alleged nuisance were neither deliberate nor reckless in a way which the first defendant knew or could reasonably foresee would cause harm to the plaintiffs. The requisite element of fault cannot be established and the claim must fail.
>
> We refer to *Goldman v Hargrave* where Lord Wilberforce stated that the tort of nuisance may comprise a wide variety of situations in some of which negligence plays no part, in others of which it is decisive. [19] The plaintiff's case, as in *Daniel Herridge & Ors v Electricity Networks Corporation t/as Western Power*, '*Herridge*', rests upon the defendant's failure to take reasonable care.[20]

The High Court case of *Hargrave v Goldman* established that a nuisance claim following an accidental fire requires a breach of reasonable care by the defendant. [21] The plurality rejected notions of strict liability to find that where the landowner does not cause the nuisance but allows it to arise, liability is dependent on breach of duty.

In the pivotal High Court case of *Burnie Port Authority v General Jones Pty Ltd, 'Burnie Port',* the majority held that the rule in *Rylands v Fletcher* had been absorbed by the principles of negligence, under which a person who takes advantage of the control of premises to introduce a dangerous substance, to carry on a dangerous activity or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. [22]

Burnie Port cemented the role of reasonable care and reasonable foreseeability within nuisance claims concerning the introduction of a dangerous substance such as fire on one's own property. Their Honours Mason CJ, Deane, Dawson, Toohey and Gaudron JJ held that:

'*Although the standard of care is that which is reasonable in the circumstances, in the case of such substances or activities a reasonably prudent person would exercise a higher degree of care and, depending upon the magnitude of the danger, the standard of 'reasonable care' may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'. [23]*

In *Southern Properties (WA) Pty Ltd v Executive Director, Department of Conservation and Land Management, 'Southern Properties',* McLure P found that the plaintiff's claim in nuisance must fail as the trial judge in that case had found that the defendant had not acted negligently. [24] McLure P went on to find that fault of the defendant may be a relevant consideration in a nuisance claim, however, a defendant's duty may not necessarily be discharged by the exercise of reasonable care.[25]

Southern Properties is distinguishable as that case was concerned with damage resulting from smoke, not from fire.[26] Smoke is not an inherently dangerous substance. *Southern Properties* was not a case where the existence or scope of a duty was well-established or well understood except at a high level of generality. [27] Consequently, *Burnie Port* was only considered in a limited sense.[28]

The case of *Herridge* concerned the Parkerville fires of January 2014. [29] The fires were ignited when a dilapidated jarrah pole supporting electrical cables, embedded in land owned by the third defendant, ignited surrounding vegetation. Both negligence and nuisance were pleaded.

Le Miere J held that the focus of nuisance is on the interference the plaintiff has suffered, however, the quality of the defendant's conduct is not to be discounted. [30] Le Miere J found that claims in nuisance may not involve fault, but the claims against the second and third defendant in this case did.[31] This was so because the plaintiff's case against the second and third defendants rested upon their respective failure to take reasonable care. As a corollary, it was held that reasonable foreseeability remains a factor to be considered in a claim of nuisance. This case is currently on appeal.

The plaintiffs claim in nuisance mirrors that of *Herridge* in that it relies on a failure to take reasonable care.

In *Warragamba Winery Pty Ltd v State of NSW*, *'Warragamba',* Walmsley AJ held that a claim in nuisance must fail where the plaintiff cannot establish negligence. Counsel for the plaintiff conceded this point.[32] Relying on a passage from *Fleming's Law of Torts*, Walmsley AJ made the following observation:

'I have noted that the plaintiffs have sued in nuisance in the alternative to their other counts. In Fleming at 403 the authors note that many cases concerning fire damage have included claims for nuisance but that the common response of courts in such cases has been that such a claim cannot succeed without proof of negligence, the underlying logic appearing to be that proof of negligence is an essential precondition in circumstances in which physical damage to property is at issue.'[33]

Fleming cites the High Court cases of *Wagon Mound No 2* and *Goldman v Hargrave* . [34] Le Miere J also cited the above passage from *Fleming* with approval in *Herridge* .[35]

It necessarily follows that if the plaintiff's claim in negligence fails, so too must their claim in negligence."

via

[21] [1963] 1 AC 645, 110 CLR 40 , per Taylor and Owen JJ at 51-52 .

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

720. But, the plaintiffs say, what is especially telling, for the present discussion, is that in the interval between the High Court decision in *Hargrave v Goldman* , and the Privy Council decision in *Goldman v Hargrave* , the Privy Council also decided *The Wagon Mound (No 2)* which case held that negligence is not an essential element in nuisance, but that nonetheless at 656G, "fault of some kind is almost always necessary and fault generally involves foreseeability" (*Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* (above) at 508 (Lord Reid delivering the judgment of the Board), see also *Gales Holdings Pty Ltd v Tweed Shire Council* (above) at [132], [139] ; [280].

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

325. However, the decision of the High Court in ***Hargrave v Goldman*** illustrates the proposition that, in some circumstances, establishing a cause of action in nuisance may require a plaintiff to establish that the defendant failed to take reasonable care. In that case, lightning had struck a tree on the defendant's farming property and caused it to catch fire. While the defendant took a number of appropriate steps in response to the fire, he was found to have failed to take reasonable care when he left the property without ensuring that the fire was fully extinguished. Taylor and Owen JJ were of the view that the relevant principle was identified in the fifth (1920) edition of *Salmond on Torts*: [294]

> When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

via

[294] ***Hargrave v Goldman*** (51 - 52). See also Windeyer J at 61 - 62 and the decision of the Privy Council in ***Goldman v Hargrave*** , 656 - 657.

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Prestage v Barrett [2021] TASSC 27 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Prestage v Barrett [2021] TASSC 27 -
Prestage v Barrett [2021] TASSC 27 -
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 -
Woodhouse v Fitzgerald [2021] NSWCA 54 (09 April 2021) (Basten, Meagher and Payne JJA)

44. The joint reasons concluded that the common law rules with respect to the escape of fire had been "absorbed into the principle of *Rylands v Fletcher* ", as stated by Windeyer J in *Hargrave* . [32] The next stage, already noted, was the adoption of that of a failure to exercise reasonable care as the standard of fault in *Rylands v Fletcher* , albeit that the duty to exercise such care was non-delegable. [33] This understanding of *Burnie Port Authority* was adopted in *Weber v Greater Hume Shire Council* . [34]

Woodhouse v Fitzgerald [2021] NSWCA 54 (09 April 2021) (Basten, Meagher and Payne JJA)

Hargrave v Goldman (1963) 110 CLR 40 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 250 , applied;

Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Lorenzato v Burwood Council [2020] NSWSC 1659 -
Lorenzato v Burwood Council [2020] NSWSC 1659 -
Byron v JBG Contractors (NSW) Pty Ltd [2020] NSWSC 1280 (21 September 2020) (Fagan J)

4. The proceedings have resolved into an assessment of damages. The defendant does not dispute that the lime escaped onto the plaintiffs' land on three days. It does not dispute that it is liable in nuisance. The elements of the tort of negligence were summarised by Emmett JA in *Gales Holdings Pty Ltd v Tweed Shire Council* [2013] NSWCA 382 in the following paragraphs:

> [131] A nuisance is either a continuous or recurrent state of affairs. An occupier of land will be liable for continuing a nuisance if, with knowledge or presumed knowledge of the state of affairs, the occupier fails to take reasonable steps to bring it to an end despite having had ample time to do so (*Hargrave v Goldman* (1963) 110 CLR 40; [1963] HCA 56 at 59-61). There will be nuisance if a state of affairs created, adopted or continued by an owner or occupier of land harms another person's enjoyment of land occupied or owned by that other person, unless the first person's conduct involves no more than the reasonable and convenient use of its own land (*Hargrave v Goldman* at 62).
>
> [132] That is to say, nuisance is a wrongful interference with another's enjoyment of land by the use of other land occupied or owned by the alleged wrongdoer. However, an owner or occupier of land is not an insurer. There must be more than mere harm being done to another's enjoyment of land. The harm must be caused by the alleged wrongdoer's use of its own land. The word use connotes that a degree of

personal responsibility is usually required, even though a deliberate or negligent act is not. A deliberate or negligent act will however be sufficient. A balance must be maintained between an owner or occupier's right to do what it likes with its land and a neighbour's right not to be interfered with. The proper test to apply in most cases is what is reasonable, according to the ordinary usages of a particular society. While negligence is not essential, fault of some kind is almost always necessary (*Elston v Dore* (1982) 149 CLR 480; [1982] HCA 71 at 487-488).

[138] [E]manations of any kind constitute a nuisance if they create an inconvenience materially interfering with the ordinary physical comfort of human existence, according to plain, sober and simple notions among ordinary people. Regard must be had to the character of the locality in which the inconvenience is created and the standard of comfort that those in the locality may reasonably expect. The reasonable use of land may occasionally cause annoyance about which neighbours cannot reasonably complain (see *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 487). In considering whether an inconvenience is unreasonable, allowance must be made for reasonable give and take. [...]

[139] Nuisance covers a variety of tortious acts or omissions and the relevant conduct need not be negligent. For example, an occupier of premises may be liable for emitting fumes or noise, even though it used the utmost care in the use of its premises. Since the amount of fumes or noise that can lawfully be emitted is a question of degree, the occupier may simply have miscalculated what was justifiable in the circumstances. On the other hand, nuisance by emission may be the result of negligent conduct. Often the same facts will establish liability both in nuisance and in negligence. Although negligence is not necessary, fault of some kind almost always is. Fault generally involves foreseeability (*Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 at 639).

Byron v JBG Contractors (NSW) Pty Ltd [2020] NSWSC 1280 -
Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council [2020] VSC 512 -
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating [2020] NSWDC 378 -
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating [2020] NSWDC 378 -
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating [2020] NSWDC 378 -
The Owners Strata Plan No. 72250 v Letmin Pty Limited t/as Dubbo Powder Coating [2020] NSWDC 378 -
Chehelnabi v Gourmet and Leisure Holdings Pty Ltd [2020] NSWCATAP 102 -
Woodhouse v Fitzgerald and McCoy (No 2) [2020] NSWSC 450 -
Woodhouse v Fitzgerald and McCoy (No 2) [2020] NSWSC 450 -
Woodhouse v Fitzgerald and McCoy (No 2) [2020] NSWSC 450 -
Woodhouse v Fitzgerald and McCoy (No 2) [2020] NSWSC 450 -
Donnelly v Hunter's Hill Council [2020] NSWDC 76 (01 April 2020) (Dicker SC DCJ)

105. In *Michos v Council of the City of Botany Bay* [2012] NSWSC 625 Slattery J stated the principles as follows relating to roots constituting a nuisance at paragraphs [57]-[60] :

"57. The law of nuisance may be concisely stated. Nuisance is the unreasonable interference with the use and enjoyment of a person's land: *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 62 per Windeyer J ; *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [295] per Bergin CJ in Eq. Whether there has been "unreasonable interference" is an objective test - whether a person of ordinary habits and sensibilities in the plaintiff's position and circumstance would regard the interference with the enjoyment of the land as unreasonable; some "reasonable give and take" is involved; and another way of stating the test is whether there has been "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of

> living, but according to plain and sober and simple notions" of the community: Jordan CJ in *Don Brass Foundry Pty Ltd v Stead* [1948] NSW St Rp 47; (1948) 48 SR (NSW) 482 at 486 and 487.
>
> 58. In determining whether there has been unreasonable interference, a court will take into account the locality in which the interference occurs: *Sturges v Bridgman* (1879) 11 Ch D 852 (CA) at 865 per Thesiger LJ; the duration, time of day, frequency and extent of the interference: *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683; and, any malice on the part of the person causing the interference: *Christie v Davey* [1893] 1 Ch 316.
>
> 59. Consistently with the notion of give and take, a neighbour may tolerate an interference with the enjoyment of the land for various reasons; but when the interference has reached the stage that the neighbour no longer feels obliged or willing to tolerate it, the neighbour will be entitled to claim that there is an unreasonable interference with the enjoyment of the land, notwithstanding earlier tolerance; but the neighbour will not be entitled to claim damages for the interference that was tolerated prior to the complaint being made: *Orr v Ford* [1989] HCA 4; (1989) 167 CLR 316 at 341 per Deane J.
>
> 60. Although there may be some exceptions, fault of some kind is now usually necessary for liability in nuisance: *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [118] - [119] per Bryson JA; *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [296] per Bergin CJ in Eq."

Donnelly v Hunter's Hill Council [2020] NSWDC 76 -
De Gruchy v The Owners - Units Plan No. 3989 [2020] ACTSC 65 (27 March 2020) (McWilliam AsJ)

> 16. A nuisance has been described as an 'unlawful interference with a person's use or enjoyment of land or a right in connexion with it': *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 (***Hargrave***) at 59 per Windeyer J .

De Gruchy v The Owners - Units Plan No. 3989 [2020] ACTSC 65 (27 March 2020) (McWilliam AsJ)

> 22. Whether an interference with land is unreasonable will very much depend on the circumstances in which it occurs: *Sturges v Bridgman*; *St Helen's Smelting Co v Tipping* (1865) 11 H.L. Cas 642 at 650. The interference must be substantial: *Walter v Selfe* (1851) 4 DeG & Sm 315 (***Walter***) at 322, 344; *Hargrave* at 60.

De Gruchy v The Owners - Units Plan No. 3989 [2020] ACTSC 65 (27 March 2020) (McWilliam AsJ)
Hargrave v Goldman [1963] HCA 56; 110 CLR 40
Hunter v Canary Wharf Ltd

The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134 (27 February 2020) (Darke J)

> 45. In broad terms, an actionable nuisance may be described as unlawful interference with a person's use or enjoyment of land, or of some right over or in connection with the land (see *Hargrave v Goldman* (1963) 110 CLR 40 at 59). Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the reasonable and convenient use of the person's own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person's land (see *Hargrave v Goldman* (supra) at 62). In *Elston v Dore* (1982) 149 CLR 480 Gibbs CJ, Wilson and Brennan JJ (with whom Murphy J agreed) stated (at 487-8) that in most cases the proper test to apply in determining whether a nuisance has been committed is as put by Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 where his Lordship said:
>
> > A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a

> useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134 (27 February 2020) (Darke J)

55. The presence of a vehicle within Lot 51 reduces the area otherwise able to be used for the manoeuvring of a vehicle either into or out of Lots 85, 86 or 87. However, Lot 51 is not truly an area available for that purpose. It is the property of Mr Veney, not part of the common property. The evidence given by Ms Shill about the "turning circle" and the evidence given by Mr Rinn about crossing Lot 51 establishes that parts of Lot 51 are routinely employed by at least some of the occupiers of the garages to assist in the effecting of entry to or exit from their garages. Of course, in the absence of the consent or agreement of Mr Veney, those occupiers have no legal right to make use of Lot 51 in that way. To the extent that parking on Lot 51 prevents or impedes such use, I do not think it can be said to be a substantial interference with another owner or occupier in the enjoyment of that person's land or of some right over or in connection with it (see *Hargrave v Goldman* (supra) at 59).

The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134 -
Zhang v Glykis [2020] NSWCATCD 17 (29 January 2020) (J Ringrose, General Member)

48. The appropriate interpretation of By-law 11 in s 153(1) of the Strata Schemes Management Act 2015 requires a consideration of terms such as a "peaceful enjoyment of a property" and "the causing of a nuisance or hazard". In *St Helen Melting Co v Tipping* (1865) 11 HSC and *Hargrave v Goldman* [1963] 110 CLR 40 the Court held that an unreasonable and substantial interference with one's use or enjoyment of land gives rise to an action in nuisance.

Murillo v SKM Services Pty Ltd [2019] VSC 663 -
Jarosz v State of New South Wales [2019] NSWSC 692 (11 June 2019) (Darke J)

44. Earlier, in *Hargrave v Goldman* (1963) 110 CLR 40, Windeyer J (at 59) cited with approval the definition of nuisance found in the Sixth Edition of *Winfield on Tort*, namely, an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". Windeyer J continued (at 62):

> In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.

See also *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514; [2013] NSWCA 382 at [131] -[132] per Emmett JA, with whom Leeming JA and Sackville AJA agreed.

Australian Unity Retirement Living Management Pty Ltd v Karimbla Properties (No. 10) Pty Limited [2019] NSWSC 635 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 (17 April 2019) (Basten and Gleeson JJA, Sackville AJA)

Hargrave v Goldman (1963) 110 CLR 40; [1963] HCA 56 ; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36 applied.

Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -

Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 (27 March 2019) (: LE Miere J)

[47] Mr B Dharmananda SC referred to ***Hargrave v Goldman*** (1963) 110 CLR 40, 66.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 (27 March 2019) (: LE Miere J)

396. In ***Hargrave v Goldman*** Windeyer J said [98] that it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant. Windeyer J further said [99] that in nuisance liability is founded upon a state of affairs, created, adopted or continued by one person which, to a substantial degree harms another person and his enjoyment of his land.

via

[98] ***Hargrave v Goldman*** (1963) 110 CLR 40, 60.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 (27 March 2019) (: LE Miere J)

Fennell the earthmoving contractor was held liable for nuisance it created on land owned by another. Glass JA said that liability attaches to any person who creates a nuisance while present on land with the authority of its occupier.[108] Balkin and Davis say that although private nuisance must involve an interference with the plaintiff's enjoyment of land, it is not necessary that the disturbance of those rights emanates from land belonging to the defendant.[109] Balkin and Davis cite ***Southport Corporation v Esso Petroleum Co Ltd*** [110] and ***Hargrave v Goldman*** [111] in support of that proposition.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 (27 March 2019) (: LE Miere J)

396. In ***Hargrave v Goldman*** Windeyer J said [98] that it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant. Windeyer J further said [99] that in nuisance liability is founded upon a state of affairs, created, adopted or continued by one person which, to a substantial degree harms another person and his enjoyment of his land.

via [107] ***Hargrave v Goldman*** (1963) 110 CLR 40, 60.

Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Herridge v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

207. First, the likelihood and extent of the harms suffered are not said to have been directly increased by any positive act of the Commonwealth. As reinforced at [213]– [215] below, the wrongs asserted are better understood as omissions, which engage the general principle

stated by Windeyer J in *Hargrave v Goldman* (1963) 110 CLR 40; [1963] HCA 56 at 66 that the common law "casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him". That position has been justified as a recognition of individual autonomy, and historically, as embodying a distinction between misfeasance and nonfeasance: see *Stovin v Wise* [1996] AC 923 at 943–944 (Lord Hoffmann); *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3 at [101] (McHugh J). In *Stuart v Kirkland-Veenstra* , Gummow, Hayne and Heydon JJ explained:

> "[88] ....The coexistence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 596 [145]; [2002] HCA 54. As Dixon J said in *Smith v Leurs* (1945) 70 CLR 256 at 262; [1945] HCA 27, '[t] he general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third' (see also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; [2000] HCA 61) It is, therefore, 'exceptional to find in the law a duty to control another's actions to prevent harm to strangers': *Smith v Leurs* at 262. And there is no general duty to rescue. In this respect, the common law differs sharply from civil law. The common law has been described as 'individualistic', the civil law as 'more socially impregnated': Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 90.
>
> [89] It may be said that the notion of personal autonomy is imprecise, if only because it will often imply some notion of voluntary action or freedom of choice. And, as Windeyer J pointed out in *Ryan v The Queen* (1967) 121 CLR 205 at 244; [1967] HCA 2 (see also *Tofilau v The Queen* (2007) 231 CLR 396 at 404405, 417418; [2007] HCA 39, albeit in a different context, words like 'voluntary' are ambiguous. But expressed in the most general way, the value described as personal autonomy leaves it to the individual to decide whether to engage in conduct that may cause that individual harm: *Agar v Hyde* (2000) 201 CLR 552 at 583584 [88][90]; [2000] HCA 41. As Lord Hope of Craighead put it in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 379380, '[o]n the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury'."

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Smith v State of Victoria [2018] VSC 475 (27 August 2018) (John Dixon J)

63. The defendant emphasised that the High Court has consistently drawn a distinction between a positive act causing damage and a failure to act. [24] Save for certain exceptional relationships, [25] the common law does not impose a duty on a person to act where no positive conduct of that person created the risk of injury. [26] As McHugh J observed in *Pyrenees Shire Council v Day,* [27] the common law does not 'generally impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another', [28] recognising an exception only 'when some special relationship exists between the person harmed and the person who fails to act'. [29]

via

[28] Ibid 368 ; see also *Hargrave v Goldman* (1963) 110 CLR 40, 66 ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 478 ; *Stuart v Kirkland–Veenstra* (2009) 237 CLR 215, 258 ('*Kirkland-Veenstra*').

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

195. In *Hargrave v Goldman* , Windeyer J compared the torts of nuisance and negligence, by observing that liability in negligence is founded upon the negligent conduct of a person, whereas liability in nuisance "is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) ..." [144]

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

198. In *Hargrave v Goldman* , [149] Windeyer J observed that "[g]enerally speaking the term "nuisance" denotes a state of affairs that is either continuous or recurrent." Where a defendant is said to be liable upon the basis that it has continued or adopted the nuisance, there is a tort which is distinct from the original creation of the nuisance. [150]

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 (27 July 2018) (Morrison and McMurdo JJA and Jackson J)

193. In *Hargrave v Goldman* , [138] Windeyer J said that, in essence, a nuisance could be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it". [139] Not every use of a person's property which interferes with the use or enjoyment of other land is an unlawful interference. In general, an unlawful interference is an *unreasonable* interference with the use or enjoyment of other land. That criterion of reasonableness has been difficult to apply in some cases, but it is a necessary constraint on the operation of the tort which has been consistently recognised.

via

[138] (1963) 110 CLR 40; [1963] HCA 56 .

State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
Weber v Greater Hume Shire Council [2018] NSWSC 667 (14 May 2018) (Walton J)

421. A nuisance is an unreasonable interference with the use and enjoyment of land: an "invasion of the common law rights of an owner or occupier of land": *Hargrave v Goldman* (1963) 110 CLR 40 at 60 (per Windeyer J).

Marketform Managing Agency Ltd v Amashaw Pty Ltd [2018] NSWCA 70 (11 April 2018) (Meagher and Leeming JJA, Emmett AJA)

52.

For present purposes, a nuisance may be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it": WVH Rogers, *Winfield and Jolowicz on Tort*, (6th ed 1954, Sweet & Maxwell) at 712 [14-4], quoted in *Hargrave v Goldman* (1963) 110 CLR 40 at 59 (Windeyer J) . Such interference may take several forms, including the infringement of rights constituting an easement, from which interference "the law presumes damage": *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 at 349–350 (Lord Wright MR). Whether by analogy with that position or otherwise, Marketform conceded that the presence of petrol in the sewer was capable of constituting a nuisance against Sydney Water, which enjoyed statutory rights to operate and maintain its sewer in land: see *Sydney*

Water Act 1994 (NSW) ss 37, 38 . Thus, both Marketform and Amashaw accepted that the state of affairs in the sewer could substantially interfere with Sydney Water's enjoyment of rights in land, an actionable loss expressly included within the definition of "Damage".

O'Connor v New South Wales [2017] NSWSC 598 -
Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia [2016] WASC 42 (12 February 2016) (KENNETH MARTIN J)

Hargrave v Goldman [1963] HCA 56 ; (1963) 110 CLR 40

Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia [2016] WASC 42 -
Blackburn v Logos Research Institute Pty Ltd [2015] SADC 175 (23 December 2015) (Slattery J)

60. The principles are as follows:-

1. Before 1940, a landowner was not subject to any liability in nuisance as a result, for example, of any rocks falling from his land due to weathering or other forces; [32] an occupier was not under a duty to prevent a noxious weed such as prickly pear, from attacking a neighbour's fence. [33]

2. After 1940, the modern law of nuisance has been further developed. The authority usually referred to in this context is the decision of the House of Lords in *Sedleigh-Denfield v O'Callaghan.* [34] At pages 894-895 Viscount Maugham said as follows:

"In my opinion, an occupier of land continues a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He adopts it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences I am not attempting exclusive definitions."

3. In *Sedleigh-Denfield v O'Callaghan* , the House of Lords approved the dissenting opinion of Scrutton LJ in *Job Edwards Limited v Birmingham Navigations* [35] where his Lordships said (at 8):

"There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it, that then if he does nothing, he has "permitted it to continue", and become responsible for it. This would base the liability on negligence on not on the duty of insuring damage from a dangerous thing... I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours."

4. The House of Lords' decision in *Sedleigh-Denfield v O' Callaghan* was applied by the High Court in *Hargrave v Goldman* [36] at page 51:-

"We can see no distinction relevant to the question of liability between potential nuisances created by trespassers and potential nuisances coming into existence: "otherwise without the act, authority or permission of the occupier"... the same notion is apparent in the final proposition as stated by Rowlatt J in *Noble v Harrison* [37] when he said:

"The result... is that a person is liable for a nuisance constituted by the state of his property:

(a) If he causes it;

(b) If by the neglect of some duty he allowed it to arise; and

(c) If, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it."

5. The propositions enunciated by Rowlatt J in *Noble* were earlier referred to with evident approval by Dixon J as he then was in *Torett House Pty Ltd v Berkman.* [38] It is apparent that Dixon J had identified and approved of the development in the common law to impose responsibility upon a land owner for the consequence to an adjoining land owner of a nuisance upon that land of which the owner knew or ought to have known. The earlier decision of Rowlatt J in *Noble* and the dissenting opinion of Scrutton LJ in *Job Edwards* formed part of the basis of formulation by Viscount Maugham of the common law position in his Lordship's speech in *Sedleigh-Denfield* .

6. In *Torett* at page 657, Dixon J emphasised that the duty to take reasonable care to abate a nuisance arises once the occupier has knowledge or presumed knowledge of its existence. This is consistent with what fell from Viscount Maugham, Lord Wright and Lord Romer in *SedleighDenfield* .

7. The decision of the High Court in *Hargrave v Goldman* , approved by the Privy Council in *Goldman v Hargrave* [39] concerned a breach of duty giving rise to a finding of nuisance and negligence. Both torts emanate from the requirement of the finding of a duty and the breach of that duty.

8. In *Goldman v Hargrave* , the Privy Council decided, consistent with the House of Lords' decision in *Sedleigh-Denfield* , that the scope of the duty required the obligor to take reasonable steps to abate a nuisance and that there a number of factors such as effort and expense that are required to be considered. In *Goldman* at page 467, the Privy Council said as follows:

"So far it has been possible to consider the existence of a duty in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of effort required? What is the position as regards expenditure? It is not enough to say merely that these must be reasonable since what is reasonable to one man may be very unreasonable and indeed ruinous to another: the law must take account of the fact that the occupier from whom the duty is cast, has, ex hypothesi, had this thrust upon him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard or as compared with those of his threatened neighbour... one may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it and the ability to abate it."

9. In *Goldman*, the Privy Council focussed upon the relative simplicity, for example, of the case where one neighbour merely douses flames in order to prevent the spread of a fire to a

neighbouring property when compared to situations and circumstances which are far more complex and where particular emphasis must be given to aspects such as effort and expense. At page 457, the Privy Council said as follows:-

"Where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be required of the occupiers what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirmed than of the able body: the owner of a small property where a hazard arises which threatens a neighbour with substantial interest should not have to do so much as one with larger interest of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstances, should, have done more."

10. In *Leakey v National Trust for Places of Historic Interest or Natural Beauty,* [40] Megaw LJ said:-

"The defendant's duty is to do that which is reasonable for him to do. The criteria of reasonableness include, in respect of a duty of this nature, the factor of what the particular man – not the average man – can be expected to do, having regard amongst other things, where a serious expenditure of money is required to eliminate or reduce the danger, to his means.

...where the expenditure of money is required, the defendant's capacity to find the money is irrelevant. But this can only be in the way of a broad and not detailed assessment; and, in arriving at a judgment on reasonableness, a similar broad assessment may be relevant in some cases as to the neighbour's capacity to protect himself from damage, whether by way of some form of barrier on his own land or by way of providing funds for expenditure on agreed works on the land of the defendant."

11. The judgment of Megaw LJ in *Leakey* has been accepted and applied in Australia. [41]

Blackburn v Logos Research Institute Pty Ltd [2015] SADC 175 -
Blackburn v Logos Research Institute Pty Ltd [2015] SADC 175 -
Blackburn v Logos Research Institute Pty Ltd [2015] SADC 175 -
Blackburn v Logos Research Institute Pty Ltd [2015] SADC 175 -
Blackburn v Logos Research Institute Pty Ltd [2015] SADC 175 -
Marsh v Baxter [2015] WASCA 169 -
Marsh v Baxter [2015] WASCA 169 -
Marsh v Baxter [2015] WASCA 169 -
Matthews v AusNet Electricity Services Pty Ltd [2014] VSC 663 (23 December 2014) (Osborn JA)

227. The circumstances in which the escape of a single fire will properly be characterised as constituting an actionable nuisance are not entirely clear. Generally speaking, a nuisance is constituted by a state of affairs which is either continuous or recurrent. [52] This was not a case of a conductor which discharged electricity on a continuing basis after it fractured or a fire which continued on SPI's property for some time before it escaped. It is to be contrasted with cases such as *Hargrave v Goldman* . [53]

via

[53] Ibid .

Matthews v AusNet Electricity Services Pty Ltd [2014] VSC 663 -
Matthews v AusNet Electricity Services Pty Ltd [2014] VSC 663 -

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

279. In respect of alleged inconsistency and incoherence with the statutory regimes, the plaintiffs relied on their submissions about justiciability. They also said that:

> (1) The Rural Fires Act, "while not the source of the duty, is plainly relevant to the existence and scope of any duty and to questions of breach. It was plainly enacted to protect the community from a particular risk (rural fires)".
>
> (2) "There is no factual basis for the assertion that the imposition of a duty of care would be likely to inhibit officers in the proper exercise of their powers".
>
> (3) A "failure to impose a duty of care on the State in the circumstances of this case would be inconsistent with the liability of an occupier identified in *Goldman* ".

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

289. The Director-General of NPW has the care, control and management of the Park (ss 31 and 33 of the NPW Act). It follows that the Director-General was the occupier of the Park for the purposes of the Rural Fires Act . The Director-General was empowered to and did delegate to Ms Crawford, the relevant Area Manager, the Director-General's responsibilities under the NPW Act and the Rural Fires Act , which included the Director-General's functions as the occupier of the Park. That said, it should be recognised that *Hargrave v Goldman* involves different factual circumstances, and not just for the reasons that NSW gave. The defendant in *Hargrave v Goldman* occupied a mere 600 acres of land. He readily could have extinguished the fire after the tree was felled. Instead, he left the property and allowed the fire to burn out of control. But a more significant difference is that the occupier in *Hargrave v Goldman* was not a statutory authority subject to other duties and responsibilities. In particular, the fire was not one which engaged a plan of operations requiring an incident controller to co-ordinate the fire fighting efforts of many agencies and to make numerous strategic decisions about dealing with the fire. The occupier in *Hargrave v Goldman* was not a public authority bound to give effect to a plan of operations as was NPWS (and thus Ms Crawford), and was not subject to the directions of Mr Arthur as incident controller under pain of criminal sanction as were all people (other than police officers) under s 45 of the Rural Fires Act from 1.00 pm on 9 January 2003. Consequently, it is difficult to extract from *Hargrave v Goldman* any principle that is readily applicable to the position in which Ms Crawford and Mr Arthur found themselves.

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

289. The Director-General of NPW has the care, control and management of the Park (ss 31 and 33 of the NPW Act). It follows that the Director-General was the occupier of the Park for the purposes of the Rural Fires Act . The Director-General was empowered to and did delegate to Ms Crawford, the relevant Area Manager, the Director-General's responsibilities under the NPW Act and the Rural Fires Act , which included the Director-General's functions as the occupier of the Park. That said, it should be recognised that *Hargrave v Goldman* involves different factual circumstances, and not just for the reasons that NSW gave. The defendant in *Hargrave v Goldman* occupied a mere 600 acres of land. He readily could have extinguished the fire after the tree was felled. Instead, he left the property and allowed the fire to burn out of control. But a more significant difference is that the occupier in *Hargrave v*

Goldman was not a statutory authority subject to other duties and responsibilities. In particular, the fire was not one which engaged a plan of operations requiring an incident controller to co-ordinate the fire fighting efforts of many agencies and to make numerous strategic decisions about dealing with the fire. The occupier in *Hargrave v Goldman* was not a public authority bound to give effect to a plan of operations as was NPWS (and thus Ms Crawford), and was not subject to the directions of Mr Arthur as incident controller under pain of criminal sanction as were all people (other than police officers) under s 45 of the Rural Fires Act from 1.00 pm on 9 January 2003. Consequently, it is difficult to extract from *Hargrave v Goldman* any principle that is readily applicable to the position in which Ms Crawford and Mr Arthur found themselves.

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Curtis v Harden Shire Council [2014] NSWCA 314 (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

265. In *Stovin v Wise* [1996] AC 923 the House of Lords considered the liability of a road authority for an accident which resulted from reduced vision at an intersection, where a mound of earth on adjoining private land obstructed the view of road users. The road authority was aware of the problem and had power to require the landowner to remove the mound, but had not done so. Lord Hoffmann, speaking for the majority, made two points which are relevant in the present case. He noted, first, that the case involved an omission, rather than positive conduct and, secondly, that the common law did not treat omissions in the same way as positive acts, referring to Windeyer J in *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 66. Lord Hoffmann continued at 943G -H:

"There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties ... or natural causes."

M and a Wood v C and R Christopherson [2013] NSWDC 233 -
Gales Holdings Pty Ltd v Tweed Shire Council [2013] NSWCA 382 (18 November 2013) (Emmett and Leeming JJA, Sackville AJA)

131. A nuisance is either a continuous or recurrent state of affairs. An occupier of land will be liable for continuing a nuisance if, with knowledge or presumed knowledge of the state of affairs, the occupier fails to take reasonable steps to bring it to an end despite having had ample time to do so (*Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 59-61). There will be nuisance if a state of affairs created, adopted or continued by an owner or occupier of land harms another person's enjoyment of land occupied or owned by that other person, unless the first person's conduct involves no more than the reasonable and convenient **use** of its own land (*Hargrave v Goldman* at 62).

Gales Holdings Pty Ltd v Tweed Shire Council [2013] NSWCA 382 -

Quinn v The Body Corporate of Sanctuary Bay CTS 6523 [2013] QCATA 25 (08 February 2013) (Dr J R Forbes, Member)

8. In the present case the Adjudicator had to apply to concrete facts and real life activities the elusive concept of '*substantial and unreasonable interference*', with no more accurate compass than a direction to make '*an order that is just an equitable in the circumstances ... to resolve [the] dispute*' [7] – a task that would no doubt attract the sympathy of Mr Justice McHugh. The criteria that the Adjudicator had to apply are derived not from his '*personal and subjective assumptions*'[8] but to the '*proper basis in law*' [9] to which the Quinns' repeatedly refer. These unsuccessful litigants may regret that the relevant ' *basis*' is hardly precise, while they '*acknow ledge that in general they are tolerant people*'[10] who '*have been able to reach an informed and enlightened opinion*' in their own cause[11], but litigants and adjudicators must make the best of the law as it is.

via

[9] E.g. submissions page 26. As to the inescapable uncertainty of the law of nuisance see *Hargr ave v Goldman* (1963) 110 CLR 40 at 60 per Windeyer J .

Quinn v The Body Corporate of Sanctuary Bay CTS 6523 [2013] QCATA 25 -
Electro Optic Systems Pty Ltd v The State of New South Wales; West and West v The State of New South Wales [2012] ACTSC 184 (17 December 2012) (Higgins CJ)

374. The West plaintiffs differ from the QBE plaintiffs only in the circumstance that their property adjoined the Park. The case of *Hargrave v Goldman* (1963) 110 CLR 40 has some similarity in that a fire hazard, coming to the landowner's attention was inadequately dealt with so that the fire later flared and spread. I agree that NSW, as the occupier of the Park, had a duty at common law to use reasonable care to avoid damage to the West plaintiffs' property. It is clear that no adequate steps were taken to prevent the fire burning down to the river and hence crossing it. With or without the "kink" solution, the efforts of NSW to deal with the western edge of the fire were inadequate and would have given rise to liability at common law.

Jeffs v Perkins [2012] WADC 140 (21 September 2012) (Birmingham QC DCJ)

198. Where a person has created or increased the risk of harm he has a duty of care to protect others from that risk of harm: ***Smith v Leurs*** [1945] HCA 27; (1945) 70 CLR 256, 261 - 262; ***Hargra ve v Goldman*** [1963] HCA 56; (1963) 110 CLR 40 ; ***Cole v South Tweed Heads Rugby League Football Club Ltd*** [2004] HCA 29; (2004) 217 CLR 469 [56]. A person who put himself in peril in attempting to save life or property is entitled to recover damages from the person whose negligence has caused the danger: ***Haynes v Harwood*** [1935] 1 KB 146.

Jeffs v Perkins [2012] WADC 140 -
Dimitrios Michos & Another v Council of the City of Botany Bay [2012] NSWSC 625 (08 June 2012) (Slattery J)

64. The plaintiffs also plead their cause of action in negligence in the alternative. In *Hargrave v Goldman* (1963) 110 CLR 40 at 62 , Windeyer J made the following distinction between nuisance and negligence:

> "In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land. In negligence liability is founded upon the negligent conduct of one person causing, to any degree, foreseeable harm to the person or property of another person (not necessarily an owner or occupier of land) to whom a duty of care was owed".

Dimitrios Michos & Another v Council of the City of Botany Bay [2012] NSWSC 625 -
SJ Weir Ltd v Bijok [2011] SASCFC 165 (23 December 2011) (Gray, Sulan and Blue JJ)

Jones v Dunkel (1959) 101 CLR 298; *Piening v Wanless* (1968) 117 CLR 498; *Anchor Products Ltd v Hedges* (1966) 115 CLR 493; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; *Bonomi v Backhouse* (1859) EB & E 646; *Backhouse v Bonomi* (1861) 9 HL Cas 503; *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; *Brown v Robins* (1859) 4 H & N 186 [157 ER 809]; *Stroyan v Knowles* (1861) 6 H & N 454 [158 ER 186]; *Pantalone v Alaouie* (1989) 18 NSWLR 119; *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127; *Hargrave v Goldman* (1963) 110 CLR 40 ; *Walker v Adelaide City Corporation* (2004) 88 SASR 225; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; *Morgan v Lake Macquarie City Council* [1993] NSWCA 184 (Unreported, NSW Court of Appeal, 2 September 1993); *Savini v Australian Terrazzo and Concrete Co Pty Ltd* [1959] VLR 811; *Middleton v Melbourne Tramway & Omnibus Co Ltd* (1913) 16 CLR 572, considered.

SJ Weir Ltd v Bijok [2011] SASCFC 165 -
SJ Weir Ltd v Bijok [2011] SASCFC 165 -
Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128 -
Hodge v Barham [2011] WADC 71 (19 May 2011) (Derrick DCJ)

Hargrave v Goldman [1963] HCA 56 ; (1963) 110 CLR 40

Hodge v Barham [2011] WADC 71 -
Onus v Telstra Corporation Limited [2011] NSWSC 33 -
Onus v Telstra Corporation Limited [2011] NSWSC 33 -
Onus v Telstra Corporation Limited [2011] NSWSC 33 -
Quick v Alpine Nurseries Sales Pty Ltd [2010] NSWSC 1248 (29 October 2010) (Ward J)

162 In *Melaleuca* , Giles JA (with whom McColl JA and Hunt AJA agreed) said (at [22]):

> For the legal wrong of (private) nuisance, a nuisance is an unreasonable interference with the use and enjoyment of land: an "invasion of the common law rights of an owner or occupier of land" (*Hargrave v Goldman* (1963) 110 CLR 40 at 60 per Windeyer J). Preferably used, the word denotes the result of the defendant's conduct, or perhaps the state of affairs created by the conduct and bringing about the result. Thus in *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637, in which water discharged from the defendant's premises onto the plaintiff's premises, Dixon J said (at 657) that there was "no nuisance or other wrongful act on the part of anyone of which the plaintiff could complain until the water began actually to flow onto the plaintiff's premises". Also preferably used, finding a nuisance does not mean legal liability for the result of the defendant's conduct. *In some circumstances there may be an unreasonable interference with the use and enjoyment of the plaintiff's land without liability in the defendant* . (my emphasis)

Norbury v Hogan [2010] QCATA 27 (13 May 2010) (President)
Hargrave v Goldman (1963) 110 CLR 40 , considered

Norbury v Hogan [2010] QCATA 27 -
South East Water Limited v Transpacific Cleanaway Pty Ltd [2010] VSC 46 -
South East Water Limited v Transpacific Cleanaway Pty Ltd [2010] VSC 46 -
R v Reid (Ruling No 1) [2009] VSC 221 (09 June 2009) (Whelan J)

8. The second reason is that the injury suffered by the deceased as a result of the back hand strike is part of the Crown case on an issue which I would describe as being: the nature of the peril faced by the deceased or the extent of the deceased's helplessness. The authorities reviewed in the course of pre-trial argument reveal that this is an issue which may affect the existence and the nature of any duty of care owed. [4] In this context, the Crown says the

deceased had injuries in addition to the coffee cup injury, and in particular the Crown says that she had received another blow to the head in the back hand strike.

via

[4] The authorities and materials considered were *R v Cowan* [1955] VLR 18; *Hargrave v Goldman* (1963) 110 CLR 40 ; *Chapman v Hearse* (1961) 106 CLR 112; *Regina v Church* [1966] 1 QB 59; *McKinnon v Burtatowski* [1969] VR 899; *R v Joukkadar*, unreported, Supreme Court of New South Wales – Court of Criminal Appeal, 13/6/75; *R v Taktak* (1988) 34 A Crim R 334; *R v Lawford* (1993) 69 A Crim R 115; *R v Wacker* [2002] EWCA Crim 1944; *R v Taber* (2002) 136 A Crim R 478; Halsbury's Laws of Australia, [300-20] and [300-50].

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

127. The common law generally does not impose a duty upon a person to take affirmative action to protect another from harm [130] . Such an approach is regarded as fundamental to the common law and has as its foundation concepts of causation. The law draws a distinction between the creation of, or the material increase of, a risk of harm to another person and the failure to prevent something one has not brought about. The distinction may be seen as reflected in notions of misfeasance and nonfeasance [131] . So far as concerns situations brought about by the action of the person at risk, it is the general view of the common law that such persons should take responsibility for their own actions [132] . In this, English law has been seen to have an affinity with Roman law, in its reluctance to interfere or to encourage interference with the freedom of the individual[133]. The common law does recognise that some special relationships may require affirmative action to be taken by one party [134] and are therefore to be excepted from the general rule. Examples of such relationships are employer and employee, teacher and pupil, carrier and passenger, shipmaster and crew.

via

[130] *Smith v Leurs* (1945) 70 CLR 256 at 262 per Dixon J; [1945] HCA 27 ; *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J; [1963] HCA 56 ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 444 per Gibbs CJ; [1985] HCA 41 ; *Stovin v Wise* [1996] AC 923 at 943 per Lord Hoffmann.

Stuart v Kirkland-Veenstra [2009] HCA 15 -
Gett v Tabet [2009] NSWCA 76 (09 April 2009) (Allsop P ; Beazley JA ; Basten JA)

322 The development of the law of negligence has witnessed an expansion not only of the scope of circumstances in which a duty may arise, a process described by Windeyer J in *Hargrave v Goldman* [1963] HCA 56; 110 CLR 40 at 63-66 , but also in the sorts of harm which are held to be compensable. These have expanded in various ways (and subject to various control devices) to include not merely physical and mental injury, but also economic loss. An expansion in one direction inevitably gives rise to attempts to generalise the new " *exception*" to form the basis of a more broadly stated general principle. Thus, in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32, the House of Lords permitted a claimant who had been exposed to asbestos fibres in several places of employment to claim against all his former employers for the loss suffered as a result of contracting mesothelioma. Because the claimant could not have established on the balance of probabilities that any one employer materially contributed to the disease (which may have been caused by the reaction to a single fibre) the claimant should have failed against each. The apparent injustice of that result led the House of Lords to allow the claim to succeed against all, thus providing an express exception (avowedly based on a policy choice) to the rule that causation must be established with respect to each tortfeasor on the balance of probabilities. As noted by Lord Hoffmann in *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 AC 572 at [5] , it was "*onl*

y natural that, the dyke having been breached, the pressure of a sea of claimants should try to enlarge the gap".

Gett v Tabet [2009] NSWCA 76 -
Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 3] [2009] WASC 52 -
Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 3] [2009] WASC 52 -
New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

182. *Gardner v Northern Territory of Australia* [2004] NTCA 14 was a bushfire case where it was common ground that the defendant owed the plaintiff a duty of care in respect of a fire which broke out on the defendant's land and ultimately burnt out adjacent land of the plaintiff and members of his family. The court at first instance and the Supreme Court of the Northern Territory, Court of Appeal held that the duty owed by the defendant had not been breached. In his leading judgment B R Martin CJ said at [1], [6] and [7]:

> *[1] This is an appeal against a decision of a Judge of this Court dismissing the appellant's claim for damages arising out of the escape of a fire from vacant Crown land onto the property jointly owned by the appellant and members of his family. The trial Judge found that although the respondent owed a duty of care to the appellant, the evidence had not established that the respondent was in breach of that duty. ...*
>
> ...
>
> *[6] By its pleadings, the respondent admitted that it owed a duty to the appellant in the following terms:*
>
> > *"The respondent was under a duty of care to take such precautions to restrain fire on its land from escaping onto the [appellant's] premises and causing damage as were reasonable in all the circumstances then prevailing."*
>
> *[7] At trial that statement was accepted, correctly in my view, as an accurate statement of the respondent's duty:* Hargrave v Goldman ... *(1963) 110 CLR 40* ; Burnie Port Authority v General Jones Pty Limited ... *(1994) 179 CLR 520* . ...

New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

143. As noted earlier, the liability of highway authorities was originally rooted in the law of public nuisance. Interference with the safe enjoyment of a public right of way over a highway might constitute a public nuisance [191] . And it was in the context of one particular aspect of the law of nuisance (namely, that aspect of the law of private as distinct from public nuisance which concerned the rights of support from adjoining land) that two unduly influential generalisations were uttered. First, in 1876, Cockburn CJ said [192] that:

"a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is *bou nd to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else* – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." (emphasis added)

The second generalisation was that of Lord Blackburn in *Dalton v Angus* [193] that:

"Ever since *Quarman v Burnett* [194] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, *a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor*. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it". (emphasis added)

On their face, these statements that a person cannot "escape" from responsibility by "delegating" responsibility to a contractor or by "employing someone else" are propositions that deny a central tenet of the law that has developed about vicarious liability – that a person may be liable for the negligence of an employee but, at least generally, will not be liable for the negligence of an independent contractor.

via

[191] *Hargrave v Goldman* (1963) 110 CLR 40 at 59.

Owners Strata Plan 4085 v Mallone [2006] NSWSC 1381 (13 December 2006) (Young CJ in Eq)

19 In Hargrave v Goldman (1963) 110 CLR 40 at 51-52 per Taylor and Owen JJ , the High Court approved Sedleigh-Denfield, quoting the identical passage from Salmond as the correct test of liability.

Owners Strata Plan 4085 v Mallone [2006] NSWSC 1381 -
T. Wagstaff v Haslam [2006] NSWSC 294 (21 April 2006) (Studdert J)

30 However, Modbury leaves open the possibility of liability in an occupier of premises who fails to control access to or continued presence upon premises. In his judgment Hayne J said (at [111]-[112]:

"[111] In those cases where a duty to control the conduct of a third party has been held to exist, the party who owed the duty has had power to assert control over that third party. A gaoler may owe a prisoner a duty to take reasonable care to prevent assault by fellow prisoners. If that is so, it is because the gaoler can assert authority over those other prisoners (cf Howard v Jarvis (1958) 98 CLR 177 ; Hall v Whatmore [1961] VR 225). Similarly, a parent may be liable to another for the misconduct of a child because the parent is expected to be able to control the child (Smith v Leurs (1945) 70 CLR 256 at 262, per Dixon J.).
[112] The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land. It is these powers of control which establish the relationship between occupier and entrant "which of itself suffices to give rise to a duty ... to take reasonable care to avoid a foreseeable risk of injury" (Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 at 488, per Mason, Wilson, Deane and Dawson JJ.) to the entrant. It is the existence of these powers which lies behind both the particular conclusion in Hargrave v Goldman ((1963) 110 CLR 40 ; affirmed on appeal Goldman v Hargrave (1966) 115 CLR 458; [1967] 1 AC 645) that occupiers of land owe a duty to take reasonable care in respect of fire or other hazards originating on the land and general statements, of the kind made by Lord Nicholls of Birkenhead in his dissenting speech in Stovin v Wise ([1996] AC 923 at 931), that '[t]he right to occupy can reasonably be regarded as carrying obligations as well as rights'."

Melaleuca Estate Pty Ltd v Port Stephens Council [2006] NSWCA 31 -
Melaleuca Estate Pty Ltd v Port Stephens Council [2006] NSWCA 31 -
Fanigun Pty Ltd v Woolworths Ltd [2006] QSC 28 -
State of SA v Simionato [2005] SASC 412 -
State of SA v Simionato [2005] SASC 412 -
State of SA v Simionato [2005] SASC 412 -
SB v State of New South Wales [2004] VSC 514 (14 December 2004) (Redlich J)

233. In *TC* ,[297] the Plaintiff sued the State of New South Wales in negligence contending it was vicariously liable for the failure on the part of officers of the Department of Youth and Community Services (hereafter YACS) to exercise the statutory power to investigate and take action in relation to complaints by the father of physical and sexual abuse by the mother. The Plaintiff alleged that the State through YACS and its officers owed a common law duty of care to children in respect of whom there had been notification within the terms of s. 148B *Child Welfare Act* 1939 (hereafter the Act). Studdert J found that there was a duty of care enlivened by a notification under s.145B(2) of the Act, the content of the duty being to exercise reasonable care in the discharge of the mandatory requirements under s.145B(5). Where the Department was neither the custodian nor guardian of the Plaintiff Studdert J found that the Act imposed obligations upon YACS to ensure prompt investigation once child abuse was suspected. As the Department had no statutory duty in relation to the Plaintiff prior to notification of the Plaintiff's abuse, Studdert J referred to the exceptional nature of the duty to provide positive assistance to third parties which his Honour described as dependent upon a special relationship, referring in particular to the judgments of Windeyer J in *Hargrave v Goldman* [298] and the judgment of McHugh J in *Pyrenees*.[299] His Honour then examined the state of the authorities as to the methodology of determining the existence of a duty of care referring to the concept of proximity and current authority as to when a common law duty may arise as a consequence of statutory duties and discretions. His Honour referred also to the decision of the House of Lords in *Caparo* [300] and the over-arching principle of "fairness justice and reasonableness". Although the *Caparo* test did not find favour with the High Court the conclusions reached by his Honour, in my respectful opinion, remain a useful guide.

SB v State of New South Wales [2004] VSC 514 (14 December 2004) (Redlich J)

233. In *TC* ,[297] the Plaintiff sued the State of New South Wales in negligence contending it was vicariously liable for the failure on the part of officers of the Department of Youth and Community Services (hereafter YACS) to exercise the statutory power to investigate and take action in relation to complaints by the father of physical and sexual abuse by the mother. The Plaintiff alleged that the State through YACS and its officers owed a common law duty of care to children in respect of whom there had been notification within the terms of s. 148B *Child Welfare Act* 1939 (hereafter the Act). Studdert J found that there was a duty of care enlivened by a notification under s.145B(2) of the Act, the content of the duty being to exercise reasonable care in the discharge of the mandatory requirements under s.145B(5). Where the Department was neither the custodian nor guardian of the Plaintiff Studdert J found that the Act imposed obligations upon YACS to ensure prompt investigation once child abuse was suspected. As the Department had no statutory duty in relation to the Plaintiff prior to notification of the Plaintiff's abuse, Studdert J referred to the exceptional nature of the duty to provide positive assistance to third parties which his Honour described as dependent upon a special relationship, referring in particular to the judgments of Windeyer J in *Hargrave v Goldman* [298] and the judgment of McHugh J in *Pyrenees*.[299] His Honour then examined the state of the authorities as to the methodology of determining the existence of a duty of care referring to the concept of proximity and current authority as to when a common law duty may arise as a consequence of statutory duties and discretions. His Honour referred also to the decision of the House of Lords in *Caparo* [300] and the over-arching principle of "fairness justice and reasonableness". Although the *Caparo* test did not find favour with the High Court the conclusions reached by his Honour, in my respectful opinion, remain a useful guide.

via

[298] (1963) 110 CLR 40 at 65-66 .

Gardner v Northern Territory of Australia [2004] NTCA 14 (10 December 2004)

[7] At trial that statement was accepted, correctly in my view, as an accurate statement of the respondent's duty: Hargrave v Goldman (1963) 110 CLR 40 ; Burnie Port Authority v General Jones Pty Limited (1994) 179 CLR 520 . At issue were the content of that duty in all the circumstances and whether the appellant had established that the respondent had failed to discharge that duty.

Gardner v Northern Territory of Australia [2004] NTCA 14 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Simionato v The City of Tea Tree Gully & the State of SA [2004] SADC 93 (30 June 2004) (Herriman J)
Young v Wheeler (1987) Aust Torts Reports 80-126; *Xuereb v Viola* (1990) Aust Torts Reports 81-012; *Act on v Blundell* (1843) 12 M & W 324; (1843) 152 ER 1223; *Hargrave v Goldman* (1963) 110 CLR 40 ; *Burnie Port Authority v General Jones Pty Ltd* (1992-94) 179 CLR 520; *Kondis v State Transport Authority* (1984) 154 CLR at 687 ; *Northern Sandblasting Pty Ltd v Harris* (1997) Aust Torts Reports 81-435, applied.

Simionato v The City of Tea Tree Gully & the State of SA [2004] SADC 93 -
Valherie v Strata Corporation No 1841 [2004] SASC 170 -
Valherie v Strata Corporation No 1841 [2004] SASC 170 -
Tilba Tilba Stud (WA) (ACN 065 413 747) as trustee for the Tilba Tilba Stud Trust v The Executive Officer of Agriculture Western Australia [2004] WASC 31 -
Chivers v Perron Investments Pty Ltd [2003] WADC 243 (07 November 2003) (Williams DCJ)
Hargrave v Goldman (1963) 110 CLR 40
Jaensch v Coffey

Chivers v Perron Investments Pty Ltd [2003] WADC 243 -

Chivers v Perron Investments Pty Ltd [2003] WADC 243 -
McClean v General Service Board of Alcoholics Anonymous Australia [2003] WADC 228 (03 November 2003) (Kennedy DCJ)

80. In ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424 at 501 502, Deane J said:

> "... The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury: cf per Windeyer J, ***Hargrave v Goldman*** (1963) 110 CLR 40 at 66. That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or 'exceptional': cf per Dixon J, ***Smith v Leurs*** (1945) 70 CLR 256 at 262 and ***Dorset Yacht Co v Home Office*** [1970] AC 1004 at 1031 1039, 1045 1046, 1055, 1060 ff. Apart from those cases where the circumstances disclose an assumption of a particular obligation to take such action or of a particular relationship in which such an obligation is implicit, they are largely confined to cases involving reliance by one party upon care being taken by the other in the discharge or performance of statutory powers, duties or functions or of powers, duties or functions arising from or involved in the holding of an office or the possession or occupation of property."

Valherie v Strata Corporation No. 1841 Inc and Ors No. Scciv-03-593 [2003] SASC 291 -
Cehner v Borg [2003] VSCA 72 (12 June 2003) (Batt, Chernov and Eames, Jj.A)

20. The appellant relied on *Taylor v. Browning [18]* in support of the claim that the Borgs' use and control of the land extended beyond its boundaries to the domestic pipe (which, it was said, was an integral part of the land and for which the Borgs were responsible). But that case is not authority for the proposition advanced by the appellant. The case concerned an easement over an underground pipe and did not deal with an obligation to maintain something that was not part of the relevant property. As Mr. Santamaria for the first respondent pointed out in argument, an easement creates rights over someone else's property, and even if the previous owner obtained a right or an easement to lay the domestic pipe, it does not mean that the Borgs became obligated to maintain it or that they became its owners or occupiers for present purposes. Reliance was also placed by the appellant on *Cunard v. Antifyre Ltd. [19]* and *Hargrave v. Goldman [20]* in support of the contention that the Borgs' relevant obligations as owner and occupier of their property did not cease at its boundary but extended to the domestic pipe. These cases are, however, irrelevant for present purposes. They deal with an obligation of an occupier of property in respect of matters – a guttering in the first case and a fire in the second – passing from *that land* on to the adjoining land which caused consequential harm. Here, the question is materially different – it is whether the Borgs had a relevant obligation in respect of the domestic pipe which, as I have said, was *outside* their property and which was not put there by them.

Cehner v Borg [2003] VSCA 72 -
Gordon v Tamworth Jockey Club [2003] NSWCA 82 (16 April 2003) (Sheller, Beazley and Giles JJA)

38 In *Hargrave v Goldman* (1963) 110 CLR 40 at 66-67 Windeyer J said:

> "The trend of judicial development in the law of negligence has been ... to found a duty to take care either in some task undertaken, or in the ownership occupation, or use of land or chattels. The occupier of land has long been liable at common law, in one form of action or another, for

consequences flowing from the state of his land and of happenings there, not only to neighbouring occupiers, but also to those persons who come upon his land and those who pass by. And, as I have remarked elsewhere, the tendency of the law in recent times has been to lessen the immunities and privileges of landowners and occupiers and to increase their responsibilities to others for what happens upon their land."

Gordon v Tamworth Jockey Club [2003] NSWCA 82 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

91. The powers and functions of the government of a polity are generally invested for the benefit of the general public. In the absence of a statutory direction, the mere existence of such a power in that government imposes no duty to exercise it for the protection of others. In that respect, its situation is analogous to a private citizen who, absent special circumstances, has no duty to take affirmative action to protect another person from harm [57] . Nor does the bare fact that the Executive government has exercised its powers from time to time create any duty to exercise its powers. Such exercises of power do not constitute "control" of an activity in the sense that that expression is used in the law of torts. They are merely particular exercises of powers that were invested in the Executive government for the benefit of the general public to be exercised at the discretion of the Executive government. Unless a particular exercise of power has increased the risk of harm to an individual, the Executive government of a polity does not ordinarily owe any common law duty to take reasonable care as to when and how it exercises its powers. No doubt circumstances may arise where conduct of the government, short of increasing a risk of harm, creates a duty of care. But such cases are less likely to arise than in the case of other public authorities. In particular, knowledge of specific risks of harm or the exercise of powers in particular situations is less likely to be a factor in creating a duty than in the case of an ordinary public authority. This is because the powers and functions of the Executive government are conferred for the benefit of the public generally and not for the benefit of individuals.

via

[57] *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J ; ***Stovin v Wise*** [1996] AC 923 at 943-944 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Brechin v Shire of Brookton [2002] WASC 228 (25 September 2002) (Master Sanderson)
Hargrave v Goldman (1963) 110 CLR 40
John Pfeiffer Pty Ltd v Canny

Brechin v Shire of Brookton [2002] WASC 228 (25 September 2002) (Master Sanderson)
Hargrave v Goldman (1963) 110 CLR 40
John Pfeiffer Pty Ltd v Canny

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

249. The common law of negligence does not provide for recovery by all who suffer negligently inflicted harm. Nor is reasonable foreseeability the only limit upon recovery. As I have pointed out before [272] , the concept of duty of care has a fundamentally important role to play. "[A]s a prerequisite of liability in negligence, [it] is embedded in our law by compulsive pronouncements of the highest authority." [273] Foresight of harm, even foresight of harm of a particular kind, has not hitherto been found sufficient to warrant finding a duty of care. As Brennan J said in *Sutherland Shire Council v Heyman* [274] , "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered *and in reference*

to the plaintiff or a class of which the plaintiff is a member" (emphasis added). (Even that double specification may not suffice in some cases.)

via

[273] *Hargrave v Goldman* (1963) 110 CLR 40 at 63 per Windeyer J .

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

186. It was observed in *Pyrenees Shire Council v Day* [158] :

> "The broad concepts which found the modern law of negligence reflect its development from the action on the case. Windeyer J explained this in *Hargrave v Goldman* [159] . These concepts are expressed in major premises which, if unqualified, may extend liability beyond the bounds of social utility and economic sustainability."

So, as in cases respecting the liability in negligence of public authorities [160] , the recovery of damages for economic losses resulting from negligent misstatement [161] , and the recovery of economic loss in the absence of physical injury to person or property [162] , various "control mechanisms" have been postulated to restrict liability in negligence for psychiatric illness not consequent upon physical harm. The control mechanisms reflect a perceived need to keep liability within practicable bounds.

Tame v New South Wales [2002] HCA 35 -
Ali v Hazim [2002] VCAT 274 -
Yared v Glenhurst Gardens Pty Ltd [2002] NSWSC 11 (28 February 2002) (Austin J)

96 *Sedleigh-Denfield* was not a case in which the damage to the plaintiff's land had been brought about by natural causes, but (as Megaw LJ pointed out in *Leakey's* at 517) the whole tenor of the speeches in the House of Lords suggested that in their Lordships' opinion, the same duty of care would have arisen if the condition had been brought about by natural causes. The High Court of Australia and the Privy Council applied the *Sedleigh-Denfield* principle to a case where the risk of damage arose out of natural causes, in *Goldman v Hargrave* [1967] AC 645 (Privy Council); (1963) 110 CLR 40 (High Court). There a tall tree on the defendant's land was struck by lightning and caught fire. The defendant cleared a space around the tree and sprayed the surrounding area with water to prevent the fire from spreading, and on the next day, the tree was cut down and the defendant left it to burn itself out. He did nothing else to prevent the fire from spreading on his land and to adjoining land. Two days later, the weather changed and a hot wind revived the fire and spread it onto the plaintiff's property. The Supreme Court of Western Australia held that the defendant was not liable to compensate the plaintiff, because he owed no duty to the plaintiff to extinguish the fire, which had been ignited and had spread through natural causes. The High Court allowed the plaintiff's appeal, holding that after he arranged for the tree to be cut down, the defendant had a duty to use reasonable care to prevent it causing damage to his neighbours. The Privy Council agreed.

Yared v Glenhurst Gardens Pty Ltd [2002] NSWSC 11 -
TC v State of New South Wales [2001] NSWCA 380 (31 October 2001)

21. *150 Once a notification was given to the director, s 148B(5) was enlivened and he thereupon became obliged to promptly cause an investigation into the subject matter of the notification. Moreover, if the director was satisfied that the child the subject of the notification "may have been assaulted, ill treated or exposed", he became obliged to take such action as he believed appropriate, which may include reporting those matters to a constable of police.*

22. It was not contended that the **Child Welfare Act** gave rise to a statutory cause of action. Rather, the submission was that the State, through YACS and its officers, owed a common law duty of care to children in respect of whom there had been a notification within the terms of s 148B . Studdert J upheld this submission (JL §§158-191). The measure of the duty imposed upon YACS by the receipt of notifications was described as a duty to exercise reasonable care in the discharge of the mandatory requirements of s 148B (JL §191). This proposition is challenged by the State in its cross appeal.

Issues fought and determined at the liability phase of the trial

23. Essentially four issues were litigated at the proceedings which culminated in the judgment as to liability:

    (i) What duty of care arose in the particular circumstances?

    (ii) What physical or sexual abuse was inflicted on TC?

    (iii) What was notified to YACS and when?

    (iv) Did YACS breach its duty in the circumstances?

24. Facts relevant to one issue could also be relevant to another.

25. In summarising the outcomes I will concentrate on the findings which touch the issues pressed by the parties in the appeal. Much of what was fought and decided at trial is no longer relevant, except sometimes as background.

(i) What duty of care arose in the particular circumstances?

26. The duty of care found to have been called into existence was one triggered by a notification under s145B(2), and its content was held to be a duty to exercise reasonable care in the discharge of the mandatory requirements of both limbs of s 145B(5) (JL §§158-191).

(ii) What physical or sexual abuse was inflicted on TC?

27. At least by the stage it got to this Court, the appellant's case was that the psychiatric harm which is assumed to have ultimately befallen him stemmed from sexual abuse as distinct from physical neglect or abuse. However, he argued that appropriate response by YACS to notifications of physical abuse would have brought to light the sexual abuse that was inflicted, and would have led to early intervention that would in turn have prevented further sexual abuse occurring.

28. In the main proceedings spanning 64 days TC sought to establish that he had been both physically and sexually abused. The primary thrust of his case was that his mother bore direct or indirect responsibility for the abuse, because YACS' breaches were said to have led it to fail to take appropriate action under s 148B(5) directed at the mother. In a strict sense, this issue of the preventable abuse that was actually inflicted went to the matter of damage. TC's ultimate case was that YACS had materially contributed to his ongoing psychiatric disorder because of its failure to respond promptly and adequately to complaints which called forth the relevant duty of care. TC's case was that early appropriate intervention

would have **prevented** further acts of sexual abuse. It was never his case that psychiatric damage attributable to YACS' default stemmed from delay in **treatment** of the psychiatric condition.

29. It is however clear that the parties joined issue on the question of actual abuse at the first stage of the trial. Obviously they recognised that there was a substantial overlap between that issue and the issue of breach. Studdert J heard argument and he made findings as to which acts of abuse actually took place. The causation hearing proceeded on the basis of those findings.

30. At trial TC, then a young man of 17, gave evidence of acts of sexual abuse practiced upon him by his mother and by a woman named Judith. There is no indication that the plaintiff (or his tutor HF, so long as he remained tutor) suggested at trial that any physical or sexual abuse by a woman occurred during the periods that TC was living with his father. HM was called as a witness by the State and she denied those allegations. There was no other direct evidence on this question, which involved hotly fought credibility issues about long past events.

31. Studdert J found on the balance of probabilities that HM was not guilty of sexually abusing TC nor had she participated in any sexually inappropriate behaviour with anyone else in the presence of TC (JL §§210, 61-72). The appellant does not challenge this conclusion.

32. On the other hand, there were findings in TC's favour to the effect that he had been the victim of sexual abuse by a female or females unknown at some time or times prior to Dr Goldberg's assessment in May 1984 (see JL §§53, 57, 60, 324; JC §68).

33. The timeframe within which the sexual abuse occurred is of considerable importance, because of the need to link the abuse (as the putative trigger for the psychiatric harm) with the actual breaches of duty found against YACS and its officers. Studdert J was unable to locate the time with any more specificity than before 12 May 1984 (JL §§53, 60; JC §68). Having regard to TC's birthdate as 10 February 1980, senior counsel for the appellant accepted that the time frame within which sexual abuse triggering the inappropriate behaviour observed by Dr Goldberg must have commenced no earlier than February 1982 (Tr p40). In his submissions at trial, February 1983 was the starting point (Orange 98). The difference does not matter.

(iii) What was notified to YACS and when?

34. Notifications of alleged abuse were made by HF to YACS from November 1980 onwards. The earlier complaints were general allegations that HM was psychologically incapable of caring for the child or related to alleged acts of verbal or physical abuse. The first notification to YACS of sexual abuse of TC or of evidence that TC was acting in a sexually inappropriate manner was found to have been made in May 1984 (JL §§73-93).

35. YACS' response to all of the notifications down to February 1983 was found to be adequate and in compliance with its duty of care (see esp JL §§35, 214-228).

36. The breaches that were found related to its response to:

    (1) the five affidavits relating to the cot tying incident, produced to YACS in February-March 1983; and

    (2) the sexual abuse notification in May 1984.

(iv) Did YACS breach its duty in the circumstances?

37. Studdert J was satisfied that the evidence did not establish any act or omission of an officer of YACS in response to any complaint made in the period 1980 to October 1982 could be regarded as constituting negligence, even assuming a private duty of care (JL §35).

38. The next period considered was between October 1982 and February 1983. TC's parents had been living apart since February 1982 and HM had been living at the Marrickville Refuge since 28 March 1982. In October 1982 HF complained that HM went out every night *"having a good time with the men"* and leaving TC tied to the bed at the women's refuge. This complaint was assigned to a Mr Plater for investigation. There were visits to the refuge and discussions with HM and others, including doctors. HM denied any neglect or abuse. There were no findings adverse to YACS as regards the conduct of its officers in following up the complaints down to February 1983 (see JL §§35, 214-229). (See also the rejection of claims of bias against all of the individual YACS officers at JL §§385-474; and the favourable findings referable to Plater and Hulbert at JL §§520-1.)

39. It was however found that the response of YACS officers to the allegations relating to the disputed cot tying incident of April 1982 contained in five affidavits or statements delivered to YACS in February-March 1982 was less than adequate (JL §§236-249, 262-265, 529). The deponent Ms Papakonstantinou was unable to be interviewed because she had left Australia. The deponent Mrs Denley did not refer to the cot incident. But Mrs Daskalopoulos, Mrs Tokatlidis and Mrs Brunner each referred to the cot incident and they were available, yet they were not interviewed. HM was, but she was not confronted with the specific allegations of the deponents. These omissions were found by the trial judge to constitute breaches of duty of care on the part of YACS and its officers (JL §§235-267; JC §53).

40. As regards the allegations of sexual abuse that came to YACS's notice in May 1984 Studdert J acquitted the officers of negligence in a number of respects. The decision to arrange a case conference for 21 May 1984 was held appropriate (JL §§485-6, 493), as was the decision to obtain a full psychiatric assessment before considering removal of TC from HM's care (JL §§493-503). In light of Dr Waters' assessment and report of 1 November 1984, the judge also held that no breach of duty towards TC occurred after that date (JL §504). The latter paragraph bears repeating:

    504. I am persuaded by the evidence Dr Scott gave that it would have been inappropriate to have removed TC from his mother before Dr Waters made his assessment, and because of the conclusions reached by Dr Waters I have decided that it was appropriate thereafter for YACS to act in the manner in which it did. Certainly as I assess the evidence I do not find it to have been proved that there was any breach of duty towards the plaintiff from the time Dr Waters made his assessment and furnished his report in November 1984.

41. There were also findings in favour of YACS and its officers that the non-institution of Children's Court proceedings at any time after November 1984 and the steps taken by YACS to intervene in the Family Court proceedings in September 1984 were appropriate in the circumstances (JL §§348-382, especially 358-9, 368, 378, 382. See also §545.)

42. Having disposed of these matters, I can address the specific and limited breach found in relation to YACS' response to the sexual abuse allegation of May 1984. The facts are set out at JL §§318-347. The relevant breach is described as *"Delay in relation to Dr Waters"* and it covers the period of nearly six months between 11 May 1984 (when the notification occurred) and receipt of Dr Waters' report on 1 November 1984. YACS was found to have been guilty of delay in engaging and instructing Dr Waters (JL §§507- 517, 546). The specific period within which YACS' breaches contributed to that delay ended on 10 September 1984 (JL §517; JC §75).

43. The appellant did not challenge the primary facts as found by Studdert J. However, the State contested the findings as to breach. I shall set out the details of those findings when I address the State's contentions as to breach.

Issues fought and decided at the causation phase of the trial

44. The separate trial of causation issues took place on 13 and 14 March 2000. The parties supplemented the evidence given at the earlier trial proceedings and Studdert J heard argument.

45. It is very clear that this short but ultimately critical phase of the trial proceeded on the basis that the four groups of findings that I have identified were not revisited. Except unintentionally, neither party sought to do so. Studdert J made it clear in argument that he was not retreating on those findings, and the causation hearing proceeded accordingly. (See also JL §551.)

46. Pursuant to earlier directions, the plaintiff produced a **Statement of Acts, Matters or Things Constituting Causal Link Between Breaches of Duty Found and Damage Alleged to Flow From Such Breaches (On Assumption That Plaintiff is Suffering From a Psychiatric Disorder)** (Orange 93). Senior counsel for the plaintiff effectively spoke to this document in his oral submissions. On my reading of the transcript of argument on 14 March 2000, Mr Shand QC did not seek to go beyond these particulars. At least, if he consciously or unconsciously drifted beyond them, he was promptly brought back into line by the judge and he accepted this without demur.

47. Two additional facts were assumed for the limited purpose of the causation proceedings. These were (1) the plaintiff is suffering from a psychiatric disorder and (2) the established sexual abuse had caused injury in the sense of contributing to that psychiatric disorder (JC §§2, 66-67).

48. Through his senior counsel TC submitted that, since the harm putatively suffered was within the area of risk which YACS' duty was designed to avoid, the onus rested upon the State to prove that the harm was not caused by its negligence. This proposition, with variants of it said to stem from *Betts v Whittingslowe* (1945) 71 CLR 637 at 648-9 and later cases, is a principal issue in the appeal. Studdert J discussed the case law (JC §§5 - 48).

49. His Honour concluded that the legal onus of proof remained throughout upon the plaintiff and that this onus required him to prove on the balance of probabilities that the breaches of duty which had been found (or either of them) were (or was) causative of injury. In the present context that involved proof that the negligence caused or materially contributed to the plaintiff's psychiatric disorder (JC §48).

50. Studdert J found that neither breach of duty was causative of harm to the plaintiff (JC §81).

Overview of issues in appeal

51. The appellant submitted that the findings in the second judgment were erroneous. The principal submission was that Studdert J erred in finding that the plaintiff bore the onus of proof on causation. Alternatively, it was submitted that his Honour failed to apply the approach to probability reasoning for cases of negligent omission endorsed by the High Court in a series of decisions.

52. The respondent for its part defended the approach and conclusions of the primary judge as to causation. It also contended that Studdert J erred in his findings as to duty of care and breach.

Onus of proof and shifting evidentiary onus on causation

(a) Issues outlined

53. Grounds 2-11 of the notice of appeal challenge in various ways the reasoning and conclusions on causation.

54. The appellant submitted that the entirety of the causation judgment is vitiated by a central flaw: Studdert J should not have concluded that TC bore the legal onus of proof that, on the probabilities, YACS' breaches materially contributed to his putative loss.

55. Alternatively, the appellant submitted that an evidentiary onus had passed to YACS in the circumstances. Implicit in this was the further submission that Studdert J erred in holding that such onus was satisfied.

56. The appellant properly starts by emphasising that the duty found was a duty to exercise reasonable care in the discharge of YACS' statutory obligations under s 145B(5) of the **Child Welfare Act**; and that the breaches found were omissions to investigate the documented cottying allegations properly and to brief Dr Waters in a timely fashion.

57. The appellant submitted that the correct approach to the causation question was that explained by Gaudron J in ***Bennett v Minister of Community Welfare*** (1992) 176 CLR 408 at 420-1. It is convenient to set out the passage, together with its footnotes:

> *Leaving aside cases involving some positive act and those in which an omission can be treated as a positive act, a case based on omission or a failure to act will, in certain respects, fall for analysis in a way that differs from that appropriate for a case based on a positive act. Thus, in the case of a positive act, questions of causation are answered by reference to what, in fact, happened. In the case of an omission, they are answered by reference to what would or would not have happened had the act occurred.19 In that exercise, the larger philosophical questions are brushed aside and the issue is approached on the basis that "when there is a duty to take a precaution against damage occurring to others through the default of third parties or through accident, breach of the duty may be regarded as materially causing or materially contributing to that damage, should it occur, subject of course to the question whether performance of the duty would have averted the harm".20*
>
> *In practice, it is not always necessary to inquire what would have happened in the circumstances under consideration had a positive duty been performed. Thus, in the case of a statutory duty, a "breach of duty coupled with an accident 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 accident did occur owing to the act or omission amounting to the breach of statutory duty".21*
>
> *And although it is sometimes necessary for a plaintiff to lead evidence as to what would or would not have happened if a particular common law duty had been performed 22, generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect 23, or that the injury would have occurred even if the duty had been performed 24, it will be taken that the breach of the common law duty caused or materially contributed to the injury.*
>
> *19 See, eg, Duyvelshaff v Cathcart & Ritchie Ltd; Quigley v The Commonwealth (1981), 55 ALJR 579; 35 ALR 537. See also Hart and Honore, Causation in the Law, 2nd ed (1985), pp 59-61 where the authors identify the hypothetical nature of an inquiry as to the causal significance of providing or failing to provide a person with, or depriving a person of, an opportunity.*
>
> *20 Sutherland Shire Council v Heyman (1985), 157 CLR 424, at p 467, per Mason J. See also Hart and Honore, op cit, p 38.*
>
> *21 Betts v Whittingslowe (1945), 71 CLR 637, at p 649, per Dixon J.*

22 See, eg, Duyvelshaff v Cathcart & Ritchie Ltd and Quigley v The Commonwealth, where there was an onus on a plaintiff employee to establish what he would have done if different working conditions had been provided.

23 McGhee v National Coal Board, [1973] 1 WLR 1, at pp 6-7; [1972] 3 All ER 1008, at pp 1012-1013, per Lord Wilberforce, where it was said that in the circumstances of that case the defendant bore an onus to that effect. But cf Wilsher v Essex AHA, [1988] AC 1074, at pp 1087, 1090, per Lord Bridge of Harwich, where the issue of causation in that case and the remarks of Lord Wilberforce in McGhee were analyzed in terms consistent with an inference arising from the evidence in the plaintiff's case in chief with a resultant evidentiary onus on the defendant. Also note the debate in Canada on a possible shift in the onus of proof, seemingly resolved in the manner indicated by Lord Bridge in Wilsher by the Canadian Supreme Court in Snell v Farrell, [1990] 2 SCR, at pp 329-330; (1990) 72 DLR (4th) 289, at p 301.

24 See Barnett v Chelsea and Kensington Hospital Management Committee, [1969] 1 QB 428 and British Road Services Ltd v AV Crutchley & Co Ltd, [1967] 2 All ER 785.

(b) Legal onus remains with plaintiff

58. For at least part of the appeal (cf CA Tr p188), the appellant submitted that this passage endorsed Lord Wilberforce's statement in ***McGhee v National Coal Board*** that the onus of proof shifts in cases such as the present. The judgment of Kirby J in ***Chappel v Hart*** (1998) 195 CLR 232 at 273-4 was also invoked as authority for this proposition. Contrary decisions or dicta of this Court in ***Bendix Mintex Pty Ltd v Barnes*** (1997) 42 NSWLR 307, ***Wallaby Grip (Bae) Pty Ltd (in liq) v Macleay Area Health Service*** (1998) 17 NSWCCR 355 and ***E M Baldwin & Son Pty Ltd v Plane*** (1999) AustTortsR ¶81-499 were said to be wrongly decided.

59. I cannot accept this submission. I remain of the view that Australian law has not adopted a formal reversal of onus of proof of causation in negligence, even negligence involving breach by omission. A robust and pragmatic approach to proof of causation permits, but does not compel, a finding of liability in cases of negligence by omission which (as Gaudron J points out in ***Bennett***) is necessarily based upon a hypothetical enquiry. A defendant who exposes a plaintiff to a risk of injury or who, by omission, fails to take reasonable steps to avoid or minimise that risk is not liable unless the risk comes home in the sense that the court is ultimately satisfied on the balance of probability that the defendant's breach caused or materially contributed to the harm actually suffered.

60. I explained my reasoning in ***Bendix Mintex*** at 311-318 . There (at 316) it was noted that the majority of the High Court in ***Bennett*** (Mason CJ, Deane J and Toohey J at 416) adverted to the questions (a) whether there might be no real distinction between breach of duty and causation and (b) whether a failure to take steps which would bring about a material reduction of the risk amounts to a material contribution to the injury. Their Honours said:

These questions have been considered in Canada in the context of a possible shift in the onus of proof ... but it seems that the problem still awaits final resolution.

I also observed (at 316) that the passage in Gaudron J's judgment in ***Bennett*** that is set out above:

... would appear to take Mason J's principle [in ***Sutherland Shire Council v Heyman*** (19 85) 157 CLR 424 at 467] *beyond the field of a duty to take care to protect the plaintiff from foreseeable injuries due to the acts of third parties or accident. What is less clear is whether her Honour was embracing the idea that in such circumstances the onus shifts*

to the defendant (cf at 420 footnote (23)) or whether she was merely endorsing a legitimate method whereby the trier of fact could validly move from evidence of risk to finding of probable cause of damage.

61. ***Bennett*** was a case of negligence by omission.

62. In ***Bendix Mintex*** I concluded that the ultimate legal onus of proof rested with the plaintiff. It is not sufficient that a plaintiff prove that the defendant negligently exposed the plaintiff to a risk of injury: liability depends upon the plaintiff persuading the trier of fact that it was probable that the risk came home (see at 318). Beazley JA was of like view (see at 339).

63. I do not think that later High Court authority has concluded otherwise as regards reversal of onus of proof. If anything, there has been an endorsement of the traditional view as to the plaintiff bearing the ultimate legal onus, albeit in a context that has emphasised the propriety of a trier of fact taking a robust and pragmatic approach to causation.

64. The passage in Kirby J's judgment in ***Chappel*** (at 273-4) upon which the appellant relies treats ***McGhee*** per Lord Wilberforce and ***Bennett*** per Gaudron J as authority for a shifting of the **evidentiary** onus in proper cases. I respectfully agree. Nothing in the other judgments in ***Chappel*** support a reversed onus of proof as a legal proposition. Indeed (on my reading) they reject it (see per Gaudron J at 238-9, per McHugh J at 244-5, per Gummow J at 257-9, per Hayne J at 281-2). ***Chappel*** (like ***Bennett***) is a case of negligence by omission.

65. It is convenient to set out these passages, emphasising portions which illustrate why there is no support for the legal proposition advanced by the appellant. The same passages endorse and explain the type of reasoning approved by Dixon J in ***Betts*** upon which the appellant relies in the alternative.

66. In ***Chappel*** Gaudron J said (at 238-9):

The argument that the damage sustained by Mrs Hart was simply the loss of a chance must be considered in a context concerned with the assignment of legal responsibility. In that context, philosophical and scientific notions are put aside33 and ***causation is approached as a question of fact to be answered "by applying common sense to the facts of [the] particular case".34 That is so both for the question whether a particular act or omission caused any damage at all 35 and for the question whether some particular damage resulted from the act or omission in question.36***

Questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. For present purposes, that framework is the law of negligence. And in that framework, it is important to bear in mind that that body of law operates, if it operates at all, to assign a duty to take reasonable steps to prevent a foreseeable risk of harm of the kind in issue.37

It was not disputed in this Court that Dr Chappel was under a duty to inform Mrs Hart of the possible consequences in the event of the perforation of her oesophagus and subsequent infection, including the possibility of damage to her voice. The duty was called into existence because of the foreseeability of that very risk 38 ***The duty was not performed and the risk eventuated****. Subject to a further question in the case of a duty to provide information,* ***that is often the beginning and the end of the inquiry whether breach of duty materially caused or contributed to the harm suffered****. As Dixon J pointed out in* ***Betts v Whittingslowe*** *39, albeit in relation to a statutory duty, "breach of duty coupled with an accident 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 accident did occur owing to the act or omission amounting to the breach".*

Where there is a duty to inform it is, of course, necessary for a plaintiff to give evidence as to what would or would not have happened if the information in question had been provided40. If that

evidence is to the effect that the injured person would have acted to avoid or minimise the risk of injury, it is to apply sophistry rather than common sense to say that, although the risk of physical injury which came about called the duty of care into existence, breach of that duty did not cause or contribute to that injury, but simply resulted in the loss of an opportunity to pursue a different course of action.

The matter can be put another way. If the foreseeable risk to Mrs Hart was the loss of an opportunity to undergo surgery at the hands of a more experienced surgeon, the duty would have been a duty to inform her that there were more experienced surgeons practising in the field. Because the risk was a risk of physical injury, the duty was to inform her of that risk. And ***that particular duty was imposed because, in point of legal principle, it was sufficient, in the ordinary course of events, to avert the risk of physical injury which called it into existence.41*** *And the physical injury having occurred, breach of the duty is treated as materially causing or contributing to that injury* ***unless there is "sufficient reason to the contrary".42***

33 See March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506 at 509, per Mason CJ.

34 Stapley v Gypsum Mines Ltd [1953] AC 663 at 681, per Lord Reid, cited with approval in March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506 at 515, per Mason CJ; at 523, per Deane J.

35 See March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; Bennett v Minister of Community Welfare (1992) 176 CLR 408.

36 See Medlin v State Government Insurance Commission (1995) 182 CLR 1.

37 See Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 487, per Brennan J; Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 422, per Gaudron J.

38 See Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 422, per Gaudron J.

39 (1945) 71 CLR 637 at 649.

40 See, eg, Duyvelshaff v Cathcart & Ritchie Ltd (1973) 47 ALJR 410; 1 ALR 125 and Quigley v The Commonwealth (1981) 55 ALJR 579; 35 ALR 537, where there was an onus on a plaintiff employee to establish what he would have done if different working conditions had been provided, referred to in Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 420, per Gaudron J.

41 See Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 422, per Gaudron J.

42 Betts v Whittingslowe (1945) 71 CLR 637 at 649, per Dixon J. See also Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 467, per Mason J.

McHugh J said (at 244-5):

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.58*** *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 59 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. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff. That being so, whether the claim is in contract or tort, the fact that the risk eventuated at a particular time or place by reason of the conduct of the defendant does not itself materially contribute to the plaintiff's injury unless the fact of that particular time or place increased the risk of the injury occurring.

58 Bonnington Castings Ltd v Wardlaw [1956] AC 613 at 614; Duyvelshaff v Cathcart & Ritchie Ltd (1973) 47 ALJR 410 at 417; 1 ALR 125 at 138; Tubemakers of Australia Ltd v Fernandez (1976) 50 ALJR 720 at 724; 10 ALR 303 at 310-311; March (1991) 171 CLR 506 at 514.

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

Gummow J said (at 257-9):

Here, the injury to Mrs Hart occurred within an area of foreseeable risk. ***In the absence of evidence that the breach had no effect or that the injury would have occurred even if Dr Chappel had warned her of the risk of injury to the laryngeal nerve and of the consequent risk of partial or total voice loss, the breach of duty will be taken to have caused the injury.98***

In those circumstances the task of Dr Chappel was to demonstrate some good reason for denying to Mrs Hart recovery *in respect of injuries which she would not have sustained at his hands but for his failure adequately to advise her. Dr Chappel founds his case upon the circumstance that injuries of the nature which were sustained by his patient may be caused without negligent performance of the procedure. He joins to that consideration three matters. The first is the circumstance that sooner or later (though it does not appear whether this would have been before Mrs Hart's retirement in August 1985 or, indeed, at any particular time) Mrs Hart would have been obliged to submit to the procedure. The second is the finding by the trial judge that at some future time Mrs Hart would in fact have done so, even after being made adequately aware of the risk. The third is that this later operation would have carried the same risk of injury. Thus, it was said to follow that Mrs Hart had lost no "real and valuable chance ... of the risk [of injury] being diminished or avoided". In support of that conclusion, reliance was placed upon passages in* ***Sellars v Adelaide Petroleum NL*** *99 which deal with lost opportunities or chances to acquire benefits. However, as is emphasised later in these reasons, Mrs Hart did not sue to recover the value of an opportunity or chance lost to her by the act or omission of Dr Chappel.*

In this way the submissions for Dr Chappel tended to divert attention from the central issue, namely whether there was adequate reason in logic or policy for refusing to regard the "but for" test as the cause of the injuries sustained by Mrs Hart, by the allurement of further cogitation upon the subject of "loss of a chance".

Once the criterion for assessment of the adequacy of causation has been determined as a matter of law, ***the question whether the plaintiff has suffered some damage and therefore has a complete cause of action in tort is normally established by evidence which satisfies the civil standard of proof.100 If causation is not established in this way, then the plaintiff will fail and recover nothing.101***

The difficulties which this standard of proof may present to plaintiffs in certain types of litigation have attracted attention in recent times. In ***Snell v Farrell****102, Sopinka J, who gave the judgment of the Supreme Court of Canada, referred with approval to the treatment of the subject by Professor Fleming. That scholar had written103:*

> *"This traditional approach has come increasingly under challenge in dealing with non-traumatic injuries such as man-made diseases linked to dust, deafness, dermatitis, asbestosis, or linked to chemical products like Thalidomide, DES, and Agent Orange. Another group of cases involves medical procedures depriving patients of a chance of survival or cure. It is often difficult to prove medical causation by `particularistic' evidence, that is direct, anecdotal, non-statistical evidence from the mouth of witnesses."*

The result of the application of the traditional criterion of proof may be to deny plaintiffs any recovery in tort. There has been discussion of alternatives to denial of recovery in obedience to the "more probable than not" civil standard of proof. *104 Writing in 1989, Professor Fleming said of these alternatives:105*

> *"One is to lower the conventional standard and accept exposure to the risk of injury instead of actual injury as a compensable event. Another is to limit liability in an amount proportionate to the risk created by each individual agent. Both of these modifications have gained reluctant and by no means universal acceptance by Anglo-American courts."*

In ***Snell v Farrell****106 Sopinka J referred to material suggesting that in the United States the loosening of the criteria for recovery in medical malpractice suits had been followed by the withdrawal of some major insurers from the market.107 Subsequently, in* ***Laferri ere v Lawson****108, the Supreme Court of Canada held that it had not been proved on the balance of probabilities that the failure in 1971 of the defendant to inform his patient that the growth removed by him was cancerous had caused her death in 1978. The evidence was that the patient's chances of survival would not have been greater had she been informed in 1971 of the diagnosis. The Court also held that the theory of liability for loss of a chance was not to be adopted in such a case.109*

The present appeal does not involve any consideration of whether such means should be adopted to assist recovery by plaintiffs in certain cases.

98 Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 420-421.

99 (1994) 179 CLR 332 at 355, 363-364, 368.

100 Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 at 351, 353.

101 Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 at 368.

102 [1990] 2 SCR 311 at 320-321.

103 Fleming, "Probabilistic Causation in Tort Law", Canadian Bar Review, vol 68 (1989) 661, at p 662.

104 Snell v Farrell [1990] 2 SCR 311 at 326-328. See also Scott, "Causation in Medico-Legal Practice: A Doctor's Approach to the `Lost Opportunity' Cases", Modern Law Review, vol 55 (1992) 521; Stauch,

"Causation, Risk, and Loss of Chance in Medical Negligence", Oxford Journal of Legal Studies, vol 17 (1997) 205, at pp 213-216.

105 Fleming, "Probabilistic Causation in Tort Law", Canadian Bar Review, vol 68 (1989) 661, at p 663. See also Coote, "Chance and the Burden of Proof in Contract and Tort", Australian Law Journal, vol 62 (1988) 761, at p 772.

106 [1990] 2 SCR 311 at 327.

107 cf Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241 at 282-283, 302-303.

108 [1991] 1 SCR 541.

109 Laferriere v Lawson [1991] 1 SCR 541 at 605-606; (1991) 78 DLR (4th) 609 at 656-658.

Kirby J said (at 273-4):

*8. Shifting the **evidentiary** onus: One means of alleviating the **burden cast by law on a plaintiff to establish a causal relationship between the breach and the damage** concerns the evidentiary onus. **Australian law has not embraced the theory that the legal onus of proof shifts during a trial.**176 Nevertheless, the realistic appreciation of the imprecision and uncertainty of causation in many cases — including those involving alleged medical negligence — has driven courts in this country, as in England, to accept that **the evidentiary onus may shift during the hearing. Once a plaintiff demonstrates that a breach of duty has occurred which is closely followed by damage, a prima facie causal connection will have been established.**177 It is then for the defendant to show, by evidence and argument, that the patient should not recover damages. In **McGhee v National Coal Board**178, a Scottish appeal, Lord Wilberforce explained why this was so. Although Lord Wilberforce's statement in **McGhee** has proved controversial in England,179 it has received support in this Court.180 Its principle has also been accepted by international experts such as Professor Giesen. I find Lord Wilberforce's exposition compelling181:*

> *"[T]he question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail — a logic which dictated the judgments below. The question is whether we should be satisfied, in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have*

taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases ... this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, ex hypothesi must be taken to have foreseen the possibility of damage, who should bear its consequences."

176 Anchor Products Ltd v Hedges (1966) 115 CLR 493 at 500; Nominal Defendant v Haslbauer (1967) 117 CLR 448 at 456; Government Insurance Office of NSW v Fredrichberg (1968) 118 CLR 403 at 413-414; cf Colvilles Ltd v Devine [1969] 1 WLR 475 at 479; [1969] 2 All ER 53 at 58. See generally Atiyah, "Res Ipsa Loquitur in England and Australia", Modern Law Review, vol 35 (1972) 337, at p 345.

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

178 178 [1973] 1 WLR 1 at 6; [1972] 3 All ER 1008 at 1012.

179 Wilsher v Essex Area Health Authority [1988] AC 1074 at 1087, 1090.

180 See, eg, March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506 at 514; Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 420-421.

181 McGhee [1973] 1 WLR 1 at 6; [1972] 3 All ER 1008 at 1012.

Hayne J said (at 281-2):

*The elementary proposition that **a defendant is liable in negligence only if the damage suffered by the plaintiff was caused by the defendant's negligent act or omission** identifies the connection between the defendant's act or omission and the plaintiff's damage as that of causation. As is said in Bennett v Minister of Community Welfare202:*

"In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of common sense203. In resolving that question, the `but for' test, applied as a negative criterion of causation, has an important role to play but it is not a comprehensive and exclusive test of causation; value judgments and policy considerations necessarily intrude."204

The resolution of that question will often find expression in an assertion of its result without any lengthy articulation of reasons. Especially would that be so in a case where policy considerations do not assume prominence in the process. In this case, however, it is as well to try to identify the process of reasoning that is adopted.

The search for causal connection between damage and negligent act or omission requires consideration of the events that have happened and what would have happened if there had been no negligent act or omission. It is only by comparing these two sets of facts (one actual and one hypothetical) that the influence or effect of the negligent act or omission can be judged.

If the damage of which the plaintiff complains would have happened without the intervention of the negligent behaviour, it will often be possible to conclude that the negligent behaviour was not a cause of that damage. Thus, to take examples cited in Prosser and Keeton on the Law of Torts205: a failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there206; a failure to have a lifeboat ready is not a cause of the death of a person who sinks without trace immediately upon falling into the ocean207; the omission of crossing signals by an approaching train is of no significance when a car driver runs into the sixty-eighth car in the line.208

202 *(1992) 176 CLR 408 at 412-413, per Mason CJ, Deane and Toohey JJ.*

203 *Fitzgerald v Penn (1954) 91 CLR 268 at 277-278, per Dixon CJ, Fullagar and Kitto JJ; March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506 at 515, per Mason CJ, at 522-523, per Deane J.*

204 *March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506.*

205 *5th ed (1984), p 265.*

206 *Stacy v Knickerbocker Ice Co (1893) 54 NW 1091 (Wis).*

207 *Ford v Trident Fisheries Co (1919) 122 NE 389 (Mass).*

208 *Sullivan v Boone (1939) 286 NW 350 (Minn).*

67. Most of these passages were set out *in extenso* by Studdert J (JC §§38-43).

68. Three of the justices returned to the topic in ***Naxakis v Western General Hospital & Anor*** (1999) 197 CLR 269 (see per Gaudron J at 278-9, per Kirby J at 296, per Callinan J at 312). Again I set out the passages with emphasis added.

69. Gaudron J said (at 278-9):

*31. It has been suggested that to allow compensation for the loss of chance would alleviate problems associated with proof of causation.34 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".35 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.36***

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

35 Chappel v Hart (1998) 195 CLR 232 at 244-245, per McHugh J.

36 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) 195 CLR 232 at 237-238, per Gaudron J; at 247-248, per McHugh J; at 257-259, per Gummow J; at 272-273, per Kirby J.

Kirby J said (at 296):

*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. 125 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.126*

125 March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; Chappel v Hart (1998) 195 CLR 232 at 272-273; McGhee v National Coal Board [1973] 1 WLR 1 at 6; [1972] 3 All ER 1008 at 1012.
126 Betts v Whittingslowe (1945) 71 CLR 637 at 649.

Callinan J said (at 312):

*127. In **Chappel v Hart**144 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**145. 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 increases146the 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 ... materially contributed to the appellant's condition.*

144 (1998) 195 CLR 232 at 244.

145 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.

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

70. This recent body of High Court learning is analysed by Spigelman CJ in ***Seltsam Pty Ltd v McGuinness*** (2000) 49 NSWLR 262 at 278-280 . Davies AJA agreed with Spigelman CJ. I respectfully agree with what the Chief Justice has written. I shall set out pars 105-109 and 119.

*105 The Respondent relied on an observation by McHugh J in **Chappel v Hart** (at 244-245 [27]) where his Honour, noting that "increases" in this context includes "creates", said:*

..."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 contribute to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff."

*106 Although his Honour's was a dissenting judgment, this passage has subsequently been referred to with approval. (See **Naxakis v Western General Hospital** (1999) 73 ALJR 782 at [31] per Gaudron J, and [127] per Callinan J).*

107 The starting point of McHugh J's analysis was that it had been established on the balance of probabilities that the conduct did create or increase the risk of injury, "and that risk had eventuated".

108 This starting point is the very matter in issue in the present case. Was there evidence on the basis of which the trial judge could conclude, on the balance of probabilities, that there was an increased risk of injury and that that risk had "eventuated" in the specific disease of the Respondent?

109 If there was such evidence then, to use the words of both Gaudron J (at [31]) and Callinan J (at [128]), the tribunal of fact was "entitled" to find that the conduct which increased risk, materially contributed to the injury - entitled, but not, of course, required to so find.

...

119 There is a tension between the suggestion that any increased risk is sufficient to constitute a "material contribution", and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in ***Chappel v Hart*** *and in the cases that suggest the former, the actual risk had materialised. The "possibility" or "risk" that X might cause Y had in fact eventuated, not in the sense that X happened and Y had also happened, but that it was undisputed that Y had happened because of X.*

71. Par 119 of ***Seltsam*** was recently approved by the Queensland Court of Appeal in ***Batiste v State of Queensland*** [2001] QCA 275. Thomas JA (with whom McMurdo P agreed) said (at [10]):

It remains the law that it is still necessary for a plaintiff to prove that a defendant's conduct materially contributed to the sustaining of the injury.

72. I agree.

73. See also ***Desmond v Cullen*** [2001] NSWCA 238.

74. I would add immediately that (save in the classic case of two negligent shooters who kill a plaintiff with one unidentified bullet: see ***Summers v Tice*** 199 P 2d 1 (1948), ***Bendix*** at 313) nothing really turns upon whether there is a formal reversal of legal onus as distinct from a "shifting of the evidentiary onus" in a proper case. The serious issues in the present appeal are whether the facts caused a shifting of that evidentiary onus and whether Studdert J erred in his approach to the facts and his ultimate conclusions.

(c) Studdert J's approach to causation

75. In several of the passages quoted above, the justices endorsed and applied the reasoning process discussed by Dixon J in ***Betts v Whittingslowe*** . The appellant submits that Studdert J failed to follow this judicial guidance.

76. Studdert J cited ***Betts*** (JC §5) and set out at length the passage in ***Bennett*** (at 420-421, that I have quoted above par 57). After rejecting the submission that the legal burden of proof shifted, Studdert J continued (JC §§49-50):

49 In order to enliven a shift in the evidentiary burden of proof, the plaintiff must first prove prima facie that for which he contends.

*50 Whilst prima facie proof may be facilitated by inference, and whilst a "robust and pragmatic approach" may be permissible (****Wilsher*** *at 1090), I remind myself that to justify the drawing of any inference:*

> *(i) the fact or facts proved must form a reasonable basis for drawing such inference:* ***Jones v Dunkel*** *(1958-59) 101 CLR 298 at 305; and*
>
> *(ii) the inference chosen must be more likely than conflicting inferences:* ***Holloway v McFeeters*** *(1956) 94 CLR 470 and* ***Millicent District Council v Altschwagen*** *(1983) 50 ALR at 173.*

77. His Honour considered the nature of the harm of which the plaintiff complained (JC §§54-67). As indicated already, he assumed that (1) the plaintiff is suffering from a psychiatric disorder and (2) the established sexual abuse had caused injury in the sense of contributing to that psychiatric disorder (JC §§2, 66-67).

78. It is convenient to set out the key passages from the second judgment. The core reasoning on causation in relation to the breaches concerning the cot-tying material notified in February-March 1983 was as follows (JC §§69-74) :

69 The avoidance of harm due to sexual abuse could only have been brought about by eliminating the exposure of the plaintiff to the risk of that abuse occurring. In turn, this would have required the introduction of effective preventative measures. Since the defendant was not aware of any sexual abuse before learning of it in May 1984, if the abuse occurred after March 1983 and if it happened whilst the plaintiff was in his mother's care, it seems to me the risk of exposure would only have been avoided if the defendant had acted to remove the plaintiff from his mother.

70 The breach of duty proved involved a failure to make a proper investigation as to the allegations of physical abuse and neglect in 1982, and in particular concerning "the cot incident" at Greek Easter time. Depending upon the results of that investigation, the occasion may have arisen for the defendant to contemplate resort to the provisions of the Child Welfare Act , including the exercise of the discretionary power under s148B(5)(b). I reviewed the relevant provisions of the statute in paras 122-151 of my earlier judgment and I will not repeat that review; of particular relevance are the provisions in Pts XIV and XVII.

71 I find myself unable to conclude that due investigation would have led in the exercise of reasonable care to the avoidance of or the reduction of the risk of exposure to sexual abuse. Absent such a finding there is absent an essential link in the chain of causation. There is a need to establish that performance of the defendant's duty to investigate would have averted the harm: see ***Sutherland Shire Council v Heyman*** *(1985) 157 CLR 424 per Mason J at 467. As I assess the factual matrix of this case, this is a case in which it is "necessary to inquire what would have happened in the circumstances under consideration had a positive duty been performed": see* ***Bennett v Minister for Community Welfare*** *(1992) 176 CLR 408 per Gaudron J at 420. The result of that inquiry does not advance the plaintiff's case.*

72 If the sexual abuse occurred after March 1983, I do not know where or when this happened. Nor do I know the circumstances that afforded the opportunity for the perpetrator or perpetrators. It is possible, although I am unable to find that it is probable, that if the plaintiff had been removed from HM's care in or about March 1983 the opportunity for the perpetrator(s) to act against the plaintiff would have been removed. However whilst it is possible that the investigation that I find ought to have been undertaken could have prompted the defendant to act so as to have the plaintiff removed from his mother's care, I do not consider this to be likely. Indeed I think it unlikely, so far as I can make any assessment on the evidence before me. There are a number of circumstances which point away from removal occurring:

> *(i) The favourable assessment Mr Hanrahan made of HM on 25 February 1983 and on 7 March 1983 (see para 240 of my earlier judgment).*
>
> *(ii) The recency of that assessment compared with the time when the events referred to in the material that required investigation allegedly took place.*
>
> *(iii) The perception, identified by Mrs Burgess, as to the difficulties of assessing the credibility of witnesses outside the court process, which perception might have been expected to influence the decision-making process of the defendant.*
>
> *(iv) When ultimately the evidence of those who alleged physical ill-treatment and neglect was put to the test in court, it was not accepted. The witnesses were assessed by*

Pawley J as unsatisfactory, and in particular he found himself unable to determine where the truth of the matter lay concerning the cot incident (see my earlier judgment at para 256). Then Bulley J found the evidence of Ms Tokatlidis and Mrs Brunner to be unsatisfactory (see my earlier judgment at para 257). When I came to consider the allegations made against HM from the various sources in question, I found myself unable to determine where the truth lay (my earlier judgment, para 276).

Whilst proper investigation undertaken in March 1983 may have revealed relevant information not disclosed in the proceedings in the Family Court and in this court, and whilst the outcome of proper investigations undertaken at that time may have prompted the investigating officer to reach some other conclusion than such conclusions as have been arrived at in court as to the credence to be given to the complaints of misconduct, I cannot conclude that this is likely.

(v) There is also the circumstance that to effect the child's removal from his mother would have required a court order, and there was the need for the purposes of s 72 of the Child Welfare Act to satisfy a magistrate that the plaintiff was a neglected child as defined. This would have involved the need to prove the substance of the allegations against HM. Moreover, a decision as to whether the proceedings should be taken in the Children's Court when there were proceedings pending in the Family Court would have given rise to issues such as the defendant later sought advice about from Mr Heagney and Mr Croke. The practical considerations that later arose when the defendant was contemplating proceedings in the Children's Court in 1984 would have surfaced at the earlier point of time in 1983. Those matters I addressed in the earlier judgment and I will not repeat them here.

(vi) I considered the opinions of Prof Oates and Dr Scott in my earlier judgment at paras 499-500. Had YACS consulted these experts after completing the investigations that should have been undertaken in March 1983, it would seem unlikely that they would have then supported an application for the removal of the plaintiff from his mother's care. It is not to be assumed however that YACS would have sought the opinion of a psychiatrist or of a person with Dr Scott's expertise before deciding what action, if any, it ought to have undertaken following proper investigation.

73 In my earlier judgment (at para 265) I recorded that had the investigating officer completed the investigations I considered ought to have been conducted, what he recorded, even if by way of an open finding, could have been more helpful to those who later reviewed the matter than what was recorded by Ms Boulter and Mr Lungley in Exhibits A(jj), (kk), (ww) and (xxx). However, as stated in para 267 of my earlier judgment, I have not found to have been established an occasion on which an officer of YACS failed to address a fresh complaint because of the history recorded in the YACS file.

74 I have concluded that the plaintiff has not proved that the failure to make the investigations that should have been made after the presentation of the material in February and March 1983 has caused or contributed to the plaintiff's psychiatric disorder, or that such failure has otherwise caused harm to the plaintiff.

79. The core reasoning on causation in relation to the breaches concerning the sexual abuse notification of May 1984 was as follows (JC §§77-80):

77 The evidence does not permit of a finding that sexual abuse occurred after 11 May 1984, although the possibility of such abuse cannot be excluded. However, since I am unable to find that there was any episode of sexual abuse after 11 May 1984, I am unable to determine that the delay beyond that date attributable to the defendant was causative of injury to the plaintiff. Once Dr Waters made his assessment in November 1984 the defendant had the benefit of his opinion that the plaintiff ought not to be removed from his mother (earlier judgment, para 497). That opinion, absent the delay due to the

defendant, would in all probability have been available to the defendant several months earlier. I do not consider the earlier receipt of Dr Waters' report would have altered the defendant's approach to this case. In addition, neither Prof Oates nor Dr Scott opined that the defendant ought to have removed the plaintiff from his mother's care at any stage before the intervention of the department in March 1986, following the plaintiff's physical abuse by his stepfather (earlier judgment, para 499).

78 Prof Oates in his report dated 14 April 1999, in commenting upon the engagement of Dr Waters, expressed the view that

> *"A prompt early assessment by a skilled person such as Dr Waters should be an initial part of the assessment of the sexually abused child."*

79 Prof Oates was asked to consider the significance of my findings concerning the delay in qualifying Dr Waters and the deficiencies in his instructions. In response, Prof Oates said he was "not convinced that an earlier assessment by Dr Waters would have made a lot of difference", and further that he was "not convinced that the outcome of [Dr Waters'] assessment would have been different if he had been given instructions as to what was being sought of him." This was, as I understand Prof Oates' report, because he regarded Dr Waters' assessment as being "a very thorough assessment".

80 Prof Oates was not required for cross examination and I see no reason why I should not accept what he wrote on the subject of delay in obtaining Dr Waters' assessment. Having considered Prof Oates report, I do not find it likely that the delay referable to the defendant's breach of duty caused the plaintiff any harm. Indeed, I find it unlikely.

80. Two immediate comments are appropriate about these passages:

> 1. Studdert J treated the plaintiff as bearing the ultimate legal onus of persuading him that the breaches of duty caused the putative injury. I have already concluded that he was correct in doing so.
>
> 2. The statements that *"Indeed I find it unlikely"* in JC §§72 and 80 constitute positive findings in the defendant's favour on the causation issues. For reasons which follow I conclude that these findings are available as *"sufficient reasons to the contrary"* to rebut the type of inferential reasoning approved in the ***Betts*** form ula (assuming *ex hypothesi* that it was engaged).

(d) The *Betts* dictum

81. The appellant challenged the correctness of Studdert J's statement at JC §49 that *"In order to enliven a shift in the evidentiary burden of proof, the plaintiff must first prove prima facie that for which she contends"*. The appellant submitted that this overlooked the passages in ***Betts*** (Dixo n J), ***Bennett*** (Gaudron J) and ***Chappel*** (Kirby J) which would cast an evidentiary burden on YACS to point to "sufficient reason" why the damage was not causally linked to the breaches of duty found by his Honour. Additionally, and necessarily, the appellant challenged the reasoning and conclusions in what I have described as the core passages of the judgment relating to causation.

82. For reasons which I develop below, I consider that the appellant's approach treats the ***Betts*** di ctum in a mechanistic way, divorced from its factual context. The appellant overlooks the fact that Studdert J was not persuaded that the particular circumstances engaged a shifting of the evidentiary onus. And the appellant also fails to recognise that Studdert J decided the case on the basis of a positive satisfaction in the defendant's favour.

83. The oft-cited passage in the judgment of Dixon J in ***Betts*** (at 649) states that:

... the breach of duty coupled with an accident 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 accident did occur owing to the act or omission amounting to the breach of statutory duty.

84. As Thomas JA points out in ***Batiste*** (at [7]), this was only part of a sentence in which Dixon J pondered the ambit of the English Court of Appeal decision in ***Vyner v Waldenberg Bros Ltd*** (1945) 61 TLR 545, a case concerned with a statutory rule of absolute duty. Indeed Dixon J's sentence commenced with the words *"It is not necessary to enquire whether their Lordships meant more than that the ..."*. ***Betts*** was itself a case of breach of an imperative statutory duty to securely fence dangerous machinery. There was no other competing inference, such as intentional self-injury, inconsistent with liability on the part of the defendant. Dixon J followed his statement with the comment:

In the circumstances of this case that proposition is enough. For, in my opinion, the facts warrant no other inference inconsistent with liability on the part of the defendant.

85. Thomas JA concluded in ***Batiste*** that in such a context it is hardly surprising that Dixon J found it acceptable to link the accident to the breach *"in the absence of any sufficient reason to the contrary"*.

86. In the passages I have quoted from ***Bennett, Chappel*** and ***Naxakis*** , it is clear that the High Court has endorsed the application of Dixon J's reasoning outside cases involving breach of statutory duty. In ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424 at 467, Mason J said:

When there is a duty to take a precaution against damage occurring to others through the default of third parties or through accident, breach of the duty may be regarded as materially causing or materially contributing to that damage, should it occur, subject of course to the question whether performance of the duty would have averted the harm.

87. As indicated above, Gaudron J cited this passage in ***Bennett*** (at 420) in support of her proposition (at 420-421) that:

... generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect ... it will be taken that the breach of the common law duty caused or materially contributed to the injury.

88. Gaudron J's *"generally speaking"* makes it plain that the process of reasoning endorsed in the ***Betts*** dictum is a generally, but not a universally, acceptable approach; and that it is one that will yield to contrary evidence showing that the breach had no effect.

89. It follows that the ***Betts*** dictum cannot be invoked to require a court to approach a causation issue divorced from its particular factual context. If it were otherwise, what is spoken of as a reversal of **evidentiary** onus ***"generally speaking"*** would more properly be described as a reversal of the legal onus.

90. My point can be illustrated by positing the breach of duty involved in a school authority allowing a very young child to leave school premises near a busy road ahead of the time when the child's parent would be expected to pick the child up (cf ***Carmarthenshire County Council v Lewis*** [1955] AC 549). Until one knows a little more about what happened to the

child, one could not plunge into the mechanistic approach to the *Betts* dictum suggested by the appellant in much of his argument on appeal. There is a world of difference between the child being struck by a car near the school and the child being punched by an older sibling who found the child wandering (fortunately unharmed) and who administered a dose of unauthorised discipline. The injury flowing from the latter event could well be found causally unrelated to the school's breach of duty and/or not reasonably foreseeable as a consequence of it. But I venture to suggest that no-one determining these issues would dream of applying a formula taken from *Betts* and then solemnly asking whether there was evidence to rebut the inference of causation.

91. This discussion may well appear somewhat semantic, and it probably is. (Mr Shand QC accepted that it made no practical difference to his argument, whether the Court was dealing with a legal or evidentiary reversal of onus of proof (Tr p32).) But my point is that one cannot treat authoritative methods of probabilistic reasoning as if they were mathematical formulas. The injunction that the trier of fact use robust common sense on issues of causation requires such guidance to be followed in its particular and unique factual context. Only when the precise duty and the precise breach and the precise harm are known can the trier of fact consider applying the process of reasoning approved in the dictum. In other words, any shifting of the evidentiary onus depends upon the plaintiff establishing at least an arguable prima facie case of causation.

92. In *Betts* , there was failure to fence dangerous machinery and a serious hand injury suffered by a fourteen year old worker.

93. In *Bennett* , the Director of Community Welfare breached a duty to obtain independent legal advice for a State ward about his right to recover damages. The ward was in a detention centre and he had injured his hand when using a circular saw without a proper guard. Due to the Director's breach, the ward's right to sue for damages became statute-barred. In other words, a specific harm was proved (ie a valuable cause of action became statute-barred). The Director's breach of duty was held to have caused or materially contributed to the loss. On the facts, there was no reason to separate or distinguish the question of breach from causation. As Gaudron J explained it (at 422, citation omitted, emphasis added):

    That is because a duty is imposed by the common law by reason that it is a precaution which a reasonable person in the position of the person sued would have taken to prevent a foreseeable risk of harm of the kind suffered. Thus, questions of the sufficiency of the precaution to avert the harm are inevitably subsumed in the finding that there was a duty: a precaution is not classified as "reasonable" unless it can be said that its performance would, ***in the ordinary course of events****, avert the risk that called it into existence.*

94. Mason CJ, Deane J and Toohey J referred to the omitted advice as something that:

    would have changed ***the course of events****, namely, the inaction of the appellant which led to the loss, and prompted instead a decision by him which would have both preserved and enforced his cause of action, thereby deflecting the loss which occurred* (at 414, emphasis added).

95. In *Chappel* , a treating surgeon's failure to warn the patient as to the risk of an operation after her specific inquiry was followed by the patient submitting to the surgery at his hands. That surgery caused injury. The plaintiff would have delayed the surgery if she had been warned.

96. *Betts* and the cases which follow it suggest an approach to reasoning that enables a robust trier of fact to proceed from breach and specific harm to causation. The decision-maker may infer causation if the breach was such that in the ordinary course of events (as perceived by the decision-maker) that type of harm is a consequence of the breach. Kirby J expressed the same notion in *Chappel* and *Naxakis* (passages quoted at pars 66 and 69 above) when he cited

Betts as a case where breach was closely followed by damage. In such cases, unless the defendant can point to some particular reason why the instant case is outside the norm, causation may (but not must) be inferred. Simply because a risk is *"not far-fetched or fanciful"* (cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48) does not mean that the trier of fact is required to infer that it came home or that the defendant's negligent conduct caused it to happen or materially contributed to its happening.

97. As Spigelman CJ pointed out in the passage from *Seltsam* already quoted (par 70 above at [109]), the tribunal of fact is **entitled**, but not required, to find causation if negligence caused an increased risk of injury and that risk eventuated.

(e) Studdert J did not err in his treatment of the *Betts* dictum

98. For reasons explained elsewhere (pars 33 and 42) YACS' liability in tort requires the psychological damage which TC is assumed to have suffered to be shown to have stemmed from YACS' failure to take or initiate steps to remove TC from his mother in the period between February 1983 and September 1984.

99. Nothing in the learning about the *Betts* dictum compelled his Honour to conclude that the breaches led in the ordinary course of things to the harm suffered by the plaintiff. Unlike *Betts* , *Bennett* and *Chappel* there was no direct or frank injury stemming directly from the breach in the ordinary course of human experience. Nor did the damage follow closely upon the heels of the breach.

100. The present injury was two steps away from the breach. To succeed, TC had to prove that YACS' failure to act in relation to HM contributed to TC remaining with HM during the critical period and that that in turn contributed to persons other than HM sexually abusing TC.

101. Nothing in *Betts* prevented Studdert J from declining to infer causation in those circumstances, when he was not satisfied that the facts formed a reasonable basis for such an inference (cf JC §§49-50, passages quoted at par 76 above).

(f) *Betts* cannot be invoked to prove damage as distinct from causation

102. One variant of the appellant's argument went as follows (Tr pp 21-24, 33-39): The delay between May and September 1984 left TC at risk. YACS failed to establish that the risk of sexual abuse did not come home during that period. Since damage by sexual abuse is the very type of risk that the duty was designed to protect against, *"the damage was subsumed into the breach of duty"* (Tr p24) by application of the *Betts* principle as explained by Gaudron J and Kirby J.

103. It is highly doubtful whether any such case was pressed at trial (see particulars and submissions at causation hearing). But there is a more fundamental problem. These submissions conflate distinct issues.

104. The very matter presently at issue is whether any sexual abuse occurred after May 1984. This is distinct from the question addressed in ***Betts, Bennett*** and *Chappel* whether specific harm proven to have occurred was causally linked to the breach of duty. In several of the passages in *Chappel* and *Naxakis* upon which the appellant relies, the justices spoke of the risk having eventuated or injury occurring within the area of the risk (*Chappel* per Gaudron J at 238, per McHugh J at 244, per Kirby J at 274 ; *Naxakis* at 279 per Gaudron J, at 312 per Callinan J). See also the passage from *Heyman* quoted by Gaudron J in *Bennett* at 420, especially the

parenthetical phrase *"should it occur"*. This essential qualification is implicit in all of the judgments. It is vital that the foreseeable risk actually came home, as Spigelman CJ demonstrates in ***Seltsam*** .

105. In the present case there was no finding of sexual abuse after May 1984. The causation hearing before Studdert J proceeded on the basis of that conclusion on the balance of probabilities, based on the facts proven **at trial**. ***Betts*** and its progeny cannot be used to convert a claim of continuing risk of harm (after May 1984) into proof that such risk actually came home during that period. And, absent proof of any actual harm, there was not even a factual context to ask the question whether, in the ordinary course of events, that harm was the sort of thing that flowed from the particular breach.

(g) Even if the *Betts* dictum were engaged the reversed evidentiary onus was rebutted

106. In any event, Studdert J made a positive finding that *"I think it unlikely, so far as I can make any assessment on the evidence before me"* that the essential step (ie removal of TC from HM's care) would not have occurred even if YACS had not been in breach of its duty. This finding is made at JC §72 and supported by a detailed list of cogent circumstances.

107. Likewise with the causation finding relating to the sexual abuse notification. The concluding sentence in JC §80 shows that Studdert J found it unlikely that delay referable to the breach of duty caused any harm to the plaintiff. Once again that finding is cogently supported by the reasons given by his Honour in the passage quoted above.

108. I reject the appellant's contention (ground 17) that these conclusions are flawed because they stand on the back of YACS' breaches in the sense that the judge credited YACS' case with the benefits flowing from its flawed investigation in 1983-84. On the contrary, the findings were based upon the evidence at trial. The judge's findings show that he placed particular reliance upon contemporaneous documentary materials, which is hardly surprising in all the circumstances.

109. In matters such as this, the ultimate enquiry concerns *"what would or would not have happened had the act occurred"* (***Bennett*** at 420 per Gaudron J). Studdert J was satisfied that it was actually unlikely that causation was established. I am unpersuaded of any error of approach or fact in his reasons.

110. Several of those reasons address the question whether more vigorous investigation in 1983 of the additional material concerning the April 1982 cot-tying allegation would have satisfied YACS that the event had occurred. Studdert J gives reasons why he inferred that it was unlikely that this would have happened (JC §72(i)-(iv)). This reasoning does not embody the fallacy attributed to it by the appellant, namely that it fails to allow for the lost evidence that would have come to light had the more efficient investigation taken place in 1983-84. ***Betts*** do es not compel that issue to be decided in the plaintiff's favour. The issue had to be addressed and decided by Studdert J on the basis of the evidence before him at the trial. To suggest otherwise is a species of the fallacy which I sought to identify at pars 102-105 above, namely the fallacy of inferring a particular harm as distinct from a causal link between a particular breach and a particular harm.

111. But let it be assumed that more vigorous investigation in 1983 would have **then** established the truth of the cot-tying allegation. *Non sequitur* that YACS would have (a) sought and (b) obtained the removal of the child from his mother.

112. Studdert J explains why this was so at JC §72(v)-(vi). Proof in 1983 that the child was "neglected" under the **Child Welfare Act** would have been no light matter; and the pendency of the proceedings in the Family Court would have been a significant added

complication. Furthermore, the 1983 breaches were confined to investigation of the cot-tying incident. Nothing about them required the inference that such investigation would have brought to light evidence of sexual abuse by persons other than the mother.

113. I also agree with the judge's conclusions as to causation relating to the 1984 delay in briefing Dr Waters (JC §§77-80). The (delayed) report of Dr Waters concluded that it was not in the child's interests to be removed from his mother. As Studdert J pointed out, there is no reason to infer that any different advice would have been given had Dr Waters been able to report earlier in the year.

(h) Failure to consider alternative case

114. In grounds 12 and 13 the appellant contends that the trial judge erred in approaching causation on the basis that "*the risk of exposure would only have been avoided if the defendant had acted to remove the plaintiff from his mother*" (JL §69). The Court was taken to evidence led during the first phase of the trial which suggested that greater supervision of HM by YACS officers may have been an alternative to removal of the child from his mother's custody. The appellant submitted that greater supervision may well have prevented situations from arising in which abuse by persons other than the mother could have taken place.

115. The appellant should not be permitted to endeavour to construct such an alternative case at this stage in the proceedings. It may readily be accepted that YACS' statutory powers extended to monitoring the mother and counselling her. Indeed there is evidence that this is what was done from time to time. However, during the critical causation phase of the trial the appellant never argued that failure to be more effective in this regard was a cause of TC's injury stemming from the sexual abuse practised upon him by a person or persons other than his mother. Prior to the causation hearing in March 2000 the plaintiff filed a detailed statement of particulars as to the matters constituting a causal link between the breaches of duty found and the damage alleged to flow from such breaches (Orange 93). The relevant allegation was:

The plaintiff asserts that armed with the information supplied to it pointing to the occurrence of assault, illtreatment or exposure or the existence of statutory neglect, the child should have been removed from the area of abuse or neglect, so as effectively to free him from any prospect of further damage, and that the YACS had the necessary power to do so and that the failure to respond to the duty found to exist, in the form of the breaches of duty which have been found to have occurred, involve a ' material increase in the risk' to which he was exposed or, conversely 'a material contribution to the injury' suffered.

116. There was some flirtation with a broader case during oral submissions at the causation hearing (Supplementary Black 8). But this was not seriously pressed, nor could it have been in light of the particulars. This highly speculative alternative case was not explored at trial and it is now too late to do so. The evidence led at trial on the broader possibilities of YACS' actions had been open-ended and was in no way focused on the small range of specific breaches ultimately established in the plaintiff's favour.

Was there a duty of care?

117. Studdert J held that the State through YACS owed a duty to exercise reasonable care in the discharge of the mandatory requirements of both limbs of s 145B(5) of the **Child Welfare Act** (ie investigate properly and take such action as is believed appropriate) (JL §158-191).

118. The learned judge commenced his reasoning by recognising that a duty to provide positive assistance to third parties is exceptional and dependant on what is usually labelled as a special relationship. He cited ***Hargrave v Goldman*** (1963) 110 CLR 40 at 65-66 (Windeyer J) and ***Pyrenees Shire Council v Day*** (1998) 192 CLR 330 at 368-9 (McHugh J). Reference was made to then current High Court discussion as to the methodology of determining whether or not a

duty of care existed, including discussion of the proximity concept and the case law as to when a common law duty may be engrafted upon statutory duties and discretions (JL §§104-120).

119. He then turned to consider s 148B in the context of the **Child Welfare Act** as a whole (JL §§122-150, being the passage set out at par 21 above). As to the terms of s 148B(5) , his Honour said that:

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 (27 July 2001) (Mason P, Handley and Heydon JJA)

62 Further, neither the stress by Gleeson CJ, Gaudron J and Hayne J on the limited scope of positive duties to act, nor the stress by Gaudron and Hayne J on the relevance of control, can be regarded as idiosyncratic over-reactions to the extreme nature of the plaintiff's claim in *Modbury's* case. In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [101]-[102] , for example, McHugh J said:

> "As I pointed out in [*Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 326], from the time of the Year Books, the common law has drawn a distinction between causing damage by a positive act and 'causing' damage by a failure to act. The early forms of action gave no remedy for failure to prevent harm. The writ of trespass, historically the most important of the early writs for remedying wrongs, was available only for direct or forcible injury. Not until the action on the case was developed did the common law provide a remedy for omissions. Initially, both contractual and tortious wrongs were remedied by the action on the case because the distinction between 'rights ex contractu and ex delicto was by no means clear' [Sutton, *Personal Actions at Common Law* (1929), p 26]. When tort and contract separated, contractual wrongs came to be identified with actions in assumpsit while tortious wrongs came to be identified with the action on the case. Speaking generally, remedies for omissions were henceforth seen as remediable by the action in assumpsit, not case. Absent consideration or its equivalent, the common law generally imposed no obligation on a person to protect or help another. As Windeyer J pointed out in *Hargrave v Goldman* [(1963) 110 CLR 40 at 66], 'the common law does not require a man to act as the Samaritan did'. For that reason in most cases, the occupier of property owes no duty to a neighbour to secure the property so as to prevent thieves gaining access to the property for the purpose of robbing the neighbour's premises [*P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342]. The 'general rule' said Dixon J in *Smith v Leurs* [(1945) 70 CLR 256 at 262], 'is that one man is under no duty of controlling another man to prevent his doing damage to a third'. Nor does the common law generally impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another. ... The careless or malevolent person, who stands mute and still while another heads for disaster, generally incurs no liability for the damage that the latter suffers. Harsh though the common law may seem to be, there are nevertheless strong political, moral and economic arguments that justify its approach, as Lord Hoffmann pointed out in *Stovin v Wise* [[1996] AC 923 at 943-944].
> In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act. By a person's failure to act, I mean that person's failure to act divorced from positive conduct by that person that causes damage such as the failure to brake while driving a car. A special

relationship may arise from the ownership, occupation or control of land or chattels, from the receipt of a benefit or from an undertaking, assumption of responsibility or invitation which might induce the person harmed to act or to refrain from acting."

Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 -
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 -
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 -
Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

85. The category of cases with respect to negligent misstatement (which includes failures to provide information or advice, as well as failures to provide information or advice that was accurate [108]) shows both the artificial nature of the distinction between "misfeasance" and "nonfeasance" and its diminishing importance. Again, who today, given the line of judgments in this Court commencing with that of Fullagar J in *Commissioner for Railways (NSW) v Cardy* [109] , would state the general duty of care which an occupier may owe to a trespasser as limited, in Sir John Salmond's phrase, to "positive acts of negligent misfeasance"[110]? Where the defendant "allows" or "permits" land to become or remain the source of the injurious consequences suffered by the plaintiff, "[h]is sin is nonfeasance rather than misfeasance"[111]. The issue in *Hargrave v Goldman* [112] , where the defendant had not originated the fire which later spread to the plaintiff's land, was whether the defendant had suffered the fire to continue without taking reasonably prompt and sufficient means for its abatement (if the action be framed in nuisance) [113] or whether the defendant was negligent in not rendering harmless the fire which spread from the felled tree (if the action be framed in negligence) [114] . On either cause of action, the essential issue concerned a failure by the defendant further to act where action was called for. The same was true of the appellant council in *Pyrenees Shire Council v Day* [115] .

Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Merrin v Cairns Port Authority [2001] QCA 178 -
Merrin v Cairns Port Authority [2001] QCA 178 -
Warne v Nolan [2001] QSC 53 (02 March 2001) (Muir J)

[100] *Goldman v Hargrave* was an appeal from the decision of the High Court in *Hargrave v Goldman. [23]* In that case a large tree on the defendant's land was struck by lightning and caught fire. With a view to removing the risk of fire spreading, the defendant cleared around the tree, cut it down and sawed it into sections. When this work was completed burning parts of the tree lay on the ground and, as a result of hot weather and strong winds, the fire continued to burn and then spread through the defendant's land to neighbouring properties. The defendant, in the High Court, was found liable in both negligence and nuisance. Taylor and Owen JJ, after observing that after the tree was cut down a hazard of a different character was created and the defendant became under a duty to take reasonable care to prevent it causing damage to his neighbours, concluded that it was of no consequence whether the defendant's liability rested in negligence or nuisance. They approved the following passage from the 5th ed (1920) of *Salmond on Law of Torts* [24] –

> "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement."

Warne v Nolan [2001] QSC 53 (02 March 2001) (Muir J)
Hargrave v Goldman (1963) 110 CLR 40 , considered

Warne v Nolan [2001] QSC 53 -
Warne v Nolan [2001] QSC 53 -
Glenmont Investments Pty Ltd v O'Loughlin (No 2) [2000] SASC 429 (20 December 2000)

379. The case concerns the escape of fire from the property of one person to that of another. The common law, and to some extent statute, has long concerned itself with liability in this situation. The history is summarised by Windeyer J in *Goldman* at 56-58 and by Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in *Burnie Port Authority v General Jones Pty Limited* (19 94) 179 CLR 520 at 529-534 . In the present case, the fire did not escape from the Society's property, but it is helpful to consider the principles applied in *Goldman* and in *Burnie Port Authority* .

Glenmont Investments Pty Ltd v O'Loughlin (No 2) [2000] SASC 429 (20 December 2000)

391. The duty of care stated by the majority in *Burnie Port Authority* is narrower than that stated by Windeyer J in *Goldman* . It applies only to a person who introduces a dangerous substance or carries on a dangerous activity. Windeyer J appears to contemplate a duty extending to a person who becomes aware of fire on his land, no matter how it occurred.

Glenmont Investments Pty Ltd v O'Loughlin (No 2) [2000] SASC 429 -
Glenmont Investments Pty Ltd v O'Loughlin (No 2) [2000] SASC 429 -
Glenmont Investments Pty Ltd v O'Loughlin (No 2) [2000] SASC 429 -
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 (23 November 2000) (Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ)

112. The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land. It is these powers of control which establish the relationship between occupier and entrant "which of itself suffices to give rise to a duty ... to take reasonable care to avoid a foreseeable risk of injury" [120] to the entrant. It is the existence of these powers which lies behind both the particular conclusion in *Hargrave v Goldman* [121] that occupiers of land owe a duty to take reasonable care in respect of fire or other hazards originating on the land and general statements, of the kind made by Lord Nicholls of Birkenhead in his dissenting speech in *Stovin v Wise* [122] , that "[t]he right to occupy can reasonably be regarded as carrying obligations as well as rights".

via

[121] (1963) 110 CLR 40 ; affirmed on appeal *Goldman v Hargrave* (1966) 115 CLR 458; [1967] 1 AC 645.

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Preston v Star City Pty Ltd [1999] NSWSC 1273 -
TC v State of New South Wales [1999] NSWSC 31 -
TC v State of New South Wales [1999] NSWSC 31 -
Fangrove Pty Ltd v Tod Group Holdings Pty Ltd [1998] QCA 404 -

W D & H O Wills (Australia) Ltd v State Rail Authority of New South Wales 43 NSWLR 338 (03 April 1998) (Mason P, Priestley and Beazley JJA)

> "... Absent consideration or its equivalent, the common law generally imposed no obligation on a person to protect or help another. As Windeyer J pointed out in Hargrave v Goldman (1963) 110 CLR 40 at 66 , 'the common law does not require a man to act as the Samaritan did'. For that reason in most cases, the occupier of property owes no duty to a neighbour to secure the property so as to prevent thieves gaining access to the property for the purpose of robbing the neighbour's premises. The 'general rule' said Dixon J in Smith v Leurs (1945) 70 CLR 256 at 262, 'is that one man is under no duty of controlling another man to prevent him doing damage to a third'."

W D & H O Wills (Australia) Ltd v State Rail Authority of New South Wales 43 NSWLR 338 -
W D & H O Wills (Australia) Ltd v State Rail Authority of New South Wales 43 NSWLR 338 -
Soutter v P & O Resorts Pty Ltd [1998] QCA 51 -
Soutter v P & O Resorts Pty Ltd [1998] QCA 51 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
CSR Ltd v Wren 44 NSWLR 463 -
Aussie Traveller Pty Ltd v Marklea Pty Ltd [1997] QCA 2 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

> (Metropolis) Act 1774, s.86.). The English legislation was subsequently adopted by a number of Australian legislatures ((9) See, generally, Higgins, Elements of Torts in Australia, (1970) at 209; Fleming, The Law of Torts, 8th ed. (1992) at 349-350.). A settled, and perhaps surprising, course of judicial decisions in England, and later in this country, has established that, contrary to the views of (amongst others) Blackstone ((10) Commentaries on the Laws of England, 10 th ed. (1787), Bk 1 at 431.) and Bacon ((11) A New Abridgment of the Law, 5th ed. (1789), vol.1 at 85. See also, Viscount Canterbury v. Attorney-General (1843) 1 Ph 306 at 315-319 per Lord Lyndhurst LC (41 ER 648 at 652-653).), any fire caused (or allowed to spread) through negligence is not, for the purposes of that legislation, an accidental one ((12) See Filliter v. Phippard (1847) 11 QB at 355-358 (116 ER at 510); Musgrove v. Pandelis (1919) 2 KB 43 at 47 ; Spicer v. Smee (1946) 1 All ER 489 at 495 ; Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947) 75 CLR 59 at 67 ; Hargrave v. Goldman (1963) 110 CLR 40 at 58 ; Goldman v. Hargrave (1967) 1 AC 645 at 665.). The result is that the rule survived, and arguably still survives ((13) See, e.g., Balfour v. Barty-King (1957) 1 QB 496 ; Mason v. Levy Auto Parts of England Ltd. (1967) 2 QB 530 at 540-541 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER 835 at 838-839 . But note, for the view that it has been absorbed by more general principles, Jones v. Festiniog Railway Co. (1868) LR 3 QB 733 at 736, 738 ; Powell v. Fall (1880) 5 QBD 597 at first instance at 599 per Mellor J; affd by Bramwell, Baggallay and Thesiger L.JJ in the Court of Appeal; Gunter v. James (1908) 24 TLR 868 ; Mansel v. Webb (1918) 88 LJKB 323 at 324-325.), in England as a special rule imposing liability upon an occupier of premises for the escape of a fire on the premises caused by the negligence of the occupier or his or her invitee or licensee ((14) Balfour v. Barty-King (1957) 1 QB at 504-505 ; H. and N. Emanuel Ltd. v. Greater London Council (1971) 2 All ER at 838 .). If the ignis suus rule, as qualified by the Tasmanian equivalent of the English legislation ((15) See Supreme Court Civil Procedure Act 1932 (Tas.), s. 11(15).) , survives in the law of Tasmania as a special rule applicable to damage caused by fire, it will, as Neasey J held at first instance, suffice to impose liability upon the Authority for the damage sustained by General in the present case since it would render the Authority liable for the damage caused by the spread from the Authority's premises of a fire caused by the negligence of the Authority's independent contractor.

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

> between "harm reasonably expected" and the requirement of "foreseeability of damage of the relevant type" in Cambridge Water Co.). "The foundation of the rule", Windeyer J said in Benning

v. Wong ((219) (1969) 122 CLR at 298 .), "is that the bringing of things with mischievous possibilities or propensities upon land creates a duty to confine them there. The harm they do by escaping could not occur but for the act of bringing them to the place whence they escape." But Rylands v. Fletcher does not impose liability on an occupier of land if the mischievous thing is not created or brought onto the land with the occupier's authority or kept there for the occupier's purpose. In Hargrave v. Goldman ((220) (1963) 110 CLR 40 ; on appeal (1966) 115 CLR

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1992] HCATrans 346 -
Burnie Port Authority v General Jones Pty Ltd [1991] TASSC 85 (11 September 1991)

21. None of the Australian cases cited in argument directly affirm or reject the proposition than an occupier of land is liable for damage caused by the spread of fire from his land caused by the negligence of his independent contractor in all circumstances. Many cases involving the liability of the occupier for the escape of fire were decided in nuisance and did not involve negligent conduct (*McInnes v Wardle* (1931) 45 CLR 548; *Hazelwood v Webber* (1934) 52 CLR 268; *Hargrave v Goldman* (1963) 110 CLR 40) by the majority Taylor and Owen JJ, (Windeyer J dissenting as to nuisance); others have been decided in negligence but of servants rather than independent contractors. (*Bugge v Brown* (1919) 26 CLR 110; *Wise Brothers Pty Ltd v Commissioner for Railways (NSW)* (1947) 75 CLR 59; *Pett v Sims Paving and Road Construction Co Pty Ltd* [1928] VLR 247; *Smith v Badenoch* [1970] SASR 9). Still others have been resolved on the basis that the defendant was not in reality the occupier (eg *Whinfield v The Lands Purchase and Management Board of Victoria & Anor* (1914) 18 CLR 606). Nevertheless, as my brother Zeeman J points out in his reasons for judgment which I have had the advantage of reading, there have been a number of observations suggesting that the liability of an occupier other than in nuisance is not absolute. (See for example the comments of Windeyer J in *Hargrave v Goldman* (*supra*) at p58 relying on *Hazelwood v Webber* (*supra*) and those of Wilson and Dawson JJ in *Stevens v Brodribb Sawmilling Co Pty Ltd* (*supra*) at p42). The true rule in my view is that the occupier will be responsible for the escape of fire due to the negligence of his independent contractor if the latter's act is one expressly or impliedly authorized or directed and the negligence is not purely collateral.

Burnie Port Authority v General Jones Pty Ltd [1991] TASSC 85 -
Burnie Port Authority v General Jones Pty Ltd [1991] TASSC 85 -
Burnie Port Authority v General Jones Pty Ltd [1991] TASSC 85 -
David Securities P/L v Commonwealth Bank of Australia [1989] FCA 208 -
David Securities P/L v Commonwealth Bank of Australia [1989] FCA 208 -
Hawkins v Clayton [1988] HCA 15 -
Walton Stores (Interstate) Ltd v Maher 5 NSWLR 407 -
Sutherland Shire Council v Heyman [1985] HCA 41 (04 July 1985) (Gibbs C.j., Mason, Wilson, Brennan and Deane JJ)

9. There is much to be said for the view that Lord Atkin's inclusion of "omissions" in his formulation of the requirement of proximity in Donoghue v. Stevenson (at p 580) was intended to be read as referring not to mere failure to act to prevent injury to another but to an omission in the course of positive conduct, such as a failure to apply the brakes of a motor vehicle while driving it on a public road or a failure adequately to inspect a product in the course of manufacturing it for sale on the open market, which results in the overall course of conduct being the cause of injury or damage (see Professor J.C. Smith and Professor Peter Burns, "Donoghue v. Stevenson - The Not so Golden Anniversary", Modern Law Review, vol.46 (1983), 147, at pp 155-156). Be that as it may however, the clear trend of authority has been to accept the principles of common law negligence enunciated in cases such as Donoghue v. Stevenson as being of general application (see, generally, the more recent cases cited by Professor Smillie in "Principle, Policy and Negligence", New Zealand

Universities Law Review, vol.II (1984), III and, in this Court, Jaensch v. Coffey; Hackshaw v. Shaw (1984) 59 ALJR 156, 56 ALR 417; Papantonakis v. Australian Telecommunications Commission (1985) 59 ALJR 201, 57 ALR 1). In my view, that trend should continue to be accepted in this Court and those principles should be recognized as governing liability in negligence for omissions as well as for acts of commission. That does not mean that the distinction between mere omission and positive act can be ignored in identifying the considerations by reference to which the existence of a relationship of proximity must be determined in a particular category of case. To the contrary, the distinction between a failure to act and positive action remains a fundamental one. The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury (cf. per Windeyer J., Hargrave v. Goldman (1963) 110 CLR 40 , at p 66). That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or "exceptional" (cf. per Dixon J., Smith v. Leurs (1945) 70 CLR 256, at p 262 and Dorset Yacht Co. Ltd. v. Home Office, at pp 1038-1039, 1045-1046, 1055 and 1060ff.). Apart from those cases where the circumstances disclose an assumption of a particular obligation to take such action or of a particular relationship in which such an obligation is implicit, they are largely confined to cases involving reliance by one party upon care being taken by the other in the discharge or performance of statutory powers, duties or functions or of powers, duties or functions arising from or involved in the holding of an office or the possession or occupation of property.

Sutherland Shire Council v Heyman [1985] HCA 41 -
Sutherland Shire Council v Heyman [1985] HCA 41 -
Jaensch v Coffey [1984] HCA 52 -
Seale v Perry [1982] VR 193 (11 September 1981) (LUSH, MURPHY and MCGARVIE, JJ)

Under the second question it is the method of the law to determine for particular categories of relationships whether the duty of care which arises prima facie on an affirmative answer to the first question, or the legal consequences of the existence of that duty of care, ought to be eliminated or restricted. One looks at categories of relationships, not, as under the first question, at the actual situation in the particular case. See: Hargrave v Goldman (1963) 110 CLR 40 , at p. 65 ; the Hedley Byrne Case, [1964] AC 465 , at pp. 524-5 and 531; Mutual Life and Citizens Assurance Company Ltd. v Evatt (1970) 122 CLR 628, at p. 632 ("the MLC Case"); the Willemstad Case (1976) 136 CLR 529, at pp. 565-7 . The categories of relationships are not immutably fixed and new categories come into being. The Hedley Byrne Case [1964] AC, at pp. 524-5 and 531, per Lord Devlin.

Seale v Perry [1982] VR 193 -
Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

It appears, therefore, that, with one possible exception, there is no case which precisely decides that one who actively creates a nuisance is not liable, unless he is in occupation or control of the land from which it emanates. Wilson's case

(1821) 6 Moore 47.

and Thompson's case

(1841) 7 M. & W. 456; 151 E.R. 845.

are direct authorities to the contrary effect, generally adopted by text writers as propounding a correct statement of the law. Devlin J.

[1953] 3 W.L.R. 773, at p. 776; [1953] 2 All E.R. 1204, at pp. 1207, 1208.

and Morris L.J.

[1954] 2 Q.B. 182, at p. 204.

in the Esso case support the wider incidence of liability, and the remarks of Denning L.J.

[1954] 2 Q.B. 182, at p. 196.

and Lord Radcliffe

[1956] A.C. 218, at p. 242.

in the same case may be regarded merely as intended to limit the action to damage caused by the misuse of land, as opposed to offensive activity of a more general character. Windeyer J. in Hargrave's case

(1963) 110 C.L.R. 40, at p. 60.

expressed the same view as Devlin J.

[1953] 3 W.L.R. 773, at pp. 775, 776; [1953] 2 All E.R. 1204, at p. 1207.

. And it is worth mentioning that at common law it was apparently unnecessary to aver, in a declaration for nuisance, that the defendant was in possession, occupation or control of the land from which the nuisance came: see Bullen & Leake, Precedents of Pleadings, 3rd ed. (1868), p. 382.

Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

(1963) 110 C.L.R. 40 , at p. 60.

Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

(1963) 110 C.L.R. 40 , at p. 60.

Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

There are in numerous cases obiter statements to the effect that persons who are on premises with the authority of the occupier may be held liable for the nuisances which they create: Hall v. Beckenham Corporation

[1949] 1 K.B. 716, at p. 723.

; Southport Corporation v. Esso Petroleum Co. Ltd.

[1953] 3 W.L.R. 773, at p. 776; [1953] 2 All E.R. 1204, at pp. 1207, 1208.

, per Devlin J.; per Denning L.J.

[1954] 2 Q.B. 182, at p. 196.

; Hargrave v. Goldman

(1963) 110 C.L.R. 40, at p. 60.

. The text writers are unanimously of the view that responsibility for nuisance devolves on anyone who actively creates it, whether or not he is in occupation of the land from which it emanates: Fleming, The Law of Torts, 5th ed., pp. 409, 410; Clerk & Lindsell on Torts, 14th ed., p. 822, par. 1418; Winfield and Jolowicz on Tort, 10th ed., p. 335; Salmond on Torts, 16th ed., p. 69. It was put to us that a non-occupier should not be liable upon the general footing that he may lack the power to abate the nuisance which has been created. This, however, is inconsistent with decisions which make the creator of a nuisance liable for its continuance, even after he has ceased to be in occupation: Thompson v. Gibson

(1841) 7 M. & W. 456; 151 E.R. 845.

. Although there appears to be no direct authority fastening liability on a complete stranger to the occupier of land upon which the nuisance is created, the weight of authority, it seems to me, attaches liability to any person who creates a nuisance while present on land with the authority of its occupier. For these reasons I would reject the first submission.

Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 -
Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 -
Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 -
Geyer v Downs [1975] 2 NSWLR 835 (21 November 1975) (Hutley, Glass and Mahoney Jj.A)

The possibility of injury occurring to the children before 9 a.m. was, therefore, apparent. But the recognition of the possibility of injury does not, it was argued, create a duty of care directed to preventing that injury. This is true. Lord Atkin spoke of the existence of the duty of care to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question": Donoghue v. Stevenson

[1932] A.C. 562, at p. 580.

. However, as has been said by Windeyer J. in Hargraves v. Goldman

(1963) 110 C.L.R. 40, at pp. 65, 66.

: "... it is a mistake to treat (this generalisation) as providing always a complete and conclusive test of whether, in a given situation, one person has a legal duty either to act or to refrain from acting in the interests of others. The very allusion shows that it has not this universal application."

Geyer v Downs [1975] 2 NSWLR 835 (21 November 1975) (Hutley, Glass and Mahoney Jj.A)

(1963) 110 C.L.R. 40 , at pp. 65 , 66.

Geyer v Downs [1975] 2 NSWLR 835 -
Hahn v Conley [1971] HCA 56 -
Smith v Jenkins [1970] HCA 2 (06 February 1970) (Barwick C.j., Kitto, Windeyer, Owen and Walsh JJ)
26. I have elsewhere had occasion to analyse the concept of duty of care as an element in the tort of negligence- Hargrave v. Goldman (1963) 110 CLR 40 , at pp 62-66 . I shall not go over that ground again here. A duty of care is, without doubt, a starting point for an action of negligence. (at p417)

Ramsay v Pigram [1968] HCA 34 -
Goldman v Hargrave [1966] HCA 42 -