ONE
INTRODUCTION TO THE LAW OF TORTS AND HISTORICAL OVERVIEW

CHAPTER OVERVIEW

Chapter 1 is divided into four sections. The first section introduces the definition of 'tort' and classification of torts, the second focuses on the short history and evolution of the law of torts, the third discusses briefly the nature of precedents and construction of statutory provisions, while the fourth provides the background to, and overview of, the 2002–03 Torts Reforms.

The notion of common law, as used in this book, refers to the single national customary law which in the late medieval period displaced the local and baronial law in England and was later supplemented by equity, though equity remained separately administered through the Court of Chancery until the Judicature reforms of 1873–75. Based on a system of judge-made precedent, the common law has no organised or unified theory of law except for the normative standards of the rule of law, which encompasses such fundamental principles as:

- The powers exercised by government and its officials must have a legitimate foundation, and they must be legally authorised.
- The law should conform to certain minimum standards of fairness and justice, both substantive and procedural.

Thus the law affecting individual liberty ought to be reasonably certain and predictable; and a person ought not to be deprived of his or her liberty, status, or other substantial interest without having been given the opportunity of a fair hearing before an impartial tribunal.

1.1 DEFINITION AND CLASSIFICATION OF TORTS

1.1.1 What is a tort?

In Latin the word 'tortus' means twisted or crooked. In Old French it came to denote some wrong or harm. This meaning was adopted by English common law, where it signifies an actionable, wrongful act, other than breach of contract, done intentionally, negligently, or in circumstances involving strict liability (i.e. where the plaintiff need not prove negligence or fault on the part of the defendant). Guido Calabresi defines torts as the law's response to 'breaches in noncriminal, often non-contractual interpersonal relationships'.[1]

Percy Winfield declared in his *Law of Torts* that, 'all injuries done to another person are torts, unless there is some justification recognised by law'.[2]

The High Court of Australia in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 519 [21] noted that:

> the term 'tort' is used … to denote not merely civil wrongs known to the common law but also acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby.

Most relationships arising out of social intercourse and professional endeavour are governed by the law of torts. Each tort relates to a particular interest or interests that the law regards as worthy of protection. For example, the law regards as worthy of safeguarding our interest in personal liberty; in unimpaired reputation; in physical, emotional and economic integrity. Economic integrity refers to the right to security of our property, and the right to exploit it within the limits of the law.

A defendant's conduct will be deemed wrongful where a failure to act in accordance with normative standards of behaviour occasions an injury to the plaintiff's interests. For instance, it is a normative standard of civilised society that one person may not interfere with another's body without the latter's consent or lawful justification.

Legally recognised wrongs that have specific names are called 'nominate torts'. By contrast, innominate torts are known by the names of cases that first legally recognised the wrong involved, for example the tort of *Wilkinson v Downton* ([1897] 2 QB 57). Thus, the law of torts comprises a miscellaneous group of civil wrongs, other than breach of contractual terms, which afford a remedy in the form of damages to a person who has sustained an injury as a result.

1.1.2 Remedies

Litigation—or arbitration, or mediation—is a means of obtaining a legal remedy. Unlike criminal law, which aims to punish the wrongdoer, the main object of torts law is to obtain damages for loss suffered as a result of the tortious conduct. The economic theory of the law of torts suggests that the social function of an award of damages is loss-spreading. Indeed, the central concern

1 Guido Calabresi, 'Toward a Unified Theory of Torts' (2007) 1.3 *Journal of Tort Law*.

2 PH Winfield, *Law of Torts*, 4th edn, Sweet & Maxwell, London, 1948, 13.

of the law of compensation is not the question of absolute right or wrong, but who should bear responsibility for the injured party's loss: the injured person or the wrongdoer?

Compensation in the form of damages may not be automatic upon the plaintiff proving wrongful conduct. Before the loss is shifted onto the defendant, the plaintiff must show not only that the injury-causing conduct was legally recognised as wrong, but also that the injury itself was of a kind recognised by the law of torts, and that it was not too remote.

In other cases, the person will not be compensated because the alleged injury is outside the interests recognised and protected by the law of torts. The law of torts thus differentiates between various interests for which individuals may claim protection against injury or loss by others. Historically, the common law has been more ready to safeguard against intentional deprivation of liberty or trespassory injury to body, property, honour or reputation, than to safeguard against injury to feelings or damage to economic interests through unintentional acts. However, the law is dynamic, and over time, some torts may be judicially or legislatively jettisoned—champerty; seduction; criminal conversation; enticement and harbour—or they may be absorbed into other torts. In the 1980s and 1990s, the tort of negligence 'swallowed up' other tortious actions: for example the tort of strict liability known as the special rule in *Rylands v Fletcher* [1868] UKHL 1, (1868) LR 3 HL 330; and general action on the Case, which was absorbed into negligence in *Northern Territory v Mengel* [1995] HCA 65; (1995) 185 CLR 307. New torts are created either by statute (for example, copyright legislation;[3] medical trespass under *Medical Treatment Act 1988* (Vic); racial victimisation under *Civil Liability Act 1936* (SA); s 73; the foreshadowed (at this stage) statutory cause of action for serious invasion of privacy under *Privacy Act 1988* (Cth); and other statutory torts) or by the judiciary (for example, action in negligence for misfeasance in public office; action on the Case for intentional infliction of nervous shock; the tort of unlawful interference with contractual relations, and so forth).

The law of torts also has another function: deterrence. This aspect of the law will be discussed in Chapter 2 (Damages) under punitive damages. However, it is worth noting at this stage that the concept of deterrence, which comes from criminal law, infuses, as it were, the quintessentially private law of torts with public law principles and considerations.[4]

The law provides for various remedies for conduct which may amount to a tort, a breach of contract, or a breach of trust. There are also non-judicial remedies, such as the self-help remedy of abatement of nuisance, the privilege of recaption of chattels, and alternative dispute resolution (ADR), either through the adversarial process of arbitration or through the non-adversarial process of conciliation and mediation. Judicial remedies include compensation through damages, punishment, restitution, and coercive relief by way of injunction and specific performance. Restitutionary remedies are different from compensation in the form of damages, in that they are based on rectifying the gain to the defendant.[5] Other remedies will be discussed in the context of specific torts.

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3 *Copyright Act 1968* (Cth).

4 JCP Goldberg, 'Tort Law for Federalists (and the Rest of Us): Private Law in Disguise' (2004) 28 *Harvard Journal of Law & Public Policy* 3; D Mendelson, 'Punitive Damages Sensu Stricto in Australia', in E Nordin and L Meurkens (eds), *The Power of Punitive Damages—Is Europe Missing Out?*, Intersentia (Ius Commune Europaeum), Cambridge, UK, 2012, 145–160; P Cane, 'Mens Rea in Tort Law' (2000) 4 *Oxford Journal of Legal Studies* 533–556.

5 M Tilbury, M Noone and B Krecher, *Remedies: Commentary and Materials*, Law Book Company, Sydney, 1993, 69.

1.1.3 Classification of torts

Broadly speaking, at present the law of torts in Australia protects the following interests:

- our right to physical integrity—the immunity of the body from direct and indirect injury, and preservation and furtherance of bodily health—protected by the torts of battery and negligence;
- our right to freedom from serious and unreasonable interference with mental integrity—mental poise and comfort—protected by the torts of assault, action on the Case for intentional infliction of nervous shock (the tort of *Wilkinson v Downton*), liability for negligently inflicted nervous shock, defamation, and nuisance;
- our right to privacy, which is relatively modern, and has received scant protection at common law—as society ascribes to it more value, statutory protections have been implemented,[6] and it is probable that either a new tort protecting privacy will be recognised or that existing torts will be expanded to encompass aspects of the right to privacy;
- our legal interest in freedom of movement—the right of personal liberty to lawfully choose where to be and which way to go—protected by the tort of false imprisonment;
- our right to use land, light, air, running water, the sea, and the shore of the sea—to some degree safeguarded by the torts of trespass to land, private nuisance, public nuisance and, sometimes, the tort of negligence;
- our rights to free belief and opinion, religious and political—partly protected through the torts of malicious prosecution, false imprisonment and defamation;
- our right to free social and commercial exchange without economic or physical duress—protected by means of such torts as interference with contractual relations, conspiracy, duress, and the tort of collateral abuse of process, while the tort of misfeasance in public office protects against intentional misuse of power by public officers;
- our rights of property—corporeal property, including the right of gift and bequest, and intellectual property, such as patents and copyrights—partly protected through such torts as conversion, detinue, trespass to goods, passing off, misrepresentation, and injurious falsehood.

To sum up, the book covers the following torts:

- trespass to person (battery, assault, and false imprisonment);
- trespass to land;
- action on the Case for intentional infliction of physical harm;
- action on the Case for intentional infliction of nervous shock;
- malicious prosecution;
- collateral abuse of power;
- misfeasance in public office;
- trespass to goods;
- detinue;
- conversion;

6 *Privacy Act 1988* (Cth); *Health Records Act 2001* (Vic); *Health Records (Privacy and Access) Act 1997* (ACT); and *Health Records and Information Privacy Act 2002* (NSW).

- negligence including:
  - non-delegable duty of care
  - omissions
  - pure economic loss
  - nervous shock: liability for negligently occasioned pure psychiatric injury
- defamation;
- deceit and injurious falsehood;
- nuisance; and
- breach of statutory duty.

Priority is given to the study of the tort of negligence because of its comparative importance.

TABLE 1.1 NOMINATE TORTS CATEGORISED BY AREA OF IMPACT

INTENTIONAL TORTS			
Trespass	**Indirect intentional torts**	**Tortious communications**	**Economic torts**
Battery	Action on the Case for intentional infliction of physical injury	Defamation	Interference with contractual relations
Assault	Action on the Case for the intentional infliction of nervous shock	Slander	Conspiracy
False imprisonment	Misfeasance in public office	Libel	Unfair competition
Trespass to land			Duress
	Deceit		Passing off
	Malicious prosecution		Misrepresentation
	Collateral abuse of process		Injurious falsehood
			Conversion
			Detinue

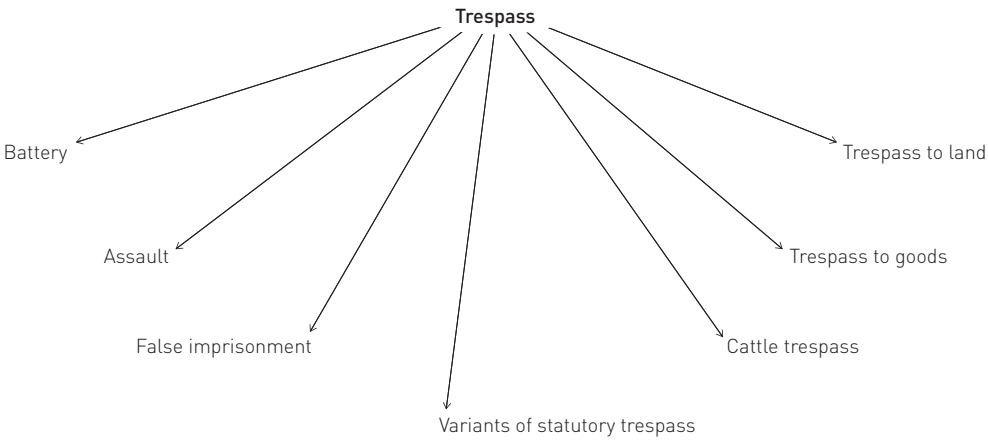
UNINTENTIONAL TORTS	
Negligence	Breach of statutory duty

MISCELLANEOUS TORTS	
Private nuisance	Liability for animals

The law of torts can be divided into three main taxonomic categories: statutory torts, trespass, and action on the Case.

The common law tort species of the genus of trespass can be diagrammatically summarised as in figures 1.1 and 1.2.

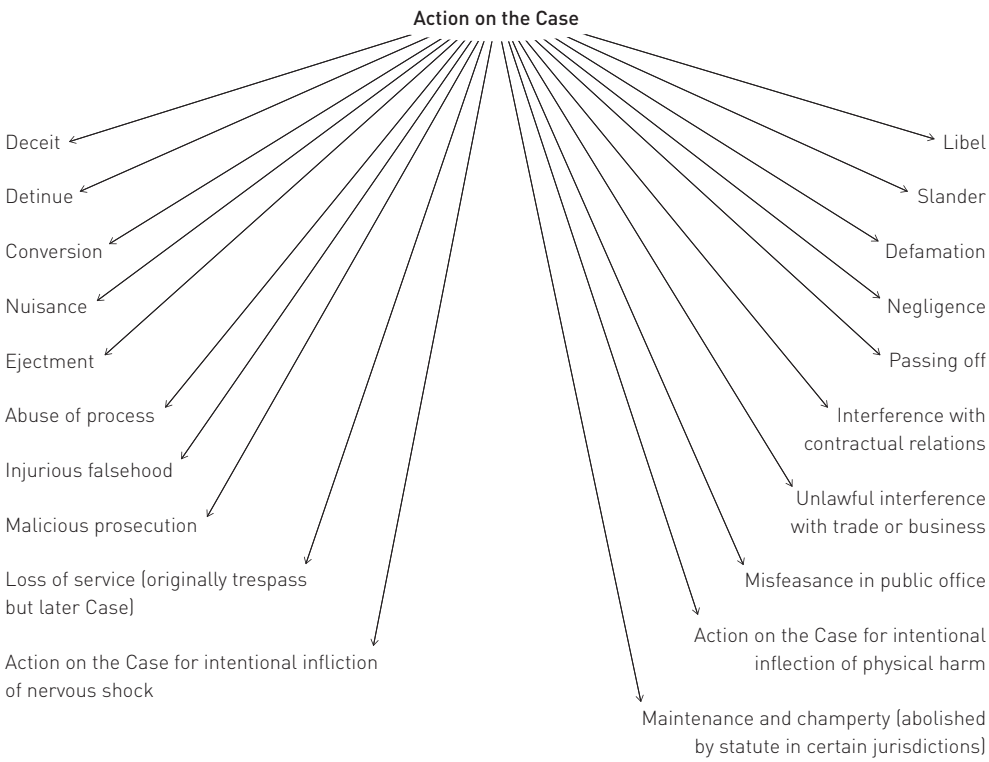
FIGURE 1.1 TRESPASS



The tort of negligence is one of the species of action on the Case. Its place within the context of the law of torts can be expressed in the diagrammatic form shown below.

Breach of statutory duty is a statutory tort.

FIGURE 1.2 ACTION ON THE CASE



1.2 HISTORICAL ORIGINS OF THE LAW OF TORTS

1.2.1 Origins of customary law of torts

The word 'law' is not derived directly from the Latin 'lex', but from the Old Norse 'lagu' (something 'laid down' or fixed), and Old North German 'lagh'. The Romans ruled most of Britain for 400 years. Yet the withdrawal of Roman military and civil administration from Britain in 410 was followed by a rapid collapse of physical, administrative and cultural infrastructure of the British Roman towns and provinces. Within some 30 years, the knowledge of Latin, and hence of the Roman law, became a rarity. The illiterate Germanic tribes—Angle, Saxon, and Jute—settled most of the country through conquest and migration and created a network of tribal, hereditary kingships. The Anglo-Saxons, as they came to be called, introduced their own customary laws, which were modified after the Viking Danish conquered eastern England in the ninth century and imposed 'Danelaw'.

Germanic laws (Salic) of the Anglo-Saxons and Danes recognised conduct that we would today consider wrong or tortious, but they dealt with it in terms of 'folk-rights'. These were unwritten customs developed by a particular locality or tribe. In some localities, for example, wronged persons were expected to personally pursue the wrongdoer. If the wrongdoer was caught 'hand-having' or 'back-bearing' (ie 'red-handed'), the victim was allowed to execute the wrongdoer on the spot.[7] Thus, the *Northumberland Assize Rolls* for 1255 record that a certain 'foreigner', Gilbert of Niddesdale, met a hermit on the moors of Northumberland. Gilbert 'beat him and wounded him and left him half dead, and stole his garments and one penny, and fled away'. When Gilbert was caught, the hermit asked for his stolen penny. However, he was told that by the custom of the county, in order to recover his stolen goods, he must behead the thief with his own hands. Determined to regain his penny, the hermit did so.[8] The custom referred to was blood feud under the law of vengeance.

In Anglo-Saxon England, customary laws of private vengeance and solidarity of kindreds in feuds (the family feud was known as *faida*), were long-standing and widespread. They were based upon a highly sensitised understanding of family honour and loyalty combined with encouragement to immediate retaliation. The law of vengeance was generally invoked for murder, adultery, violation or rape of a married woman, violation of the dead, aggravated robbery, or, importantly, any insult to the family honour.[9] It was open to all ranks among the Germanic, English, and Frankish people of the early Middle Ages, and for centuries the royal authority—before and after the Norman invasion—as well as the Church, struggled to suppress

7 AR Houge, *Origins of the Common Law*, Liberty Press, Indianapolis, 1966, 16.

8 GC Coulton, 'Some Problems in Medieval Historiography', The Raleigh Lecture on History (1932) 17 *Proceedings of the British Academy*, 17–18. Full record of the case (1891) 88 *Surtees Society* 70. Quoted by AR Houge, *Origins of the Common Law*, Liberty Press, Indianapolis, 1966, 16.

9 Duels of honour—private combat in the form of consensual revenge for the perceived injury to the participants' honour and reputation—were probably the best known vestiges of the law of vengeance.

it. Thus the code of Æthelberht, King of Wessex (d 865), contains elaborate tariffs of fines for breach of the peace. The preservation of peace would be the mainspring of the law of trespass.[10]

1.2.2 The institution of ordeals

Forensic procedures of customary law were based upon a premise that law was not 'made' or 'created' but rather 'declared' by those familiar with the custom of a certain territory. Customary laws approved by use carried the greatest authority. The wise men of each community were familiar with procedures for settling disputes by imposition of physical tests, known as 'ordeals'. Ordeals were meant to invoke the miraculous intervention of God in settling human disputes. In an ordeal of hot iron, a piece of iron would be placed in the fire and then handed to the suspect, who had to carry the red-hot iron, weighing between 500 g and 1.5 kg, over a distance of between three and nine paces. Sometimes, the suspect had to walk barefoot over nine red-hot ploughshares. The suspect's hands or feet were inspected by the priest three days later; if the burn had festered, God was taken to have decided against the party. The ordeal by hot water followed a similar procedure. Failure of the test meant not only loss of the suit, but also a conviction for perjury. Ordeals were abolished as part of the canon law by the Fourth Lateran Council in 1215, but persisted in common law for a number of centuries.

The administration of the oath or 'wager of law' was also governed by custom. With the court's consent, either of the parties could be required to swear to the truth of their case on the holy evangels. The custom required that the party swearing the oath bring a number of compurgators or 'oath-helpers', usually kinsmen or peers who also swore the oath, to back up the assertions. If pronounced in the correct manner, the oaths were considered as proof. There was always a danger that the party who had more money to bribe the greatest number of witnesses would win. The Frankish Queen Fredegond (d 597) persuaded three bishops and three hundred nobles to swear that the infant prince was actually begotten by her deceased husband.[11] Nevertheless, the 'wager of law' persisted until 1833.

The oaths and ordeals were intended to preclude human judgment on the merits of the case. The Normans introduced the form of judicial combat called ordeal by battle both upon accusations of felony (an ancient form of a law suit known as 'appeal') and on an equally ancient writ of right for the recovery of land.[12] Where, by reason of age or physical incapacity, a party could not fight, or if the party were a woman or an ecclesiastic, a substitute, usually a kinsman or a hired champion, could fight the combat. The first recorded refusal of trial by battle in an action for trespass dates back to 1304.[13] According to William Blackstone, the last trial by battle allowed in a civil suit was during the reign of Queen Elizabeth I.[14]

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10 The term 'trespass' (from French 'trespas' and Latin 'transgressio') came to be used as name for a discrete form of action in the third quarter of the thirteenth century. PR Hyams, *Rancor & Reconciliation in Medieval England*, Cornell University Press, Ithaca, NY, 2003, 241.

11 Gregory of Tours, *History of the Franks*, Ormonde M Dalton (trans), vol 2, Oxford University Press, Oxford, 1927, 334–335; quoted by CF Riedel, *Crime and Punishment in the French Romances*, AMS Press, New York, 1966, 33.

12 DJ Seipp, 'Symposium: the Distinction between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59–87.

13 YB 32; See also 33 Edw I (RS) 318, 320.

14 *Commentaries on the Laws of England*, A Facsimile of the First Edition of 1765–1769, vol 3, Clarendon Press, Oxford; photographically reprinted by The University of Chicago Press, Chicago and London, 1979, 336–341.

Traditionally, the adversarial civil litigation process is considered to be essentially a fact-finding endeavour in the sense that it is a trial of the strength of each side's advocacy and ability to adduce the most credible evidence in support of its pleas and allegations. In his book *The Judge*,[15] Lord Devlin observed that 'the centrepiece of the adversary system is the oral trial and everything that goes before it is a preparation for the battlefield.' The presumption is that 'the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light.' Lord Devlin's reference to 'battlefield' aptly characterises the nature of cross-examination of witnesses in the open court, which aims to expose dissimulation, concealment, and fraud—and which often leaves deep emotional scars.

More recently, however, Kirby J, in a dissenting judgment in *Whisprun Pty Ltd v Dixon* [2003] HCA 48 at [117]–[118], noted that the function of the trial judge is intellectually more complex:

> With respect, the joint reasons in this Court, and the reasons of the primary judge, appear to approach that function as if the judge were the successor to the adjudicator of the combat of knights of old—in a kind of public tournament between parties. In my view, we have travelled some distance since those times. The modern civil trial process is a more rational undertaking. It is based upon a close analysis of the relevant evidence, evaluated by a competent decision-maker who is obliged, if a judge, to give reasons which explain the decision arrived at … The law has advanced since the days when truth was distinguished from falsehood at trial by battle and ordeal or by their modern equivalent—conclusive judicial assessment based on impression and on necessarily limited evidence.[16]

His Honour (at [120]) went on to define the function of the trial judge in a civil trial thus:

> the ultimate duty of the decision-maker in an Australian court [is] to decide a case according to law and the substantial justice of the matter proved in the evidence, not as some kind of sport or contest wholly reliant on the way the case was presented by a party.

1.2.3 The courts

At the time of the Norman Conquest, England was divided into counties and hundreds (an administrative subdivision of counties sufficient to sustain one hundred families). Customary laws administered in shire-moots, hundreds, and county courts were very diverse, and in many ways incapable of adapting to social and political change. With the growth of the feudal system and its institutions of overlordship and vassalage, traditional communal courts based upon customary law gave way to the seignorial (baronial) courts.

Following the Norman Conquest in 1066, William the Conqueror (r 1066–87) began the process of administrative and judicial centralisation in England by organising the judiciary and regulating criminal and evidentiary law. The royal courts, known as *curiae regis*, were created as part of the efforts by Henry II (r 1154–89) to establish legal institutions capable of maintaining

15 Oxford University Press, Oxford, 1981, 54, 60.

16 Kirby J referred to: Holdsworth, *A History of English Law*, 7th edn, Methuen, London 1956, vol 1, 308–312, and *Fox v Percy* (2003) 77 ALJR 989 at 995 [30]–[31]; 197 ALR 201 at 209–210.

social order. Initially, royal justice was dispensed by the King. He exercised judicial powers personally, or through appointed surrogates—earls, bishops, abbots and royal counsellors—in his council, the *Curia Regis*.[17] This court came to be known as *coram rege* (before the King) or the Court of King's Bench.

The beginnings of the modern law of torts are generally traced to the twelfth century when, under Henry II, royal courts were vested with jurisdiction to protect peaceable possession of land. The Court of Exchequer (or Exchequer of Pleas) was the first court to be established as a separate royal court. Originally it dealt with revenue cases, but later became the main court of equity as well as having limited jurisdiction to hear civil cases.[18] The Court of Common Pleas was the central royal court that sat at Westminster. The Court of Common Pleas had jurisdiction throughout England for most civil actions (real and personal) at first instance, particularly those where the breach of peace was involved, as well as all actions relating to land under the feudal system.

From 1179, in any case concerning property rights the defendant could choose between trial by jury in the royal courts and trial by battle in the baronial courts. Trial by jury has its origins in the Republican Rome of 149 BCE, when jurors (*iudices*) were selected from a standing list to a permanent tribunal investigating charges of extortion. The cases were determined by majority vote.[19] However, the direct predecessor of the English jury system was the French royal *inquisition* established under Charlemagne. The jury, arraigned from free men who came from the locality where the dispute arose, was entrusted with the task of resolving questions of fact. The jury thus replaced ordeals, and in particular, the judicial duel, as the means of proof in civil matters.[20]

However, in medieval times, travel was slow and dangerous, and it was very inconvenient for the jurors to have to come to Westminster. Henry II's royal sessions, the Assize of Clarendon (1166) and the Assize of Northampton (1176), established the system of circuit judges[21] who travelled throughout the country during four 'law terms'.[22] Their rounds were organised in 1328 into a fixed pattern of six circuits. These remained virtually unchanged in England until 1971. In Australia, as in England, senior judges of the Supreme Court and County or District Court in each jurisdiction, as well as judges of the Federal Court and the High Court, still go 'on circuit'.

From the beginning of the fourteenth century, civil cases were generally tried by summoning the juries to the Court of Common Pleas at Westminster or to the Court of King's Bench, unless (*nisi prius*) the judges had earlier visited the locality to hear the juries' verdict. Judges would then

17 J Crawford, *Australian Courts of Law*, Oxford University Press, Melbourne, 1986, 9.

18 The Court of Common Pleas had sole jurisdiction over real actions.

19 G Mousourakis, *The Historical and Institutional Context of Roman Law*, Ashgate, Aldershot, 2003, 224.

20 RC van Caenegem, *An Historical Introduction to Private Law*, Cambridge University Press, Cambridge, 1988, 26, 107.

21 *Courts Act 1971* (UK).

22 From the twelfth century, the Court of Common Pleas and other courts heard cases almost continuously during four distinct periods of the year, known as the law terms: Michaelmas term (autumn); Hilary term (winter); Easter term; and Trinity term (summer). *The Supreme Court of Judicature Act 1873* (36 & 37 Vict, c 66) abolished the legal terms and replaced them with court 'sittings', at times which correspond to the old 'terms'. See: *Historical Note on the Legal Terms* at <www.newsquarechambers.co.uk/calculators/termdatecalculator.htm##historicalnote> accessed 27 May 2014.

bring the verdict back to the court in which the case had begun, for it to be formally recorded.[23] And thus the fourth of the royal courts, the Court of Nisi Prius, came to be established. The Court of Nisi Prius was a court of first instance composed of a judge and jury.

The royal courts operated in parallel with the old customary courts. Local courts and old feudal (baronial) courts were not dismantled; however, plaintiffs were given a choice of redress, through either the local courts or the royal courts.

1.2.4 The writ system

From the twelfth century, an action in the royal courts was usually commenced by a royal writ issued from Chancery. Writs were collected and catalogued in the Registry of Writs for the use of clerks and attorneys.[24] Chancery was also known as *officina brevium* ('the writ-shop'), because then, as today, the plaintiff had to pay for a writ. It was through the royal writ system that the foundations of the common law became established.[25]

A 'writ', also called 'formula', was an order issued by the court in the Sovereign's name under the Great Seal, addressed to the sheriff of the county in which the cause of action arose, or in which the defendant resided, commanding the sheriff to cause the defendant to appear in the King's Court on a certain day to answer the complaint. Only free men (women had no standing to sue in their own right) had the right to turn directly to the royal jurisdiction. Villeins and serfs had no right of redress in the royal courts.[26]

The writ system was founded on the principle that the plaintiff must inform the defendant about the facts upon which the plaintiff's grievance is based and about the remedy sought. Every writ would contain a precise and succinct formula founded on some principle of law giving the plaintiff a legal right of action. The plaintiff's pleadings included facts that brought the case within the relevant legal principle.

Writs had specific names, which reflected the particular cause of action. For instance, the writ of *Covenant* was used to secure enforcement of an agreement; the writ of *Debt* to collect certain moneys lent; *Replevin* was applicable when a plaintiff tried to recover personal property or chattels illegally taken; and *Scienter* ('*scienter retinuit*') applied to owners and keepers of dangerous animals who were strictly liable for any injury occasioned by the animal. The fault lay in keeping the animal with knowledge of the danger. The writ of *Assumpsit* (late Latin for undertaking) was issued to enforce parol agreements or informal contracts whereby the defendant 'took upon himself' (*assumpsit super se*) to do something, but did it so badly that the plaintiff suffered damage.[27] The writ of *Assumpsit* would eventually evolve in the sixteenth century into the *special assumpsit* for misfeasance—an undertaking that was badly executed to the detriment of the

23 JH Baker, *An Introduction to English History*, 2nd edn, Butterworths, London, 1981.

24 AR Hogue, *Origins of the Common Law*, Liberty Press, Indianapolis, 1966, 14–15, 208–209.

25 Although the writ has been regarded as a prerequisite of proceedings at common law, some early actions were begun by bill. AK Kiralfy, *The Action on the Case*, Sweet & Maxwell, London, 1951, 231.

26 RC van Caenegem, *An Historical Introduction to Private Law*, Cambridge University Press, Cambridge, 1988, 100.

27 JH Baker, *An Introduction to English History*, 2nd edn, Butterworths, London, 1981, 274.

plaintiff, and the *indebitatus assumpsit*—an action for nonfeasance in the sense of contractual non-performance.[28]

Some of the early causes of actions were edicts or enactments made at the royal sessions and directed at the judges and officials of Chancery's Register of Writs. They were also referred to as 'assize'.[29] Today, all tortious actions are initiated by writs of summons.

The courts had the final word on the suitability of the chosen writ: if it did not fit the facts of the case, it was quashed. According with the maxim 'no writ, no remedy' the plaintiff would be left without legal relief. The plaintiff could accept the ruling or petition the King and his Privy Council for a new remedy.

1.2.5 The origins of the doctrine of precedent

In the royal courts, royal judges declared what the law was. By the end of the twelfth century, laymen specialising in law began to be appointed as professional judges. Their status as the King's surrogates gave these professional jurists the power to interpret, articulate, and enforce the law. The practices and traditions of customary law guided judges of the early royal courts. But the new professional judiciary was also influenced by the *ius commune*. This combination of Roman law, canon law and customary law was taught at the universities of Padua, Bologna, Pavia, Montpellier, Sorbonne, Oxford, and Cambridge. Roman and Canon law are both based on a system of casuistry whereby in determining the question of right and wrong in relation to a particular conduct—or an issue of conscience—the judge applies general principles of 'right conduct'. These would evolve into normative standards against which the conduct of the alleged wrongdoer would be measured. However, in early medieval England, the common law and its rules were not codified and had no systematic theoretical underpinnings. Consequently, in order to discern the relevant general principle, the judges would look to previous decisions that dealt with a similar issue. Indeed, the major difference between the functionaries of the customary and baronial courts and the royal judiciary was that the latter respected the principle that like cases should be judged in like fashion. To aid memory, records of facts, arguments and determinations made in the royal courts were written on parchment.

One medieval judge of the Court of King's Bench (*regis coram*), Henry Bracton (c 1200–68), examined and, in his *Note Book*, transcribed from the manuscripts of the old royal plea rolls, some 2000 cases which he believed were the best sources of authority. Bracton used cases decided in the first 24 years of the reign of Henry III (r 1216–72), from rolls held at De Banco and Coram Rege courts as well as the Eyres of Martin of Pateshull.[30] Some of these cases were utilised in the treatise known as the *De Legibus et Consuetudinibus Angliæ* (Laws and Customs of England).[31] According to modern research, most of the material in *De Legibus et Consuetudinibus Angliæ* was written by others during the 1220s and 1230s. It was then edited and partially updated from the

28 For a discussion see: DJ Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford University Press, Oxford, 1999, 130–151.

29 AR Hogue, *Origins of the Common Law*, Liberty Press, Indianopolis, 1966, 255. For instance a possessory assize of Novel Disseisin created in 1166 by the Assize of Clarendon provided a remedy to a dispossessed freeholder.

30 AR Hogue, *Origins of the Common Law*, Liberty Press, Indianapolis, 1966, 200–201.

31 H Bracton, *De Legibus et Consuetudinibus Angliæ*, was probably written between 1240 and 1256.

late 1230s to 1250s, and was greatly influenced by the institutions of *ius commune*.[32] Bracton was probably the last owner of the original manuscript and the last author to supplement the treatise.

It was in *De Legibus* that the principle of precedent was formulated in the following way:

> If any new and unwonted circumstances … shall arise, then if anything analogous has happened before, let the case be adjudged in like manner, since it is a good opportunity for proceeding from like to like. (*Si tamen similia evenerint per simile iudicentur, cum bona sit occasio a similibus procedere ad similia*.)[33]

English law thus became a body of recorded rules enforced by the state through the royal courts. By the end of the reign of Henry II, the process of developing a *single* national customary law, common to the entire kingdom, in contrast to the collection of diverse laws administered through local and baronial courts, was well advanced.[34] Though the phrase 'common law' denotes judge-made law, historically it meant the law administered through the royal courts based on principles common throughout the realm. From medieval times, the law of torts in England evolved almost entirely through case law. The system of forms of actions developed in the early medieval period enabling the law to develop in response to the values and needs of the English society at various stages of its evolution.

In the 1280s, the first Year Books containing reports of cases heard in the royal courts began to appear. Written in Law French, they were originally disseminated as manuscripts, and then between 1481 and 1535 in printed form. They were written by mainly anonymous lawyers for those practising at the Bar. Rather than recording the final determination, they tended to focus on procedural rules, points of law, legal arguments and reasons for a particular adjudication.[35] Year Books were the precursors of law reports by named reporters who concentrated on recording judicial decisions.

However, the obverse of the writ system's flexibility was lack of conceptual coherence, insofar as these writs constituted a straggle of theories which relied upon or blended diverse categories of law. Though torts diverged from the 'public wrongs' of crime in the sixteenth century, it was only in the eighteenth century that William Blackstone, in his *Commentaries on the Laws of England*,[36] expressly separated contract (*assumpsit*) from 'private wrongs' (torts) when he wrote:

> Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded in contracts, the latter upon torts or wrongs … Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nusances (sic), assaults, defamatory words, and the like. (Italics in original).

Throughout the nineteenth and twentieth centuries, the common law refined the system of precedent.

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32 See H Bracton, *On the Laws and Customs of England*, Thorne SE (trans), William S Hein & Co, Buffalo, New York, vol 1, 1997, XXXVI–XL.

33 Bracton, *De Legibus*, fol 1b, quoted in AR Hogue, Origins of the Common Law, Liberty Press, Indianapolis, 1966, 200.

34 RC van Caenegem, *An Historical Introduction to Private Law*, Cambridge University Press, Cambridge, 1988, 35.

35 WJV Windeyer, *Lectures on Legal History*, Law Book Company, Sydney, 1957, 148.

36 *Commentaries on the Laws of England*, A Facsimile of the First Edition of 1765–1769, vol 3, Ch 8, 117.

Although initially judicial decisions *per se* did not have normative force as a source of law,[37] judges would examine a line of cases to distil the correct principle, which would be followed unless good reasons existed for by-passing or reversing it. In *Fisher v Prince* (1762) 97 ER 876 at 876, Lord Mansfield was to comment: 'the reason and spirit of cases make law; not the letter of particular precedents.'[38] In *Jones v Randall* (24 April 1774) 98 ER 706 at 708; Lofft 383 at 385, while discussing validity and enforceability of a gaming contract his Lordship observed that:

> The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. 1[39] to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law.

On the following day in the same case,[40] Lord Mansfield further elucidated the relationship between principle-based approach and adherence to precedent, and distinguished judge-made law from 'exclusive of positive law, enacted by statute':

> It is admitted by the counsel for the defendant, that the contract is against no positive law: it is admitted too, that there is no case to be found which says it is illegal; but it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them.

Thus, in the eighteenth century, judges administered the law either by deferring to enacted laws, or, more often, by creating new law though application of legal principles found in precedents that they have synthesised or interpreted, adjusted or rejected for the purpose of the case at hand.

Today, unless it is distinguishable or overcome by legislation, all courts throughout Australia are bound by the *ratio decidendi* of a High Court decision.[41] McHugh J in *Woolcock St Invest v CDG Pty Ltd* (2004) 216 CLR 515 at [59]–[61] explained the constituent elements of this system thus:

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37 JH Berman and CJ Reid, Jr, 'The Transformation of English Legal Science: from Hale to Blackstone' (1996) 45 *Emory Law Journal* 437 at 445.

38 For a further discussion, see JH Berman and CJ Reid, Jr, 'The Transformation of English Legal Science: from Hale to Blackstone', (1996) 45 *Emory Law Journal* 437 at 449.

39 Richard I was King of England from 6 July 1189 until his death in 1199.

40 *Jones v Randall* (1774) 98 Eng Rep 954 at 955; 1 Cowp 37 at 39.

41 In *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 Gaudron, McHugh, Gummow and Hayne JJ stated at 403 [17]: 'It should be emphasised that it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled.' Their Honours referred to *Jacob v Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200; 116 CLR 200 at 207 (per Barwick CJ), 217 (McTiernan, Taylor and Owen JJ agreeing). See also *Rabenor Overseas Inc v Redhead* (1998) 72 ALJR 671 at 672 per Brennan CJ; MD Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243.

> [59] The common law distinguishes between the holding of a case, the rule of the case and its *ratio decidendi*. The holding of a case is the decision of the court on the precise point in issue—for the plaintiff or the defendant. The rule of the case is the principle for which the case stands—although sometimes judges describe the rule of the case as its holding. The *ratio decidendi* of the case is the general rule of law that the court propounded as its reason for the decision.
>
> [60] Under the common law system of adjudication, the *ratio decidendi* of the case binds courts that are lower in the judicial hierarchy than the court deciding the case. Moreover, even courts of co-ordinate authority or higher in the judicial hierarchy will ordinarily refuse to apply the *ratio decidendi* of a case only when they are convinced that it is wrong.
>
> [61] Prima facie, the *ratio decidendi* and the rule of the case are identical. However, if later courts read down the rule of the case, they may treat the proclaimed *ratio decidendi* as too broad, too narrow or inapplicable. Later courts may treat the material facts of the case as standing for a narrower or different rule from that formulated by the court that decided the case. Consequently, it may take a series of later cases before the rule of a particular case becomes settled … If later courts take the view that the rule of a case was different from its stated *ratio decidendi*, they may dismiss the stated *ratio* as a mere dictum or qualify it to accord with the rule of the case as now perceived.

Thus, the major characteristic of common law is its constant change. Over the centuries, common law judges have incidentally developed whole new branches of law in the course of deciding specific cases (see Chapter 6). Their responses have traditionally focused upon the protection of individual rights in the form of recognised legal interests rather than furthering abstract legal principles of social and moral justice. Generally, in their deliberations, judges would consider (positively or otherwise) legal reasons provided in the past determinations of similar issues, as well as moral values, and socio-economic priorities of their own day.[42]

1.2.6 Reception of English torts law in Australia

On 26 January 1788 Governor Arthur Phillip, under commission from the British Government, brought a party of sailors, soldiers and convict prisoners to eastern Australia, named New South Wales by James Cook in 1770, and took possession of the land in the name of His Majesty King George III. In a settled colony,[43] as Australia was supposed to be, the English colonists brought with them 'so much of the English law as [was] applicable to their own situation and the condition of the infant colony',[44] which at this time was described as a 'desert uninhabited country'. From

42 For a discussion of changing values and the law's response to these changes see: *Grant v YYH Holdings Pty Ltd* [2012] NSWCA 360.

43 The international law of the eighteenth century recognised three effective ways of acquiring sovereignty: by conquest, cession, or occupation (settlement) of the territory which did not have a settled population.

44 This was because, for the purposes of the common law, the colonists were regarded as living under the law of England. The law was not amenable to alteration by exercise of prerogative. Blackstone, *Commentaries*, A Facsimile of the First Edition of 1765–1769, Book I, Ch 4, 107; *State Government Insurance Commission v Trigwell* [1979] 142 CLR 617 at 625, 634; *Mabo v Queensland* [1991–1992] 175 CLR 1 at 35.

the strictly legal point of view, it was through the enactment of the *Australia Courts Act 1828* 9 Geo IV, c 83, s 24 that on 25 July 1828 the common law, the rules of equity, and statutes then in force in England, except as locally altered, became formally applicable in New South Wales and other colonies.[45] Until well into the second part of the nineteenth century, judges—mostly free settlers—were appointed to the colonial Supreme Courts by the British government.

Naturally, when determining torts cases, nineteenth-century Australian judges followed English precedents. Appeals to the Judicial Committee of the Privy Council (created in 1833 exclusively to hear appeals from courts in the then Colonies and Dominions of the British Empire), provided homogeneity of approach to common law principles.[46] In relation to statutory law, even after the Colonies and Dominions acquired self-government, the Imperial Parliament retained the power to enact statutes, which bound the former by paramount force,[47] thus ensuring a degree of legislative uniformity throughout the Empire.[48] Even where the statutes were enacted by local legislatures, the Privy Council in *Trimble v Hill* [I879] 5 AC 342 at 344, advised as follows:

> Their lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts of England are bound until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature the colonial Courts should also govern themselves by it.

The need for uniformity, certainty, and predictability of law also underpinned development of the doctrine of *stare decisis*[49] whereby the *ratio decidendi* in a particular case, rather than a line of cases, became binding upon a court in a later similar case.

When the Commonwealth of Australia came into existence on 1 January 1901, the Australian Colonies, which continued as states, retained their common law jurisdictions.[50] However, one of the aims of the Founding Fathers was to ensure a reasonable degree of uniformity of common law among the states (and later, territories), of the federation. To this end, Part III of the *Commonwealth Constitution*[51] created the High Court of Australia as the Court of Appeal from all state Supreme Courts, whether exercising federal or purely state or territory jurisdiction.

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45 The courts were composed almost entirely of free settlers, and adopted standard practices of the English courts. Colonial legislation was reviewable by the Privy Council, as were colonial court decisions involving more than £3000.

46 Colonial legislation was also reviewable by the Judicial Committee of the Privy Council.

47 *Colonial Laws Validity Act 1865* (UK) imposed constrains upon the Colonial (state) parliaments to repeal, amend and enact laws which are contrary (repugnant) to the United Kingdom legislation extending to Australian states by paramount force.

48 This was the reason why the *Australian Constitution Act* was a United Kingdom Statute, and why the *Australia Act* was first enacted by the Commonwealth Parliament in 1985, then by the United Kingdom parliament in 1986, followed by all state parliaments (hence the collective name: *Australia Acts 1986*). *The Colonial Laws Validity Act 1865* (UK) was repealed by *Australia Acts 1986*, s 3.

49 Short for *stare decisis et non quieta movere*, variously translated as 'stand by the thing decided and do not disturb the calm', 'to stand by the decisions and not to disturb settled points'.

50 See: *Lipohar v The Queen* [1999] HCA 65, (1999) 200 CLR 485, per Gaudron, Gummow and Hayne JJ at [54]–[58].

51 *Commonwealth of Australia Constitution Act 1900* (UK). The High Court itself was established by the *Judiciary Act 1903* (Cth).

Moreover, the High Court's common law determinations on cases appealed from any jurisdiction were binding on all Australian courts.[52] The object was to create a single system of jurisprudence comprising the Constitution, federal, state, and Territory laws, and the common law of Australia.[53] However, parties could appeal decisions of the High Court to the Judicial Committee of the Privy Council until the enactment of the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth). In 1985, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ in *Kirmani v Captain Cook Cruises Pty. Ltd. [No. 2]* (1985) 159 CLR 461 at 464–465, declined to grant to the Attorney-General for the State of Queensland a certificate to appeal to the Privy Council under s 74 of the *Constitution*. The court considered that (1) the High Court's jurisdiction to grant such certificate 'has long since been spent' and was obsolete; and (2) granting the certificate would amount to 'abdication of its [the High Court's] responsibility to decide finally questions as to the limits of Commonwealth and state powers, questions having a peculiarly Australian character and being of fundamental concern to the Australian people.'[54] For, as Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ would explain in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 518 [15]:

> because there is a single common law of Australia there will be no difference in the parties' rights or obligations on that account, no matter where in Australia those rights or obligations are litigated.

Indeed, over the past century, the High Court has moulded and developed a relatively uniform Australian common law of torts.[55] In the 1980s, the system of *stare decisis* came to be regarded as too rigid, and was tacitly abandoned in favour of the system described by McHugh J in *Woolcock St Invest v CDG Pty Ltd* (2004) 216 CLR 515 (above). In *Ruhani v Director of Police* [2005] HCA 42, Kirby J noted (at [196]) that:

> in matters of ordinary public and private law, judges of this [High] Court normally submit to the considered exposition of the law as stated by the majority.' In other words, until overturned, it is the majority's opinion that states the valid law. The problem for lower-instance courts, legal practitioners and law students arises when the seven Justices of the High Court unanimously agree on the outcome of the case (for the claimant/appellant or for the respondent), but each, in a separate judgment, provides a different *ratio decidendi*.

A number of High Court decisions relating to torts can serve as examples of Kirby J's concerns.[56]

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52 J Crawford, *Australian Courts of Law*, Oxford University Press, Melbourne, 1986, 160.

53 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 534 [66] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

54 The right of the state Supreme Courts to seek a certificate to appeal to the Privy Council was formally abolished by *Australia Acts 1986*, s 11.

55 Jurisdictional variations were mainly due to legislative actions; historically, the areas of the law torts regulated by statute included defamation, occupiers' liability and contributory negligence.

56 For example: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

As the final court of appeal, the High Court hears and determines only a tiny fraction of torts cases; thousands more are litigated in state and territory courts. How is the notion of 'a single common law of Australia' embodied in practice? In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ at 151–152 [135] prescribed that:

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.[57] Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.[58]

With respect to non-statutory law, in *Scott v C.A.L. No 14 Pty Ltd t/a Tandara Motor Inn (No 2)* (2009) 256 ALR 512,[59] Gummow, Heydon and Crennan JJ at [51] held that:

> Unless the Full Court majority had concluded, giving reasons, either that the present case was exceptional, or that the New South Wales Court of Appeal was plainly wrong, it was its duty to follow the New South Wales Court of Appeal.

Their Honours added (at [51]) that any other course would result in:

> an undesirable disconformity between the view of the New South Wales Court of Appeal as to the common law of Australia and the view of the Tasmanian Full Court majority. At best the Full Court decision would have generated confusion. At worst it would have encouraged the commencement of baseless and ultimately doomed litigation, to the detriment both of the unsuccessful plaintiffs and of the wrongly vexed defendants.[60]

In *C.A.L.,* Gummow, Heydon, and Crennan JJ also noted that this approach to the *stare decisis* doctrine is in the tradition of 'the pre-1986 practice',[61] when Australian courts were expected to

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57 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 112 ALR 627; 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ: 'uniformity of decision in the interpretation of uniform national legislation … is a sufficiently important consideration to require that an intermediate appellate court—and all the more so a single judge—should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.'

58 Referred to by Gummow, Heydon and Crennan JJ in *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47, at [51]. See also *Woolcock St Invest v CDG Pty Ltd* (2004) 216 CLR 515 at [59], per McHugh J.

59 In this case, the High Court determined that (1) the licensee (and, vicariously, the proprietor) of a pub was not under a duty of care to insist that he call the customer's wife to collect her inebriated husband in the face of the latter's refusal to provide telephone contact numbers; (2) the failure to persist in the face of the customer's refusal did not constitute a breach of duty; (3) if there was a breach, it did not cause the customer's death when on the way home his motorcycle ran off the road.

60 *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47 at [51], Gummow, Heydon and Crennan JJ (Hayne J specifically agreeing at [63]).

61 Before appeals from the states to the Privy Council were abolished by the Australia Acts 1986, s 11.

follow decisions of the English Court of Appeal and House of Lords,[62] unless they considered them to be plainly wrong.[63]

Today, as Kirby J pointed out in *International Air Transport Association v Ansett* [2008] HCA 3; (2008) 234 CLR 151 at [123], decisions of the House of Lords (since 1 October 2009, the Supreme Court of the United Kingdom),[64] just like other foreign final courts of appeal, may 'afford a most valuable source of comparative law, deserving of respect in an Australian court'. But not more than that—for, as his Honour stressed, the weight to be given to the judicial opinions of the foreign courts 'is entirely dependent on the cogency of … reasoning, as assessed by Australian judges, who alone enjoy the constitutional legitimacy and power to determine the particular case that is before an Australian court.'[65]

There have been a number of truly exceptional jurists in other foreign courts, including the House of Lords (for example Lord Hoffmann), whose views and legal analysis are fundamental to the understanding of difficult legal theories. However, as a general rule, apart from international law, laws are made for, and develop within, particular societies; they form a fabric that is closely interwoven with the country's particular political, economic and socio-cultural systems and traditions. Thus, when deciding personal injury cases, Australian judges (and even more so the juries in jurisdictions that have retained civil juries) do so against the background of the Australian national health insurance scheme (Medicare),[66] the social security and pension systems, the superannuation arrangements, the state and territory compulsory motor vehicle insurance and workers' compensation schemes, the National Disability Insurance Scheme,[67] and the like.

In the seminal case of *Sullivan v Moody* (2001) 207 CLR 562 (see extract in Case Book), speaking in the context of imposing duty of care in novel cases under the law of negligence,

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62 In *International Air Transport Association v Ansett* [2008] HCA 3; (2008) 234 CLR 151, Kirby J (at [123]) reiterated that according to a strict theory of precedent, the High Court of Australia was never technically bound by a decision of the House of Lords: *Piro v W. Foster & Co. Ltd* (1943) 68 C.L.R. 313; *Skelton v Collins* (1966) 115 CLR 94 at 134, per Windeyer J.

63 The joint judgment in *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board C.* [2009] HCA 47 at [50] referred to Dixon J's comment in *Wright v Wright* (1948) 77 CLR 191 at 210, that diversity in the development of the common law is an 'evil'. In *Wright v Wright* (1948) 77 CLR 191 the High Court of Australia imposed a civil standard of persuasion in matrimonial causes, thus departing from the decision of the English Court of Appeal in *Ginesi v. Ginesi* [1948] P. 179, which imposed a criminal standard of proof.

64 See www.supremecourt.gov.uk.

65 See also *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60, (2007) 232 CLR 245, per Kirby J at [138]–[140].

66 Australia has a national health insurance care scheme, Medicare, which provides free treatment as a public patient in a public hospital, free or subsidised treatment by medical practitioners including general practitioners, specialists, participating optometrists or dentists (under Medicare chronic disease dental scheme). Medicare operates within the Commonwealth Department of Human Services. It provides payment of Medicare benefits to patients who incur medical expenses in respect of a professional medical service, hospital services and certain other specified services (nursing home benefits and residential care subsidies). Medicare benefits apply to any personal injury, condition, disease, or illness irrespective of its severity and duration. Many Commonwealth of Australia Acts regulate Medicare; among the most significant are the *Health Insurance Act 1973* and the *Human Services (Medicare) Act 1973* (Cth). Many amending Acts have also made major changes to the administration and regulation of Medicare. Two of the most significant have been the *Health Services Legislation Amendment Act 2005* (Cth), and the *Health Services Legislation Amendment Act 2011* (Cth).

67 *National Disability Insurance Scheme Act 2013* (Cth).

Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ, in a joint judgment, cautioned (at 576 [42]) that the question needs to be posed whether such imposition 'would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms'. This cautionary principle is relevant to the law of torts in general. To coin a phrase, 'parachuting' legal institutions and approaches in from foreign jurisdictions and thereby creating precedents that are inconsistent with wider essential characteristics of Australian law impairs its integrity.

1.3 INTERPRETATION AND CONSTRUCTION OF LEGISLATIVE PROVISIONS

Ever since the end of the thirteenth century, legislation[68] modified to greater or lesser degree the common law. Professor Peter Cane has observed:

> The social and governmental environment in which courts operate in 21st-century Australia is very different from the environment of 13th-century or even 18th-century England. Today, governments have large law-making resources at their disposal and don't need courts in the way the early English monarchs did. As law-makers, courts are on the defensive.[69]

However, in such traditionally common law areas as torts, the legal profession sometimes treats any legislative intrusion with hostility,[70] and statutory provisions as if they were a judicial holding or an *obiter dictum*. Although theories of statutory interpretation and construction have been developed, the courts rarely apply them consistently.[71] In *Conway v The Queen* [2002] HCA 2; (2002) 209 CLR 203 at 229 [74], Kirby J was very critical of judges who ignore or alter the meaning of clear statutory words, pointing out that:

> it is a fundamental tenet of the law that courts must obey the provisions of an applicable statute where the statute is constitutionally valid and governs the case.[72]

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68 See, for example, the Statute of Westminster the Second, 13 Edward I, c24 (1285). TFT Plucknett, 'Case and the Statute of Westminster II' (1931) *Columbia Law Review*, 778–799 reproduced in *Studies in Legal History*, Hambledon Press, UK, 1983, Chapter II. PM Tiersma, 'Ambiguity of Interpretation: Distinguishing Interpretation from Construction' (1995) 73 *Washington University Law Quarterly*, 1095–1102.

69 P Cane, *The Political Economy of Personal Injury Law*, The Mcpherson Lecture Series, vol 2 (2007) University of Queensland Press, Brisbane at 32–33.

70 P Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 *Oxford Journal of Legal Studies* 393 at 395, citing the Hon Justice Peter Underwood's passage from 'Is Ms Donoghue's Snail in Mortal Peril?' (2004) 12 *Torts Law Journal* 39.

71 For example, while still the Chief Justice of New South Wales, but writing extra-curially, the Honourable James J Spigelman pointed out inconsistent approaches to theories of statutory construction in *Minister for Immigration & Citizenship v SZJGV* (2009) 238 CLR 642; 83 ALJR 1135. J Spigelman, 'The intolerable wrestle: Developments in statutory interpretation', (2010) 84 *Australian Law Journal* 822 at 831.

72 It has been noted that 'the task on which a court of justice is engaged remains one of construction': *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105; cf J Spigelman, 'The Poet's Rich Resource: Issues in Statutory Interpretation', *Australian Bar Review*, vol 21 (2000) 224 at 233.

> Just as there is a modern 'distaste' for studying the text of applicable legislation,[73] so there is another tendency to read legislation as incorporating all of the nuances of pre-existing judge-made authority. In my view, both of these tendencies are erroneous and have to be resisted. Whilst the common law adapts to the Constitution[74] and to any relevant statute law,[75] it is an elementary mistake to approach the construction of applicable legislation as if it expresses long-standing and familiar principles. Unless the language and obvious purpose of the legislative text clearly require that approach to be adopted, it should be avoided.

Likewise in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at 46–47 [47] Hayne, Heydon, Crennan and Kiefel JJ wrote:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[76]

However, in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56 at [25], French CJ and Hayne J opted for a different approach:

> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure.[77] Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others,[78] to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the *legislature is taken to have intended them to have*'[79] (emphasis added). And as the plurality went on to say in *Project Blue Sky*:

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73 This tendency is here evident in the 'remarkable' fact that the judge and parties at trial paid no regard at all to the provisions dealing with accomplice evidence in the *Evidence Act 1995* (Cth): *Conway* (2000) 98 FCR 204 at 253 [202]; see also joint reasons at 223–224 [53]–[55].

74 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562–567.

75 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25–27 [81]–[83], 46–47 [129]–[130]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59–63 [18]–[29], 86 [97]; cf *Lamb v Cotogno* (1987) 164 CLR 1 at 11–12.

76 Cited with approval by French CJ and Hayne J in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56, at [23]; in *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257; [2012] HCA 55 at [39] by French CJ, Hayne, Crennan, Bell and Gageler JJ.

77 *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 at 592 [44]; [2011] HCA 10.

78 *Zheng v Cai* (2009) 239 CLR 446 at 455 [28]; [2009] HCA 52; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1009 [146(v)], 1028 [258], 1039 [315], 1040 [321]; 280 ALR 221 at 274, 299, 315–316; [2011] HCA 34.

79 *Project Blue Sky* (1998) 194 CLR 355 at 384 [78].

> Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[80] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[81]

Whether or not this approach legitimises re-drafting statutory provisions in the name of 'the purpose of the statute or the canons of construction', it does create a perception of blurring the boundary between judicial and legislative powers. For:

> Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.[82]

The reader is encouraged to reflect, when studying this fascinating, if complex, area of the law, on the way judges construe torts-related legislation.

In recent times, the process of 'construing legislation' has been twofold. According to Kirby J in *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96, at [34]:

> The starting point for statutory interpretation is always the text of the written law.[83] It is in that text that the legislature expresses its purpose or 'intention'. It is a mistake for courts to begin their search for the meaning of the law with judicial elaborations, ministerial statements or historical considerations.[84] Moreover, in performing its functions, a court should never stray too far from the text, for it constitutes the authentic voice of the constitutionally legitimate lawmaker.[85]

As Mason CJ, Wilson and Dawson JJ stated in *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 (at 518), 'the words of a Minister must not be substituted for the text of the law', particularly so (as was the case in *Re Bolton*), where the words used in the Second Reading Speech are not replicated in the statutory provision. However, the same principle applies to other extraneous sources, such as parliamentary debates, explanatory memoranda, parliamentary reports and the like.[86] While these sources may aid the understanding of the semantic, political,

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80 For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15.

81 (1998) 194 CLR 355 at 384 [78].

82 J Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation', (2010) 84 *Australian Law Journal* 822 at 826.

83 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; Chang (2007) 234 CLR 1 at 20–21 [59].

84 See *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135] where relevant authorities are collected.

85 Compare *Trust Co of Australia Ltd v Commissioner of State Revenue* (Qld) (2003) 52 ATR 665 at 1029 [68]–[69]; 197 ALR 297 at 310–311.

86 *Acts Interpretation Act 1931* (Tas), ss 8A, 8B(3).

or socio-economic context of a provision, their words should not be imported into, or substituted for, the actual text of the legislative enactment.

Only after the court has interpreted the text of a statutory provision by elucidating the meaning of its words and clauses[87] can it properly 'construe' the provision in the sense of determining its legal consequences by reference to the purpose of the statute: what were the objects of the legislation, which mischief was it designed to overcome? This involves 'an appreciation of relevant historical and other materials that cast light on the purpose of the … Parliament in adopting, and giving effect to, the [particular statute].'[88] For even plain words in a provision may acquire a new meaning if read in context of the statute and its purpose as a whole.[89] According to Kirby J, in light on the above, the court is required 'to prefer a construction that promotes the purpose and object of legislation to one that merely gives effect to its grammatical words'.[90] His Honour observed that the judiciary has recognised 'the pragmatic truth':

> that one price of simplification and concision in the enacted law is an increased need for courts to strive to give effect to the purpose of the lawmaker rather than resorting to the judicial lament that 'the target of Parliamentary legislation … has been missed'.[91]

Along with the modern approaches to the interpretation of statutes, some historical rules are also being reconsidered. For example, McHugh J has noted the tendency of modern parliaments to 'routinely enact laws which adversely affect or modify common law rights'. Consequently, the once 'basic principle of statutory construction … the presumption that legislatures do not intend to abrogate or curtail fundamental common law rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language'[92] is:

> inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.[93]

McHugh J made these observations in the wake of the profound changes to the common law of negligence and the law of damages brought about by the Torts Reforms.[94]

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87 Edwin W Patterson, 'The Interpretation and Construction of Contracts' (1964) 64 *Columbia Law Review* 833–865.

88 *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96, Kirby J at [32].

89 *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96, Kirby J at [39].

90 *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96, Kirby J at [35].

91 Diplock, 'The Courts as Legislators', in Harvey (ed), *The Lawyer and Justice* (1978) 263, at 274, cited in Kingston (1987) 11 NSWLR 404 at 424.

92 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [118].

93 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, at 284 [36], per McHugh J.

94 See for example *Harrison v Melhem* [2008] NSWCA 67. See also *Harrison v Melhem* [2008] NSWCA 67 Spigelman CJ at [3]: 'the principle of statutory interpretation [that Parliament is presumed not to intend to abrogate common law rights] … is now of minimal weight. It reflects an earlier era when judges approached legislation as some kind of foreign intrusion. The scope and frequency of legislative amendment of the common law, including the common law relating to personal injury damages, has been both wide ranging and fundamental'.

1.4 TORTS REFORMS OF 2002–03

1.4.1 Background to reforms

The partial restatement or codification[95] of the law of torts carried out to a lesser or greater extent by all Australian jurisdictions over two years (2002–04), can best be compared to the *Insurance Contracts Act 1984* (Cth), which codified, *inter alia*, judge-made law in this area.

In order to properly comprehend Australian post-reform law, one needs to understand the background to the reforms. The immediate trigger for the legislative action was the public liability insurance crisis of 2001–02.[96] During this period, community groups, businesses, public authorities, medical practitioners, and other professionals experienced difficulty in obtaining public liability and professional indemnity coverage at reasonable premiums. Several factors contributed to the problem of availability and level of insurance. These included the terrorist attacks of 11 September 2001, the global slump in share prices, and the collapse of the HIH insurance group in August 2001,[97] which affected some 30 000 individuals, community groups, home owners, businesses, public authorities, volunteers, medical practitioners, and other holders of professional indemnity.[98] Many of those affected were unable to obtain replacement policies at reasonable premiums. The HIH collapse was essentially due to incompetence and mismanagement rather than wholesale fraud and embezzlement,[99] but the insurance industry blamed high levels of litigation for its difficulties.[100]

There was a community perception that personal injury litigation increased dramatically in the last two decades of the twentieth century,[101] that the law of negligence as applied in the courts was 'unclear and unpredictable', and that 'it has become too easy for plaintiffs in personal injury

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95 Compare *Civil Liability Act 2002* (Tas), s 3A(5): 'This Act is not a codification of the law relating to civil claims for damages for harm.'

96 Compare P Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 *Oxford Journal of Legal Studies* 393.

97 HIH Insurance Limited was a publicly listed company in Australia. Prior to its collapse in 2001, the HIH Group was the second-largest general insurer in Australia: <www.hih.com.au>.

98 Final Report of the HIH Royal Commission <www.hihroyalcom.gov.au/finalreport/index.htm> accessed 25 May 2014.

99 Final Report of the HIH Royal Commission <www.hihroyalcom.gov.au/finalreport/index.htm> accessed 25 May 2014.

100 Some of the blame was justified, for the Australian Law Reform Commission Report (1995, No 75), Costs Shifting—Who Pays for Litigation, noted, at [3.20], that insurance companies are major participants in litigation as defendants in personal injury and property damage claims. In 1995 these categories of claim constituted about 50 per cent of District and Supreme Court civil litigation in New South Wales, with a similar pattern evident in other states and territories. Available at <www.austlii.edu.au/au/other/alrc/publications/reports/75/ALRC75.html##ALRC75> accessed 25 May 2014.

101 In June 2002, 36 124 solicitors and barristers were practising in Australia. The total income of barristers increased by 36 per cent between 1998 and 1999 and had an annual average growth rate of 10.8 per cent. In New South Wales, where barrister practices represented 43.9 per cent of the Australian total, average barrister practice income was at $412 200. Australian Bureau of Statistics, 8667.0—Legal Practices, Australia, 2001–02, released on 25 June 2003. In June 2008 there were 3,869 barristers; average operating profit per barrister for a senior counsel was $580,900, with an average of $195,800 for a junior counsel. Of the $1.4b total income generated by barristers, 98.8 per cent ($1.4b) was derived from fee income, with personal injury law providing 21.7 per cent of total fee income, or $300.4m. Australian Bureau of Statistics 8667.0—Legal Services, Australia, 2007–08 released on 24 June 2009.

cases to establish liability for negligence', and that 'damages awards in personal injuries cases have been too high'.[102] Some judges were aware of the problem; for example, in *Tame v New South Wales* (2002) 211 CLR 317, McHugh J at 354 noted:

> I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall—perhaps it already has fallen—into public disrepute if it produces results that ordinary members of the public regard as unreasonable.

One of the cases credited with precipitating the insurance crisis was *Simpson v Diamond* [2001] NSWSC 925,[103] in which the trial judge awarded A$14 202 042 to Calandre Simpson, who was born in 1979 and suffered from athetoid cerebral palsy. It was held that Calandre's condition was caused by Dr Diamond, who attempted five times to deliver her with forceps before performing a caesarean section.[104] Dr Diamond was indemnified by United Medical Protection Ltd. Although two years later the New South Wales Court of Appeal reduced the original quantum of damages to $10 998 692 (*Diamond v Simpson (No 1)* [2003] NSWCA 67), on 3 May 2002 United Medical Protection Ltd, Australasian Medical Insurance Ltd, and MDU Australia Insurance Co Pty Ltd went into provisional liquidation citing the *Simpson* damages payout as the main factor. In the event, the majority of medical practitioners in New South Wales and Queensland found themselves without medical indemnity insurance.[105] The uninsured doctors threatened that they would cease to see private patients. In a country with a fee-for-service medical system, this would have led to a health care crisis.[106] Medical practitioners in all jurisdictions, particularly those practising in such high-risk areas as obstetrics and neurosurgery, were also making decisions to prematurely retire from practice or to move to areas less prone to claims for damages.[107]

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102 D Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence Report*, at [3.5] (Ipp Report). The Second Report incorporating the First Report was released on 10 October 2002: see <archive.treasury.gov.au/documents/1200/PDF/Par_4_Reforms.pdf> accessed 25 May 2014.

103 For a detailed analysis of the case and damages awarded, see H Luntz, 'Damages in Medical Litigation in New South Wales' (2005) 12 *Journal of Law and Medicine* 280.

104 In 2006, CS Gibson, AH MacLennan, PN Goldwater, EA Haan, K Priest K and GA Dekker published a study, 'Neurotropic Viruses and Cerebral Palsy: Population Based Case-Control Study' (2006) 332 *British Medical Journal* 7 6–80, which shows a significant association between the presence of neurotropic viral nucleic acids in the blood of newborns and the subsequent diagnosis of cerebral palsy. According to the study, the risk of cerebral palsy is nearly doubled with an in-utero exposure to herpes group B viruses; though it may require other factors, such as genetic susceptibility to infection and inherited thrombophilia or, *inter alia*, growth restriction or prematurity—for the brain damage and subsequent cerebral palsy to occur. None of these factors seems to be associated with the conduct of delivery, negligent or otherwise.

105 At the time, 32 000 doctors, constituting approximately 60 per cent of the nationwide market were insured with the UMP. Andrew Webster, 'Australian Doctors Down Tools', *BBC News* (30 April 2002) available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1959303.stm> accessed 25 May 2014). In 2001, St Paul International Insurance Co Ltd (UK), the major underwriter of medical defence organisations, withdrew from the Australian market.

106 For a further discussion see: ST Masada, 'Australia's 'Most Extreme Case': A New Alternative for US Medical Malpractice Liability Reform' (2004) 13 *Pacific Rim Law & Policy Journal* 163.

107 Apparently, in April 2002 the typical annual premium for a neurosurgeon or obstetrician was A$100 000. A Webster, 'Australian Doctors Down Tools', *BBC News* (April 30, 2002), available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1959303.stm> accessed 16 January 2014; compare H Luntz, 'Medical Indemnity and Tort Law Reform' (2003) Journal of Law and Medicine 1–9.

The immediate response to the general insurance and professional indemnity crisis by the federal and state governments was to commission two reports. At the request of the Australian Health Ministers' Advisory Council, the Victorian Law Reform Commissioner, Professor Marcia Neave, produced a report titled *Responding to the Medical Indemnity Crisis: an Integrated Reform Package*,[108] which recommended *inter alia* capping damages; improving courts' usage of expert witnesses; changes to limitation of action periods; thresholds for compensable injuries; and the institution of structured settlements. She also recommended that apologies following 'adverse events' caused by medical treatment, rather than the patient's underlying condition, should not be regarded as an admission of fault.

On 30 May 2002, at a Ministerial Meeting on Public Liability, ministers from the Commonwealth, state and territory governments jointly agreed to appoint a panel to examine and review the law of negligence, including its interaction with the *Trade Practices Act 1974 (Cth)*. The panel was chaired by the Honourable Justice Ipp, at the time an Acting Judge of Appeal, Court of Appeal, Supreme Court of New South Wales and a Justice of the Supreme Court of Western Australia; panel members were Peter Cane, Professor of Law in the Research School of Social Sciences at the Australian National University;[109] Dr Don Sheldon, Medical Practitioner and the Chairman of the Council of Procedural Specialists; and Mr Ian Macintosh, Mayor of Bathurst City Council in New South Wales and the Chairman of the NSW Country Mayors' Association. The panel consulted widely with lawyers, doctors, professional and voluntary organisations, insurance companies, community associations, and other interested parties. Its report, titled *Review of the Law of Negligence Report* and known as the Ipp Report,[110] recommended partial codification of, and far-ranging changes to, the law of negligence and the law of damages, to be contained in a single statute to be enacted in each jurisdiction. Among the recommended changes were:

- alteration of tests for foreseeability of a risk of harm and duty to take precautions with regard to obvious risks;[111]
- modification of tests for standard of care for professionals;[112]

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108 M Neave, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package*, 18 September 2002.

109 In his *The Political Economy of Personal Injury Law*, The Mcpherson Lecture Series, vol 2, University of Queensland Press, 2007, at 30, Professor Cane hypothesised 'that what motivated the Ipp Review was not dissatisfaction with the balance of responsibility and risk embedded in the basic principles of negligence law, but rather with the judiciary's politics of responsibility as manifested in their interpretations and applications of negligence law'.

110 Available at <www.amatas.com.au/assets/ipp_report.pdf> accessed 25 May 2014.

111 *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), Pt 1A, Div 4 (obvious risks), s 5L, hereinafter referred to as *Civil Liability Act 2002* (NSW); *Wrongs Act 1958* (Vic), ss 53 (meaning of 'obvious risk'), 54 (voluntary assumption of risk); *Civil Liability Act 2003* (Qld), Ch 2, Pt I, Div 3 ss 13–16 (obvious and inherent risks), ss 19 (dangerous recreational activities), 21 (medical duty to warn of all risks); *Civil Liability Act 2002* (WA), Pt 1A, Div 4, 5E-5K; *Civil Liability Act 1936* (SA), Pt 6, Div 3, ss 36–39; *Civil Liability Act 2002* (Tas), Pt 6, Div 4 and Div 5, ss 15–20.

112 *Civil Liability Act 2002* (NSW), Div 6, s 21; *Wrongs Act 1958* (Vic), ss 59–60; *Civil Liability Act 2003* (Qld), ss 21 (medical duty to warn of all risks), 22 (standard of care for professionals); *Civil Liability Act 1936* (SA), Pt 6, Div 4, ss 40–41; *Civil Liability Act 2002* (Tas), Pt 6, Div 6, ss 21–22.

- introduction of more stringent rules relating to contributory negligence[113] and voluntary assumption of risk;[114]
- waivers of liability in relation to recreational activities;[115]
- statutory restrictions on circumstances in which damages for pure mental harm can be awarded;[116]
- imposition of caps on damages for personal injury claims (past and future economic and non-economic loss);[117]
- introduction of structured settlements;[118]
- exclusion of civil liability for wrongful acts and omissions when done in good faith by good samaritans and volunteers;[119] and
- provision of a statutory policy defence for public authorities.[120]

The new statutory principles are applicable to any claim for damages for personal injury or death resulting from negligence, regardless of whether the claim is brought in tort, contract, equity, or under a statute or any other cause of action.[121] In this sense, the Australian law of

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113 *Civil Liability Act 2002* (NSW), Pt 1A, Div 8, ss 5R–5T; *Civil Law (Wrongs) Act 2002* (ACT), Pt 4.4, s 47; *Personal Injuries (Liabilities and Damages) Act* (NT), Pt 3, ss 14–17; *Wrongs Act 1958* (Vic), ss 62–63 *Civil Liability Act 2003* (Qld), Ch 2, Pt 1, Div 6, ss 23–24; *Civil Liability Act 2002* (WA), Pt 1A, Div 5, 5K-5L; *Civil Liability Act 1936* (SA), Pt 7, ss 44–50; *Civil Liability Act 2002* (Tas), Pt 6 Div 7, s 23; *Wrongs Act 1954* (Tas), s 4.

114 *Civil Liability Act 2002* (NSW), Pt1A, Div 4, ss 5F–5I; *Wrongs Act 1958* (Vic), s 54; *Civil Liability Act 2003* (Qld), Ch 2, Pt 1, Div 3, ss 13–16; *Civil Liability Act 2002* (WA), Pt 1A, Div 6, 5M-5P; *Civil Liability Act 1936* (SA), ss 37, 38, 47(6); *Civil Liability Act 2002* (Tas), Pt 6, Div 4, ss 15–17.

115 *Civil Liability Act 2002* (NSW), Pt 1A, Div 5, ss 5K-5N; *Wrongs Act 1958* (Vic), Pt IX, s 36(1)(c); *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 23(1); *Civil Liability Act 2003* (Qld), Ch 2, Pt 1, Div 4, ss 17–19; *Civil Liability Act 2002* (WA), Pt 1A, Div 4, ss 5H, 5I, 5J; *Fair Trading Act 1987* (SA) s 42; *Fair Trading Regulations 2010* (SA) r 5; *Civil Liability Act 2002* (Tas), Pt 6, Div 5, ss 18–20; *Consumer Affairs and Fair Trading Act* (NT), s 48.

116 *Civil Liability Act 2002* (NSW), Pt 3, ss 27–33; *Wrongs Act 1958* (Vic), ss 73–75; *Civil Liability Act 2002* (WA), Pt 1B, 5Q-5T; *Civil Liability Act 1936* (SA), s 53; *Civil Liability Act 2002* (Tas), Pt 8, ss 29–35; *Civil Law (Wrongs) Act 2002* (ACT), Pt 3.2, ss 32–36.

117 *Civil Liability Act 2002* (NSW), Pt 2, Div 2, ss 12–15C; *Health Care Liability Act 2001* (NSW); *Wrongs Act 1958* (Vic), Pt VB; *Civil Liability Act 2003* (Qld), Ch 2, Pt 5 ss 49A, 49B, Ch 3, Pt 3, ss 53–62; *Civil Liability Regulation 2003* (Qld) rr 5A, 6, 6B, 7, Sch 3 and 4; *Civil Liability Act 2002* (WA), Pt 2, Div 2, ss 9–13; *Fair Trading Act 1987* (SA) s 42; *Fair Trading Regulations 2010* (SA) r 5; *Civil Liability Act 2002* (Tas), Pt 7, ss 24–28E; *Civil Law (Wrongs) Act 2002* (ACT), ss 35(2), 98, 99, 107B(2), 107E(1), 127(1)(g)(ii), 139F(1), (2); *Personal Injuries (Liabilities and Damages) Act* (NT), ss 24–28.

118 *Civil Liability Act 2003* (Qld), Ch 3, Pt 4, ss 63–67; *Wrongs Act 1958* (Vic), Pt VC; *Civil Liability Act 2002* (WA), Pt 2, Div 4, ss 14–15; *Personal Injuries (Liabilities and Damages) Act* (NT), Pt 4, Div 6, ss 31–32; *Civil Liability Act 2002* (NSW), Pt 2, Div 7, ss 22–26; *Civil Liability Act 2002* (Tas), Pt 5, ss 7A–8.

119 *Personal Injuries (Liabilities and Damages) Act* (NT), ss 7, 7A, 8; *Civil Law (Wrongs) Act 2002* (ACT), ss 5–11B; *Civil Liability Act 1936* (SA) ss 74, 74A; *Volunteers Protection Act 2001* (SA) s 4; *Civil Liability 2002 (WA)*, Pt 1D, ss 5AB-5AD; *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA); *Law Reform Act 1995* (Qld), Pt 5, ss 15–16 (protects doctors and nurses in circumstances of emergency); *Civil Liability Act 2003* (Qld), Pt 3, Div 2, ss 38–44; Pt 1 Div 7, ss 25–27(exempt emergency service agencies in circumstances of emergency); *Wrongs Act 1958* (Vic), Pts VIA, IX; *Civil Liability Act 2002* (NSW), Pts 8, 9, ss 55–58, 59–66; *Civil Liability Act 2002* (Tas), Pt 8A (good samaritans), 8B (food donors) and 10 (volunteer protection) ss 35A-35F, 44–49; *Commonwealth Volunteers Protection Act 2003* (Cth).

120 *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), Pt 5 (Sch 1 [5]); *Wrongs Act 1958* (Vic), Pt XII ss 79–87; *Civil Liability Act 2003* (Qld), Pt 3, Div 1, ss 34–37; *Civil Liability Act 2002* (WA), Pt 1C, ss 5W-5Z; *Civil Liability Act 1936* (SA), s 42 (road authority or public body responsible for roads); *Civil Liability Act 2002* (Tas), Pt 9, ss 36–43; *Civil Law (Wrongs) Act 2002* (ACT), Ch 8, ss 108–114.

121 Ipp Report at [2.1]–[2.3].

damages for personal injury is moving towards the civil law concept of the law of obligations. At the same time, the new statutory regime involves primarily the law of negligence, thus highlighting the distinction between intentional fault-based torts and non-intentional fault-based torts (see Chapter 2, Damages, for further discussion of this point).[122]

1.4.2 The process of implementation

Encouraged by community groups, professional organisations, and insurance companies, in 2002–03 each Australian legislature participated in implementing a series of reforms to the substantive law of negligence and to the law of damages for negligently occasioned injury. The partly codified and modified common law principles and doctrines of negligence were accompanied by changes to the law of damages. The legislature did not intend all the new statutory provisions to form an 'exclusive' source of law; rather, the intention was to modify and supplement the existing common law regime.[123] Admittedly, the *Civil Liability Acts*, including amendments to the *Wrongs Act 1958* (Vic), were intended 'to limit their ambit to particular areas of tort law',[124] namely, negligence;[125] nevertheless, not only the law of negligence, but the law of torts in general, has been changed, and through the judicial process of statutory interpretation and construction, is in the process of profound transformation.

The Ipp Report recommended that a similar single statute be enacted by each Australian jurisdiction. However, Australia is a federation comprising six states and two territories. Under the Commonwealth Constitution,[126] the legislative power to administer and regulate the common law, including torts and contract law, is vested in state and territory parliaments. The federal government can only exercise powers conferred upon it by the federal Constitution or by referral from the states under special constitutional arrangements. Since the states were not asked to cede the relevant powers to the federal parliament (and did not volunteer to do so), the Commonwealth lacked legislative power to validly enact a torts reform statute that would bind the states.[127] Consequently, each jurisdiction has enacted its own statutory code of tortious liability. It should be noted that in every Australian jurisdiction, torts reform legislation was enacted with the support of the governing and the opposition parties, and each reforming state and territory government was subsequently re-elected.

Although several existing common law principles have been statutorily entrenched across all states and territories, other rules were legislatively modified or significantly changed in some jurisdictions but not in others. Moreover, while the wording of certain legislative provisions has been replicated in all or most Australian jurisdictions, there are marked differences in the drafting of others. As a result, despite the commonality of features, the common law of

122 *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107.

123 Hon Mr Carr, Second Reading Speech, Civil Liability Amendment (Personal Responsibility) Bill, New South Wales Legislative Assembly, Hansard, 23 October 2002 at 5765: 'The bill modifies particular aspects of the common law. It does not establish a complete code.'

124 P Handford, 'Intention, Negligence and the Civil Liability Acts' (2012) 86 *Australian Law Journal* 100 at 101–102.

125 P Handford, 'Intention, Negligence and the Civil Liability Acts' (2012) 86 *Australian Law Journal* 100 at 102.

126 *Commonwealth of Australia Constitution Act 1900* (UK).

127 Under s 122 of the Commonwealth Constitution, the Federal Parliament has plenary powers to make laws for the territories to the extent and on the terms which it thinks fit. The Commonwealth, however, chose not to exercise these powers in the area of torts reform.

negligence, which until 2002 was relatively uniform throughout Australia, is fragmenting into eight discrete systems.[128]

This means that in cases where in issue is an interpretation or an approach to a particular reform provision, the opinion of the High Court will bind the courts of the originating jurisdiction as well as jurisdictions that have identical or similar/corresponding legislative provisions. High Court decisions concerning common law doctrines will bind all jurisdictions, except where a specific state or territory legislation provides otherwise. Strictly speaking, the Australian doctrines of precedent and *stare decisis* have operated in the same way under the pre-reform regime; the difference now is in the scale and diversity of statutes and provisions.

1.4.3 Scope of the reforms

As a general rule, work-related injuries covered under various workers compensation schemes,[129] personal injuries which fall within the purview of transport accident compensation schemes,[130] and injuries caused by tobacco products or dust-related disease are excluded from the scope of the legislation.[131] Some jurisdictions have introduced a statutory defence of 'illegal activity', which may diminish or prevent the award of damages;[132] others preclude compensation for injury or death sustained while the claimant was engaged in conduct constituting a serious offence.[133] Although the diverse pre-existing statutory compensation schemes[134] that exist in

128 *Civil Liability Act 2002* (NSW); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 2003* (Qld); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (WA); *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA); *Wrongs Act 1958* (Vic); *Personal Injuries (Liabilities and Damages) Act* (NT); *Competition and Consumer Act 2010* (Cth) as amended.

129 *Civil Liability Act 2002* (Tas), s 3B(3) and (4); *Civil Liability Act 2002* (WA), s 3A(1), Item 3 of Table; *Wrongs Act 1958* (Vic), s 28C(2)(d); *Civil Liability Act 1936* (SA), s 4(4); *Civil Liability Act 2003* (Qld), s 5(1)(a) and (b); *Civil Liability Act 2002* (NSW), s 3B(1)(f); *Civil law (Wrongs) Act 2002* (ACT), ss 41(2), 50(2)(a) & (3), 93(2), 107B(4)(c), 108(3)(b), 209; *Personal Injuries (Liabilities and Damages) Act* (NT), s 4(3).

130 *Personal Injuries (Liabilities And Damages) Regulations* (NT), r 3; *Civil Liability Act 2002* (Tas), s 3B(2); *Civil Law (Wrongs) Act 2002* (ACT), ss 107B(4)(b), 108(3)(a), 209; *Civil Liability Act 2002* (NSW), s 3B(1)(d) and (e); *Wrongs Act 1958* (Vic), s 28C (2)(b); *Civil Liability Act 2002* (WA), s 3A(1), Item 2 of Table. *Civil Liability Act 1936* (SA), s 43(4)(a)(i), excludes liability in certain cases involving criminal conduct 'arising from a motor accident (whether caused intentionally or unintentionally)'.

131 *Civil Liability Act 2002* (Tas), s 3B(1)(b); *Civil Liability Act 2002* (NSW), s 3B(1)(b) and (c); *Civil Liability Act 2002* (WA), s 3A(1), Items 4 and 6 of Table; *Wrongs Act 1958* (Vic), s 28IF(2)(a) and (b); *Civil Liability Act 2003* (Qld), s 5(1)(c) and (d); *Personal Injuries (Liabilities and Damages) Act* (NT), s 4(3)(c); South Australia does not provide for this kind of exclusion.

132 *Wrongs Act 1958* (Vic), s 14G(2)(b); depending on interpretation, *Civil Liability Act 2002* (WA), s 3A(1), Item 1 of Table.

133 *Civil Liability Act 2002* (Tas), ss 5A–6 (recovery by criminals); *Civil Liability Act 2002* (NSW), s 53 (damage limitations apply even if self-defence not a reasonable response) and s 54 (criminals not to be awarded damages); *Civil Liability Act 2003* (Qld), s 45(1) (criminals not to be awarded damages); *Civil Law (Wrongs) Act* (ACT), s 94 (an indictable offence); and, depending on interpretation, *Civil Liability Act 2002* (WA), s 3A(1), Item 1 of Table. In South Australia, under the *Civil Liability Act 1936* (SA), s 43(1)(a) and (4)(c), the court has to be, *inter alia* 'satisfied beyond reasonable doubt that the accident occurred while the injured person was engaged in conduct constituting an indictable offence'.

134 For example: *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Seafarer's Rehabilitation and Compensation Act 1992* (Cth); *Workers' Compensation Act 1951* (ACT); *Workers Compensation Act 1987* (NSW); *Accident Compensation Act 1985* (Vic); *Transport Accident Act 1986* (Vic); *Workers' Compensation and Rehabilitation Act 2003* (Qld); *Workers Rehabilitation and Compensation Act 1986* (SA);; *Workers Rehabilitation and Compensation Act 1988* (Tas); *Motor Vehicle (Third Party Insurance) Act 1943* (WA); *Workers' Compensation and Injury Management Act 1981* (WA); *Work Health Administration Act 2011* (NT); *Workers Rehabilitation and Compensation Act* (NT).

each Australian jurisdiction were not directly affected by the tort reforms, they have influenced the choice of reform models.

Coincidentally with partial codification of negligence and damages law, long-mooted reforms of defamation law were undertaken. The new defamation provisions, unlike the statutory changes to damages and negligence laws, are mostly homogeneous throughout Australia.

The post-reform fragmentation of the law of torts has important implications for the choice of laws. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 87 (see extract in Case Book) Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, in a joint judgment (at 544 [102]), determined that *lex loci delicti*, the law of the place of the tort, 'should be applied by courts in Australia as the law governing all questions of substance to be determined in a proceeding arising from an intra-national tort.' The court added that 'laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws'. This means that, as a general rule, the laws governing compensation are those of the state or territory in which the tort was committed.

For example, under the *lex loci delicti* doctrine, if a vehicle collision between two Queensland drivers takes place in Western Australia, the Queensland court will have to apply not its own laws, but those of Western Australia. Since the law of torts is no longer governed in its entirety by a national common law, lawyers must be aware of and understand its variants, similarities, and rules as they apply in all Australian jurisdictions and endeavour to develop a common approach to resolving like cases.

To sum up, in the twenty-first century, Australian courts have started to re-interpret the law of torts in the light of the principles of autonomy,[135] the principle of cohesion and integrity of law[136] woven into, as it were, the principles and rules codified through the torts reform. The process is intense, multifaceted, and not uncontroversial, and makes the Australian torts jurisprudence the most fascinating and intellectually stimulating area of the law.

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135 For example *Cole v Sth Tweed Heads Rugby Club* (2004) 217 CLR 469; *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47.

136 *Sullivan v Moody*; *Thompson v Connon* (2001) 207 CLR 562.

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