

## THE (SELF) REGULATION OF LAW: A SYNERGISTIC MODEL OF TORT LAW AND REGULATION

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### I INTRODUCTION

There appears to be a consensus that the law of negligence is out of balance. There is a sense abroad that tort law in general, and the tort of negligence in particular, has been allowed to drift into conflict with major social institutions, including insurance markets, and with basic community values. A starting point for the Panel appointed to review the law of negligence was that 'the present state of the law imposes on people too great a burden to take care of others and not enough of a burden to take care of themselves'.<sup>1</sup> This finds expression in claims that the tort of negligence has become a form of social welfare, or that somehow it has become associated with a form of 'strict liability'.<sup>2</sup>

A recent report on the insurance crisis made just this claim when it asserted that one possible area of reform was to 'rewrite tort law to bring the standard of negligence back to a reasonable person's approach, and away from strict liability'.<sup>3</sup> There appears to be a general view that tort law is an institution in society which needs to be reintegrated into the legal system to ensure that the values it upholds accord with those of the 'broader community'.<sup>4</sup>

The perception that there is an uncontrolled expansion in tort law is wrong and unhelpful. There are, of course immediate and practical problems caused by

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1 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) [1.24]. Many of the *Review of the Law of Negligence Final Report's* recommendations are proposed to be implemented in the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW).

2 Chief Justice Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432.

3 Geoff Atkins, Estelle Pearson and Peter Rose, *Public Liability Insurance Analysis for Meeting of Ministers 27 March 2002* (2002) Trowbridge Consulting, 45, <[http://www.trowbridge.com.au/4A2568A90009B04D/0/837DD1F7E6796A68CA256B95000A72AD/\\$FILE/R\\_Public+Liability+Final.pdf?OpenElement](http://www.trowbridge.com.au/4A2568A90009B04D/0/837DD1F7E6796A68CA256B95000A72AD/$FILE/R_Public+Liability+Final.pdf?OpenElement)> at 14 November 2002.

4 See 'Terms of Reference: Principles-Based Review of the Law of Negligence', Panel of Eminent Persons, above n 1, ix–xi. The Terms of Reference state that '[t]he award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another'.

the current trough in the insurance market and there seems little doubt that the cost and/or availability of insurance is a problem for some, perhaps even broad, sections of the community.<sup>5</sup> What I argue is that these problems are not in any real sense 'caused' by tort law. Rather, they are the result of the interaction of a broad matrix of institutional and legal concerns. These include changes in regulation and in understandings of institutional responsibility, for example expectations of markets, regulators and of significant public and private institutions responsible for the delivery of goods and services in the community. The problems generated by these institutional and regulatory changes should be addressed with reference to this matrix of factors and not via a surrogate — tort law.

The current focus on tort reform has three major consequences. First, some of those injured, or who suffer loss, caused by 'negligent' conduct will receive less or no compensation. This has distributional consequences, which affect those injured and their families who often bear the ultimate responsibility of long-term care for them. Secondly, the Commonwealth government will bear more of the costs of injury as more people who would have recovered compensation fall back onto the health care and social security systems.<sup>6</sup> Thirdly, the current focus allows special interest groups such as insurers and industry groups to seek law reform that will accrue to their benefit. This is in effect a form of rent-seeking, which will not benefit the community as a whole.

The impacts of tort law reform will be real and important. They will not however resolve the underlying concern in the community about the meaning of concepts such as 'responsibility' — applied to either institutions or individuals. This broader issue can only begin to be addressed if policy makers reject the view that tort law reform can be used either to achieve particular public policy outcomes or to alleviate particular social problems. In its place there needs to be a consideration of how the law of torts interacts with other bodies of law to produce particular outcomes.

This shift in focus is important because it requires an analysis of the way in which bodies or categories of law interact to produce a system of law. In particular it requires an analysis of how the legal system uses forms of self-regulation to regulate the interaction between categories of law. This is the question of how particular sets of rules in tort or contract or regulatory law create a framework that regulates the interaction between these categories of law.

The idea that the interaction between rules in tort law and rules in contract, or between rules in tort law and rules in regulatory law, can establish a framework for the operation of tort law is important for another reason. One of the signal features of the current tort law reform debate is the view that tort law does not appear to have an established framework or boundaries. It is not just that tort law has breached its boundaries — it is almost as though there are no boundaries for this category of law. This view seems to be supported by the difficulty that the

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5 Atkins, Pearson and Rose, above n 3, 24–30.

6 See text accompanying nn 116–18 below.

High Court has had in providing any overarching set of principles to guide courts and others in the application of tort law. It is this lack of an accepted framework for tort law that creates the space for broad ranging political discussion of the role of tort. It is this space that Chief Justice Spigelman used to characterise tort law as a 'last outpost' of the welfare state.<sup>7</sup>

The purpose of this article is to develop a multidimensional model describing the interaction between tort law and other categories of law. The article is made up of four parts. The first reviews the current, single-dimensional account of tort law. By reviewing some recent developments in regulatory theory this part shows why this model of tort is inadequate and why there is a need to develop a more complex model of the way in which tort law is integrated into the legal system. The second and third parts develop a multidimensional model of tort law. In these parts I argue that there is a synergistic relationship between tort law and regulation. The fourth and final part uses this synergistic model of tort law to develop a critique of some of the major proposals for tort law reform. It also sets out to show how to advance the debate about the appropriate form of tort law reform.

## II THE NEED FOR A NEW MODEL OF THE LEGAL SYSTEM

Much of the current debate about tort law implicitly adopts a one-dimensional model of the legal system. The claim that tort law has adopted a form of 'strict liability' and is out of balance with current community expectations is based upon such an analysis. The proposition is that it is possible to analyse concepts about responsibility as if tort law were the only body of law which has an impact on the way that we understand this concept. This is the basis for the claim that tort law reform will resolve the insurance crisis by pursuing the public policy goal of insisting that individuals exercise greater levels of personal responsibility.

A one-dimensional model of law is built around a particular view about the construction of the legal system. It assumes that there are particular severable categories of law (for example tort or contract or regulatory law) that can be analysed as if they operate independently of each other. Within this model there will be disputes about the appropriate boundaries of particular areas of law. The search for boundaries is the search for a way of deciding which rule in which category of law should take precedence and apply to a particular problem. It is one-dimensional in the sense that it is the search for the particular category of law that should supply the rule in the particular area where categories overlap.<sup>8</sup>

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<sup>7</sup> Spigelman, above n 2.

<sup>8</sup> There is a vast body of literature dealing with these boundary concerns: see, eg, Hugh Collins, *Regulating Contracts* (1999) 41–6; Basil Markesinis and Simon Deakin, *Tort Law* (4<sup>th</sup> ed, 1998) 7–18, 113–18; John G Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) 203–7. For an example of judicial reference to these concerns, see *Astley v Austrust Ltd* (1999) 197 CLR 1. See Harold Luntz and David Hamby, *Torts Cases and Commentary* (5<sup>th</sup> ed, 2002) [6.1.3] for a review of the commentary on the decision in this case. See generally Peter Birks (ed), *The Classification of Obligations* (1997).

This is the foundation that supports the practice of analysing complex social problems with reference to the structure of rules in a particular category of law.

Hugh Collins has developed a sustained critique of a one-dimensional model of contract law:

Yet my argument has been that private law is undergoing a transformation in its discourses. The change in the pattern of private law reasoning has resulted most immediately from an inevitable clash with the discourses of the economic and social regulation that were designed to address the inadequacies of private law as a form of distributive regulation caused by its lack of differentiation between the social contexts of contractual practices. The result of the collision between discourses has been the reconfiguration of private law reasoning, so that instrumental or policy concerns with its normative orientation become the dominant force for its evolutionary trajectory.<sup>9</sup>

One of the themes developed by Collins is the notion that ‘discourses of the economic and social regulation’ have affected the core content of the law of contract. The law of contract and discourses of regulation have interacted to reorient the law of contract toward different goals. It is this movement toward a multidimensional account of private categories of law that this article seeks to develop.

As Collins has argued, one of the primary challenges to categories of private law, including tort law, is the ubiquity of regulation. Greater attention to the problems of using regulation to achieve public policy outcomes has highlighted the need for a better understanding of the legal system as a whole. There are two ways in which the need for a better understanding of the legal system has become apparent.

On the one hand there has been a movement away from predominantly direct forms of regulation. The failure of these forms of regulation has highlighted the complexity of the problem of deploying law to achieve public policy goals.<sup>10</sup> In general terms, direct forms of command and control regulation have often failed to achieve expected outcomes. There are many reasons for this, including the development of unnecessarily complex rules, over-regulation of activities, the prevalence of ‘creative compliance’ and a lack of resources for regulatory agencies to enforce the law.<sup>11</sup> In simpler terms, the problems with command and control regulation have reflected the problems associated with a one-dimensional model of the legal system. On this basis the problem with command and control regulation is that particular sets of regulatory laws implementing this form of regulation have often been designed to operate as independent entities within the broader legal system.

9 Collins, above n 8, 53.

10 See, eg, Gunther Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in Robert Baldwin, Colin Scott, and Christopher Hood (eds), *A Reader on Regulation* (1998) 389, 406–14. Teubner argues that ‘[t]he effect of regulatory law must be described in far more modest terms as the mere *triggering of self-regulatory processes*, the direction and effect of which can hardly be predicted’ (emphasis in original). For a practical example of the complexity of deploying law to achieve public policy goals, see Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1998).

11 Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (2002) 8–12. See also Gunningham and Grabosky, above n 10, 5–11.

On the other hand there is now broad agreement that there is no such thing as an unregulated set of social practices.<sup>12</sup> The idea of 'deregulation' was debunked as it became clear that it was part of regulatory change and not the removal of regulation. It involved both a change in the style of regulation, that is, the rejection of primary reliance on direct regulation, and a change in the goals of regulation. The preference given to the goal of establishing the conditions for markets based on freedom of competition yielded to the need to recognise other social, economic and political goals.<sup>13</sup>

It is against this background that the concept of deregulation made space for the development of more subtle, complex forms of self-regulation. This has found expression in a renewed focus on the potential for self-regulation to achieve public policy goals through a combination of direct and indirect approaches to regulation.<sup>14</sup>

One good example of the move to adopt more subtle, complex forms of self-regulation is the introduction of the *Financial Services Reform Act 2001* (Cth) ('FSRA'). This Act introduced a complex body of regulation dealing with the financial services and markets. It includes provisions which, amongst other things, establish financial markets, license financial service providers, set up disclosure requirements for financial services licensees, and set out disclosure requirements for financial product statements.<sup>15</sup> The object of the FSRA is set out in s 760A of the *Corporations Act 2001* (Cth). This lengthy provision states that the main object of chapter 7, which was substituted by the FSRA, is to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products ...

The financial services reform package introduced a complex collection of self-regulatory mechanisms to regulate financial markets. The object of this body of regulation is to balance a number of competing objects concerned with both the efficiency and transparency of markets and confident and informed decision making by consumers. This package of reforms stands in stark contrast to the proposals for tort law reform. The approach to financial services regulation is

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12 See, eg, Teubner, above n 10, 416–20. At a minimum the market as a complex, self-regulating system needs be supported by 'general rules to guarantee the basic conditions of freedom of competition': at 419. This requires the 'absolute primacy of competition over other economic, social and political goals': at 419–20.

13 For a very influential account of this change see Ian Ayres and John Braithwaite, *Responsive Regulation Transcending the Deregulation Debate* (1992) 3–18. See also Gunningham and Grabosky, above n 10, 5–11 and Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329.

14 See, eg, Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets Report* (2000) <<http://www.selfregulation.gov.au/publications/TaskForceOnIndustrySelf-Regulation/FinalReport/contents.asp>> at 14 November 2002. 'The Government has an objective of lowering regulatory costs on business and improving market outcomes for consumers, by encouraging self-regulation, where this is the most effective option for addressing an identified problem': Executive Summary.

15 *Corporations Act 2001* (Cth) s 760B ('Outline of Chapter').

pluralistic and complex. The high standards of conduct expected of market participants and the rights given to consumers to claim compensation for misleading or deceptive conduct are not treated as a form of 'social welfare'.<sup>16</sup>

One approach which regulatory theorists have developed in order to refine our understanding of the complexity of regulation is the concept of 'regulatory space'. One theorist has explained the notion of regulatory space in the following way:

The chief idea of the regulatory space metaphor is that resources relevant to holding of regulatory power and exercising capacities are dispersed and fragmented. These resources are not restricted to formal, state authority derived from legislation or contracts, but also include information, wealth and organisational capacities. The possession of these resources is fragmented among state bodies, and between state and non-state bodies. The combination of information and organisational capacities may give to a regulated firm considerable informal authority, which is important in the outcome even of formal rule formation or rule enforcement processes. Put another way, capacities derived from the possession of key resources are not necessarily exercised hierarchically within the regulatory space, regulator over regulatee.<sup>17</sup>

The characteristic feature of 'regulatory space' is the dispersal of 'regulatory resources' — information, authority, and organisational capacities. This has resulted in the development of a wide range of strategies to achieve public outcomes. These strategies have included novel approaches to the process of standard setting, enforcement and monitoring and to the range of sanctions available for regulatory breach.<sup>18</sup>

The development of this more subtle understanding of the problems of regulation has however profoundly affected our understanding of the legal system. A one-dimensional model of the legal system provides little insight into the web of law surrounding and supporting relationships, which are the targets of regulation. The formal set of rules seeking to regulate conduct jostles alongside a range of bodies of law, which help to support relationships between those engaged in the relevant conduct. A body of regulatory law will have to be integrated with basic law of contract, tort, elements of public law and corporate law, to mention only some.<sup>19</sup>

The challenge created by these new approaches to regulation is to develop a framework for describing the operation of the legal system.<sup>20</sup> It is no longer enough to describe the outlines of particular categories of law such as tort or

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16 *Corporations Act 2001* (Cth) ss 1041H–I. See Spigelman, above n 2, for reference to negligence as a form of 'social welfare'.

17 Scott, above n 13, 330.

18 See generally *ibid*; Ayres and Braithwaite, above n 13; Parker, above n 11; and Gunningham and Grabosky, above n 10. In relation to the sanctions in regulation, see Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002).

19 See, eg, Parker, above n 11, 57–61. 'A model for corporate social responsiveness' describes the process by which organisations can integrate public policy goals into their own governance structures. This process embeds regulation into the matrix of laws and practices, which support the capacity of organisations to make this change.

20 This is the broad project pursued by Collins, above n 8, 53–5. The process by which the law of contract integrates economic and social regulation is described as 'productive disintegration'.

corporate law. It is necessary to describe ways in which these categories interact to produce a 'system' of law. It is only in this way that it is possible to begin to gain an understanding of how the full cross-section of particular laws will affect, and be affected by, the conduct which public policy makers are seeking to regulate. A better model of the legal system will not, by itself, help policy makers resolve all, or even the biggest, regulatory problems. Equally though, it is clear that without a better model of the legal system these regulatory problems will be significantly harder both to define and resolve.

### A Framing the Outlines of a 'Synergistic' Model of Tort

The tort of negligence has the appearance of a sprawling empire that continues to expand throughout the legal system and across all sectors of society.<sup>21</sup> There are some, following this metaphor, who would argue that this particular empire is crumbling in upon itself. On the one hand it is unable to sustain itself because its rules and principles are simply too ambiguous and vague to provide sufficient guides for conduct.<sup>22</sup> On the other hand there is no coherent rationale or principle which binds together the very broad range of relationships where tort has established a presence.<sup>23</sup> In simple terms, the tort has expanded too far and lacks the glue that would bind the particular instances in which it applies into any coherent body of law.

On one view this is an inherent feature of the tort of negligence. This tort is a category of law characterised by an iterative process of reasoning. This process of reasoning moves from particular cases to general principles through a process of inductive reasoning. It was this process of reasoning Lord Atkin used to generate the 'neighbour' principle in *Donoghue v Stevenson*.<sup>24</sup> The general principle is then applied to specific sets of facts through a process of deductive reasoning. This stage of the process involves the assertion that wherever there is a 'neighbour' relationship there will be a duty of care. In *Donoghue v Stevenson*, once the relationship could be described as a neighbour relationship there was a basis for finding that the defendant owed the plaintiff a duty of care. It is this process of reasoning which has supported the expansion of the tort of negligence to new kinds of relationships.

21 See, eg, *Hill (t/as RF Hill & Assoc) v Van Erp* (1997) 188 CLR 159, 223 (the potential for supplanting by the tort of negligence of other established principle).

22 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 215–16 (McHugh J outlining the importance of predictability in the law of negligence). See generally Martin Davies, 'Common Law Liability of Statutory Authorities: *Crimmins v Stevedoring Industry Finance Committee*' (2000) 8 *Torts Law Journal* 133 (the difficulties encountered by the High Court in formulating the approach to deciding upon the existence of a duty of care).

23 Spigelman, above n 2, 434 ('The traditional function of the law of negligence ... of distributing losses that are the inevitable by-product of modern living ... appears to have reached definite limits as to what society is prepared to bear'). See also 'Terms of Reference: Principles-Based Review of the Law of Negligence', Panel of Eminent Persons, above n 1, ix–xi; Luntz and Hambly, above n 8, 19–20 (*Lisle v Brice* (2001) 34 MVR 206, [4]–[5] (Thomas JA), commenting on the development of a 'blame-conscious community').

24 *Donoghue v Stevenson* [1932] AC 562.

The problem with this iterative process of reasoning is that it is at once too open and too closed. On the one hand the neighbour principle is just too 'opaque'<sup>25</sup> to provide any secure indication of when the tort of negligence should extend its coverage by recognising a duty of care.<sup>26</sup> On the other hand navigating through a wilderness of particular instances in negligence without any guiding principle has also proven to be unsatisfactory. In recent times the judges of the High Court have recognised the limitations of 'incrementalism' as a form of reasoning in negligence.<sup>27</sup>

The dichotomy between principles that are too general and empty and rules that are too specific and unprincipled appears to confirm a view that the tort of negligence cannot be dynamic, flexible *and* principled. However, the tort of negligence is only caught in this dichotomy so long as the interaction between the tort of negligence and other bodies of law is ignored. A multidimensional model of tort law focuses on the way that values and policies which are part of other areas of law, such as contract law and regulatory law, are integrated into the rules and principles that mark out where the tort of negligence will apply and where it will not.

A 'synergistic'<sup>28</sup> model of the tort of negligence is a particular way of developing a multidimensional model of tort law.<sup>29</sup> It provides a way of showing how the tort of negligence can combine with other categories of law in a way that allows each to function synergistically with the other. A synergistic model of tort law is founded on two steps in the process of reasoning to decide upon the existence of a duty to exercise reasonable care. Both of these steps are a ubiquitous and well-recognised part of the process of reasoning in tort law.

## B    The Space Occupied by Negligence

There are few who would disagree with Lord Atkin's basic proposition in *Donoghue v Stevenson* that the neighbour principle embodies elements which are common to all instances in which there is a duty to exercise care in negligence.<sup>30</sup>

25 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 416–18.

26 *Ibid* 416–19 (Kirby J, review of approaches taken to ascertaining a duty of care). See also *Sullivan v Moody* (2001) 183 ALR 404, 414 (the Full Court used a similar argument to criticise the use of proximity as a criterion of the existence of a duty of care).

27 The 'incremental approach' proposed by McHugh J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 217–18 was rejected by other members of the High Court, eg, at 253–4 (Gummow J stated that incremental reasoning suffers from a 'temporal defect'), at 273–5 (Kirby J), 302 (Hayne J), at 325–6 (Callinan J argued that the law should develop incrementally). Where incrementalism becomes a form of 'gradualism' there is a risk that tort reasoning will stagnate. For an argument that McHugh J adopts a form of incrementalism founded in principle and policy, see Prue Vines, 'The Needle in the Haystack: Principle in the Duty of Care in Negligence' (2000) 23 *University of New South Wales Law Journal* 35, 38–42, 47–55.

28 The idea of calling this model a 'synergistic' model draws on Chief Justice Gleeson's description of the relationship between statute law and common law as 'symbiotic' in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532.

29 For an example of multidimensional analysis of negligence that begins by providing an account of what judges do, see Jane Stapleton, 'Duty of Care: A Selection from the Judicial Menu' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 59.

30 *Donoghue v Stevenson* [1932] AC 562, 579–80.



The neighbour principle embodies the concept of mutual interdependence. On the one hand the defendant knows that their conduct has the potential to cause harm and that they are able to reduce the risk of such harm by the exercise of reasonable care. On the other hand the defendant's knowledge will be balanced by an expectation from the plaintiff(s) that the defendant will exercise reasonable care in these circumstances. Although it is more common to focus attention on the defendant's knowledge there is no doubt that the very idea of a 'neighbour' embodies the idea of expectations as well as obligations.

The first step in developing an understanding of a synergistic model of negligence is that neighbour relationships, characterised by relationships of mutual interdependence, do not come into existence because of the operation of the law of tort. Relationships of mutual interdependence are not created by rules in tort law that specify that a neighbour relationship is one where harm to the plaintiff is a reasonably foreseeable consequence of the defendant's acts or omissions.

Rather, these relationships are the incidental result of the interaction between particular social practices and the bodies of law that support those practices. The space that is occupied by the tort of negligence is therefore created and marked out by the interaction between those social practices and their associated bodies of law. Further, the values and public policy choices, which support those social practices, are the result of private and public decision making that find expression in contract or in particular areas of regulatory law. In this sense there is simply no need for the judges deciding upon the existence of a duty of care in the tort of negligence to decide whether these values and public policy choices are either good or bad. They are simply the points of reference used to map out the space occupied by the tort of negligence.

In this context, the role of the 'tests' used to determine whether in a particular instance a defendant owes a duty to exercise reasonable care to prevent the plaintiff from sustaining harm is not to specify preconditions for deciding when a duty of care will come into existence. Rather, one of the roles of these tests is to explore particular kinds of relationships to decide whether there is space for the tort of negligence to occupy. This involves analysing whether particular relationships have the characteristics of mutual interdependence that are a necessary but insufficient condition for the recognition of a duty of care.

The process of reasoning in *Donoghue v Stevenson* is a good example of this point.<sup>31</sup> The relationship of mutual interdependence between the manufacturer and Mrs Donoghue in this case was a consequence of the commodification of food products. By the time of the decision in *Donoghue v Stevenson* it was possible for manufacturers to expand their markets by manufacturing packaged food that could be distributed under a recognisable brand name to consumers through a range of retailers and intermediaries. As a result the manufacturer no longer had a contractual relationship with either the purchaser or the ultimate consumer — though both the manufacturer and the consumer were involved in a mutually interdependent relationship in which the manufacturer needed to

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31 Ibid 562–3.

mutually interdependent relationship in which the manufacturer needed to establish a relationship of trust with the consumer so that the consumer would be able to rely on the quality of the product being manufactured. The law of contract supported this new form of manufacturing and marketing by creating the respective linkages between the manufacturer and retailer and retailer and purchaser.<sup>32</sup>

In this sense the relationship of mutual interdependence between the ultimate consumer and the manufacturer was supported by, and indeed created by, the operation of the law of contract. It was the contractual relationships between the manufacturer and the retailer, and the retailer and the purchaser, which marked out the potential neighbour relationship between the manufacturer and the ultimate consumer. The space for the tort of negligence to occupy was hence the combined result of the practice of commodification of food and the law of contract that supported this new social practice.

One of the functions of the neighbour principle in Lord Atkin's judgment in *Donoghue v Stevenson* was to allow Lord Atkin to explore the relationships between the manufacturer, the purchaser and the ultimate consumer to determine whether there was space for the tort of negligence to occupy. The neighbour principle allowed Lord Atkin to consider whether the relationship between manufacturer and ultimate consumer was the kind of mutually interdependent relationship which could support the existence of a duty of care.<sup>33</sup> In later portions of his judgment, Lord Atkin addressed the question whether the tort of negligence should occupy this space.<sup>34</sup>

This first step in developing a synergistic model of negligence is important for two reasons. Firstly, it sometimes appears as though the recognition of a duty of care involves the imposition of a relationship of responsibility upon the parties. It is as if the operation of the tort of negligence is the result of courts making public policy choices, which impose values and responsibilities on the parties that are illegitimate because the decision is made by an unelected judge. In this sense the values and public policy underlying the decision to impose the duty of care are not the result of either private decision making or of a legislative process that is designed to make public policy choices. This has led to an extensive debate about whether it is appropriate for courts, rather than legislatures, to make these choices.<sup>35</sup>

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32 The process of development of new markets has been described as a form of commodification. This process of commodification has been at times a site of significant political dispute as broadly based popular movements sought to resist these developments: see Ben Maddison, 'Reification and Commodification: Popular Anti-Market Discourse in Australia 1917-1924' (2001) 8 *Bridges: An Interdisciplinary Journal of Theology, Philosophy, History and Science* 143.

33 *Donoghue v Stevenson* [1932] AC 562, 578-83.

34 *Ibid* 583-99.

35 See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532-7 (Gleeson CJ, arguing that the decision to abolish the non-feasance rule for highway authorities should be left to Parliament). See also *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. By contrast the majority in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 547, identified a range of factors in deciding to abolish the non-feasance rule for highway authorities. Gaudron, McHugh and Gummow JJ argued that 'the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens so as to impose upon the authority a duty of

By contrast, a synergistic model of tort law suggests that the space occupied by the tort of negligence is marked out by the operation of bodies of law that are the result of either public or private contractual processes of decision making. In effect this means that neighbour type relationships are generated by the operation of either regulatory law or systems of private governance. In deciding whether the tort of negligence should colonise these spaces, courts are therefore able to accept or adopt the public policy choices that are inherent in the bodies of law which create neighbour type relationships. The issue for the law of negligence is to determine the criteria for deciding whether any particular relationships, characterised by relations of mutual interdependence, should give rise to a duty of care.

The second reason that this point is important is that it helps establish the framework within which the tort of negligence operates. One of the central conundrums in this tort is the ambiguity of the control factors defining the reach of the duty of care. The recognition that the problem for the tort of negligence is one of recognising relationships of mutual interdependence gives ambiguity in duty of care reasoning an important function. It is this ambiguity that ensures that the tort of negligence retains the capacity to recognise mutually interdependent relationships, which result from the interaction of new social practices and the bodies of law regulating and supporting those social practices. This is arguably the most important legacy of *Donoghue v Stevenson*, for without it the tort of negligence would ossify around a determinate set of relationships that play an increasingly marginal role in the community.

### C A Synergistic Model of Negligence

The second step supporting a synergistic model of the tort of negligence is also a familiar one. The decision to recognise a duty of care is the decision as to whether the tort of negligence should fill the space marked out by the interaction between social practices and the bodies of law supporting those practices. The issue is one of whether any particular relationship, which is characterised by a relationship of mutual interdependence, should also support a duty of care. This is the point at which tort law appears to be most controversial.

The central feature of a synergistic model of tort law is that this decision is based upon the interaction between two sets of concerns. On the one hand there is a judgment about whether the particular relationship of mutual interdependence 'fits' existing categories of duty of care in tort. This involves an analysis of the central principles of tort law as they are expressed in prior

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Australia without any 'proper regard to Australian statutory contexts': at 602. In this sense it is the position of the public authority which creates the space for the tort of negligence to occupy.

cases.<sup>36</sup> On the other hand there is an assessment as to whether the recognition of a duty of care would either enhance, or at least not detract from, the objects of the bodies of law regulating the relevant social practices. This means that a decision to recognise a duty of care is based on an internal analysis of whether such a decision is consistent with the principles of tort law and with an external assessment of the fit between tort law and the other bodies of law regulating the conduct in question.<sup>37</sup>

This model of tort law, which is based on the idea that negligence facilitates the operation of complex bodies of law regulating social practices, significantly undercuts many claims about the imperial march of the tort of negligence.<sup>38</sup> If the decision to recognise a duty of care is significantly affected by an assessment of whether the duty will enhance the objects of a system of law regulating particular social conduct, the tort of negligence is adopting public policy choices made elsewhere in the legal system. As a body of law it has an important role in establishing synergistic linkages between segmented parts of the legal system. It identifies relationships of mutual interdependence, which are created by the impact of private decision making and regulation. It facilitates and supports the existence of the relevant social practices and the operation of the bodies of law regulating those practices.

This form of reasoning represents a ubiquitous part of the tort of negligence.<sup>39</sup> The failure to recognise it results partly from the adoption of a one-dimensional model of the legal system. If the starting point is that the body of law called the

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36 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 547. In deciding to abolish the non-feasance rule and apply the ordinary duty of care in negligence to highway authorities, Gaudron, McHugh and Gummow JJ considered various problems with the non-feasance rule. These included the 'unprincipled distinctions' created by the rule, the 'unsatisfactory dichotomy between misfeasance and non-feasance', the role of precedent, clarification of the distinction between negligence and nuisance, and the statutory context in New South Wales for the existence of the 'immunity'. Kirby J identified a similar range of factors: at 600–4.

37 See below Part III; see, eg, *Sullivan v Moody* (2001) 183 ALR 404, 417. The Full Court explicitly considered the impact of the finding of a duty of care upon the regulatory scheme that was designed to protect children. The Court argued that

[i]t would be inconsistent with the proper and effective discharge of those duties should they [the defendant medical practitioner and social workers] be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm.

This approach to deciding upon the existence of a duty of care was also used in *Tame v New South Wales* (2002) 191 ALR 449, 457–8 (Gleeson CJ), 463 (Gaudron J), 478–9 (McHugh J), 507 (Gummow and Kirby JJ), 525 (Hayne J), 534–5 (Callinan J). For an example of the application of this process of reasoning by an intermediate court of appeal, see *New South Wales v Paige* [2002] NSWCA 235 (Unreported, Spigelman CJ, Mason P and Giles JA, 19 July 2002) [86]–[96] (an example of the application of this 'coherence of the law' approach to a novel duty of care case involving a complex scheme of regulation). For a further very explicit example of this form of reasoning see, *Lynch v Lynch* (by her tutor Lynch) (1991) 25 NSWLR 411.

38 David Partlett, 'Economic Loss and the Limits of Negligence' (1986) 60 *Australian Law Journal* 64, 75–7 (recovery in tort facilitates development of cooperative behaviour).

39 See, eg, *Donoghue v Stevenson* [1932] AC 562, 582–3. Lord Atkin explicitly considers the impact of the recognition of a duty of care on the broad pattern of contractual relationships supporting the manufacture, marketing and consumption of ginger beer by a manufacturer, which distributes product to a consumer via intermediaries.

tort of negligence is an independent actor in the legal system, its facilitative role will not be evident. It is only by acknowledging that the tort of negligence is integrated into a number of different dimensions of the legal system that its facilitative role becomes evident.

### III A SYNERGISTIC ANALYSIS OF ECONOMIC LOSS

The law relating to the recovery of pure economic loss in negligence is a particular instance of some of the broader problems encountered elsewhere in the tort of negligence. There appears to be a combination of indeterminate and empty rules that lack any coherent rationale to support the existence of the right to recover pure economic loss in negligence. For example Harold Luntz and David Hambly argue that, apart from the test of reasonable foreseeability, '[i]t is not easy to ascertain from the lengthy judgments in these and other cases what are the other factors that will determine the existence of a duty of care.'<sup>40</sup>

Similarly, there is a lack of agreement on the rationale supporting the right to recover pure economic loss in negligence. Broad debate takes place about particular cases without reaching agreement about the underlying rationale for allowing recovery for pure economic loss. There are however a range of attempts to provide a principled explanation of why plaintiffs should be able to recover pure economic loss in negligence and how this right fits around remedies in contract law and sanctions and remedies found in systems of law regulating particular activities.<sup>41</sup>

The combination of ambiguity in the legal principles governing the right to recover pure economic loss with the lack of any coherent rationale for the existence of this right creates the impression of a body of rules operating outside any accepted framework, generating a body of law that is both unstable and unpredictable.

This conjunction of ambiguity and lack of overall coherence is in one sense particular to the body of rules dealing with the right to recover for pure economic loss. In another sense, though, this state of affairs is a metaphor for tort law more generally. The combination of ambiguity and lack of overall

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40 Luntz and Hambly, above n 8, 848–9. The cases referred to in this quote include *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241, *Hill v Van Erp* (1997) 188 CLR 159, *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

41 See, eg, Peter Cane, 'The Blight of Economic Loss: Is There Life after *Perre v Apand*?' (2000) 8 *Torts Law Journal* 246; Bruce Feldthusen, 'Liability for Pure Economic Loss: Yes, But Why?' (1999) 28 *University of Western Australia Law Review* 84 (an example of an attempt to provide a coherent rationale for the right to recover pure economic loss in negligence); Bruce Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel' (2000) 8 *Tort Law Review* 33; Partlett, above n 38, 76–7 (law relating to recovery of pure economic loss 'performs a facilitative role in a relational setting'); Angus Corbett, 'The Rationale for the Recovery of Pure Economic Loss in Negligence and the Problem of Auditors' Liability' (1994) 19 *Melbourne University Law Review* 814 (a review of the rationale for the recovery of pure economic loss). See also Markesinis and Deakin, above n 8, 35–7 (an example of the difficulties in conducting an economic analysis of the decision of the Canadian Supreme Court in *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021).

coherence has produced the space which is now being filled by proposals for tort law reform. This space is being filled with proposals that are based on the need to reassert the importance of people accepting more responsibility to care for themselves with less reliance on the right to seek compensation from others.<sup>42</sup>

By contrast, a synergistic model of tort law provides an account of how the framework supporting the law of tort is the product of the interaction between tort law and other bodies of law. The following analysis of *Perre v Apand Pty Ltd* ('*Perre v Apand*')<sup>43</sup> is an example of how a synergistic model of tort can provide an account of the framework that gives structure to the law relating to the recovery of pure economic loss in negligence.

### A    *Perre v Apand Pty Ltd*

Gleeson CJ summarised the facts of *Perre v Apand* in 'broadest outline' in the following way:

In a rural locality in South Australia, a number of farmers grew potatoes, some for export to Western Australia. The respondent ['Apand'] negligently introduced a form of disease, known as bacterial wilt, on to the land of one farmer. The Western Australian regulations imposed a prohibition on the importation into Western Australia, not only of potatoes grown on land known to be affected by the disease, but also of potatoes grown on land within a certain distance of affected land. The appellants ['the Perre interests'] were involved, in various ways, in potato growing on such land, and claimed to suffer financial loss.<sup>44</sup>

The claim by the Perre interests was that, as a result of the conduct of Apand, the regulation, disallowing sale in Western Australia of potatoes grown within 20 kilometres of any farm where diseased potatoes had been found, prevented them from selling their potatoes in Western Australia.<sup>45</sup> This resulted in pure economic loss in the form of a loss of opportunity to sell their product into Western Australia at a price that was higher than they were able to obtain in South Australia. The primary issue in this case was whether Apand, who brought the diseased seed on to the land of one farmer, owed a duty to exercise reasonable care to prevent the Perre interests from sustaining these financial losses.

Ultimately the Court decided that Apand, the person responsible for introducing the diseased seed, did owe a duty of care to either some,<sup>46</sup> or all of the Perre interests.<sup>47</sup> The Perre interests, personally and through interposed companies and other legal entities, either grew or processed potatoes within 20

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42 Spigelman, above n 2.

43 (1999) 198 CLR 180.

44 Ibid 191.

45 *Plant Diseases Regulations 1989* (WA) r 4(1), sch 1, pt B, item 14(1)(b).

46 *Perre v Apand* (1999) 198 CLR 180, 233–5 (McHugh J included those Perre interests growing potatoes for export to Western Australia, but excluded those who processed potatoes for sale to Western Australia), 308 (Hayne J included only those directly affected by the 20 kilometre rule, that is, only those growing and processing potatoes intended for sale in Western Australia).

47 Ibid 259–61 (Gummow J included all the 'components of the Perre business' that could establish that they had sustained damage), 291–2 (Kirby J included all 'members of the integrated commercial operation'), 329 (Callinan J included all Perre interests subject to proof and assessment of damages).

kilometres of the farm on to which Apand brought the diseased seed. The effect of this decision appears to be that it is possible for a defendant to owe a duty of care to a determinate class of plaintiffs — even where the defendant had no relationship with these plaintiffs and no specific knowledge of their activities. On the face of it this appeared to be an extension of the principles outlined in a number of cases which had required either a direct relationship with the plaintiff or some specific knowledge of the particular risk which the defendant's conduct imposed on the plaintiff.<sup>48</sup>

### B The Problem in *Perre v Apand*

There is a problem of deciding whether or not the decision in *Perre v Apand* involved an extension of the circumstances giving rise to a duty to exercise reasonable care to prevent damage in the form of pure economic loss. There is a second issue as to whether or not this extension of the range of the duty of care, if there was such an extension, can be justified. A third issue, whether the process of reasoning in *Perre v Apand* makes the application of the law of negligence in the area of recovery for pure economic loss more or less predictable, is also important.

On the basis of the processes of reasoning used by the seven judges in their separate judgments these are difficult questions to answer. On the one hand there was no agreement between the justices on the process for deciding novel duty of care questions. The different approaches taken by each of the justices have been mapped by a number of authors.<sup>49</sup> On the other hand there was a significant degree of agreement on the 'salient features' of the relationship between the Perre interests and Apand which supported the recognition of a duty of care.<sup>50</sup> These features included the finding that the Perre interests were members of a clearly identifiable class, that Apand understood the impact of the 20 kilometre rule, that Apand had decided for its own commercial reasons to carry out an experiment which involved the introduction on to the Sparnon farm of uncertified seed, and that the Perre interests sustained harm as a result of a decision by Apand over which they had no control. In more abstract terms, Apand had control over the risks of harm to which the Perre interests were exposed and the Perre interests were exposed to a risk of harm without their knowledge and were without any opportunity to protect themselves.<sup>51</sup> There was no agreement or explanation as to why these factors were salient or why they justified the recognition of duty of care.

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48 *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529; *Hill v Van Erp* (1997) 188 CLR 159.

49 Adrian Baron, 'The "Mystery" of Negligence and Economic Loss: When is a Duty of Care Owed?' (2000) 19 *Australian Bar Review* 167, 183–91; Jim Davis, 'Liability for Careless Acts or Omissions Causing Purely Economic Loss: *Perre v Apand Pty Ltd*' (2000) 8 *Tort Law Journal* 123, 125–9; Jane Swanton and Barbara McDonald, 'Liability in Negligence for Pure Economic Loss' (2000) 74 *Australian Law Journal* 17.

50 Baron, above n 49, 188; Davis, above n 49, 129–30; Swanton and McDonald above n 49, 20–2.

51 *Perre v Apand* (1999) 198 CLR 180, 194–5 (Gleeson CJ), 201–2 (Gaudron J), 233–6 (McHugh J), 255–61 (Gummow J), 286–91 (Kirby J), 303–8 (Hayne J), 326–31 (Callinan J).

### C    Application of the Synergistic Model

An account of the process of reasoning based upon a synergistic model of negligence provides a different method of addressing the problems in *Perre v Apand*. A synergistic model invites consideration of two sets of issues. The first is whether the regulatory and statutory structure creates space for the tort of negligence to occupy. There are a number of indicators of where a body of law does create a space for negligence. One indicator will be whether the system of regulation creates mutually interdependent relationships. Another indicator will be whether the regulatory scheme seeks to allocate risks generated by this relationship between the relevant parties.

The second set of issues concerns the broad question about whether the tort of negligence *should* occupy the space created by the regulatory scheme. This issue requires analysis of the internal 'fit' of a decision to recognise a duty of care. Does the recognition of a duty of care share sufficient common features with prior decisions or does it represent a rupture in the continuity of the law? It also requires analysis of whether the decision to recognise a duty of care 'fits' the external regulatory environment. Does the recognition of a duty of care enhance or detract from the capacity of the regulatory regime to achieve its goals and objectives?

An account of the process of reasoning based upon this model of tort law suggests some determinate answers to the questions about the impact of the decision in *Perre v Apand*. It would suggest that there was a real issue as to whether the context of the relationship between the *Perre* interests and *Apand* created space for the tort of negligence to occupy. The application of negligence to this new form of social conduct did involve a degree of novelty and unpredictability. It would also suggest that the process of reasoning about the relevance of the 'salient features' was less casual and more structured than the judgments otherwise indicate. Finally it would indicate that the meta-analysis of the process for deciding upon novel applications of the duty of care was unproductive.

The most important element of this account of the decision in *Perre v Apand* is the claim that the process of reasoning used to decide upon the relevance of the 'salient features' was carried on by the judges within a determinate framework. The next step in establishing the outlines of this is to review the system regulating agricultural product markets.

### D    The Regulation of Commodity Markets

The growing and marketing of agricultural commodities is the context for the decision in *Perre v Apand*. These markets, and their associated systems of regulation, have some very particular features. Callinan J noted, without clarification or addition, that '[i]t is notorious that commodity markets are fragile (as the evidence here indicates) and in particular are vulnerable in modern times to contamination both prospective and actual.'<sup>52</sup>

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52    Ibid 327 (Callinan J).



One particular characteristic of these commodity markets is the regulatory structure that supports them. It is a regulatory structure that has to work around two sets of concerns.<sup>53</sup> The first set is that identified by Callinan J and relates to what may generally be described as contamination of product, by disease or chemical agents. In *Perre v Apand* the potatoes grown by the Sparnons with the seed provided by Apand were affected by bacterial wilt. The second set relates to the structure of the agricultural industry. This industry is, for the most part, made up of a large number of broadly spread producers that are dispersed through the many regions in Australia.

The regulatory structure supporting agricultural commodity markets is a form of national regulation. Although each State has a separate body of legislation regulating these markets the content of each State's legislation is roughly comparable. In addition the overall impact of each state's regulatory scheme is to produce a pattern of complementary regulation covering broadly similar subject matter. The following description of the system of regulation uses New South Wales as an example of the kind of regulation which the States use to regulate agricultural commodity markets.

The system of regulation is a distinctive form of command and control regulation with 'steep sides'.<sup>54</sup> It is a system of regulation that deals extensively with the labelling and certification of seeds,<sup>55</sup> artificial breeding,<sup>56</sup> genetic modification of organisms,<sup>57</sup> the use of fertilisers,<sup>58</sup> rights to use water,<sup>59</sup> the use of water catchment areas, soil conservation,<sup>60</sup> the use of medicines,<sup>61</sup> pesticides,<sup>62</sup> and stock food.<sup>63</sup> In addition there are schemes of regulation dealing with travelling stock,<sup>64</sup> the removal of weeds,<sup>65</sup> plant diseases,<sup>66</sup> and stock diseases.<sup>67</sup> This is the context for the schemes regulating the growing of potatoes

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53 For a review of the global system of regulation of food, see John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 399–417. The authors argue that the era of regulation of food by central states lasted less than a century and is now subject to international institutions and structures: at 400. The focus in this article on regulation is not so much concerned with the source of standards for the quality and safety of food as it is with the regulatory structure that is designed to achieve the standards.

54 For a further explanation of the meaning of 'steep sides' see below nn 81–2 and accompanying text.

55 *Seeds Act 1982* (NSW) s 5 deals with the labelling of seeds; pt 4 sets up Varietal Verification Schemes that regulate the growing of, and the certification of, specified varieties of seeds. This failure to use certified potato seed by Apand was a central part of the reasoning used by the High Court to affirm that Apand was subject to a duty to exercise reasonable care to prevent the Perre interests sustaining pure economic loss.

56 *Stock (Artificial Breeding) Act 1985* (NSW).

57 *Gene Technology Act 2000* (Cth).

58 *Fertilisers Act 1985* (NSW).

59 *Water Management Act 2000* (NSW).

60 *Soil Conservation Act 1938* (NSW).

61 *Agricultural and Veterinary Chemicals Code Act 1994* (Cth); *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth).

62 *Pesticides Act 1999* (Cth).

63 *Stock Foods Act 1940* (NSW).

64 *Rural Lands Protection Act 1998* (NSW), pts 8 and 9.

65 *Noxious Weeds Act 1993* (NSW); *Seeds Act 1982* (NSW).

66 *Plant Diseases Act 1924* (NSW).

67 *Stock Diseases Act 1923* (NSW); *Exotic Diseases of Animals Act 1991* (NSW).

and the management of the presence of bacterial wilt in potatoes — the basic subject matter of the dispute in *Perre v Apand*.

The directives produced by this system of regulation of commodity markets are highly prescriptive and clearly supported by criminal sanctions. For example, the *Seeds Act 1982* (NSW) ('*Seeds Act*') deals with the labelling of seeds. Amongst other things, this requires that a parcel of seeds have a label which states the botanical name of the seed, the mass or number of seeds, the brand which identifies the source of the seeds and the name of any chemical applied to the seed to prevent pests or disease. If the parcel contains a declared weed, the label must state the maximum allowable number of seeds (of the declared weed) per kilogram of the seed.<sup>68</sup> In addition Part 4 of the *Seeds Act* allows the Minister to establish Varietal Verification Schemes, which are comprehensive and intrusive in relation to the activities of participants. The *Plant Diseases Act 1924* (NSW) ('*Plant Diseases Act*'), amongst other things, prohibits the introduction of things likely to introduce a disease or pest, and makes provision for the treatment and eradication of pests and diseases.<sup>69</sup> The *Pesticides Act 1999* (Cth) ('*Pesticides Act*') similarly deals with the wilful or negligent misuse of pesticides,<sup>70</sup> and extends to a prohibition of such activities as the possession of an unregistered pesticide,<sup>71</sup> or the keeping of a pesticide in a container without an approved label.<sup>72</sup> The *Pesticides Act* even extends to making it an offence to fail to read an approved label.<sup>73</sup>

The sanctions specified for breach of these and other provisions are not the most significant feature of these systems of regulation. It is the procedures used to minimise the impact of the spread of impurities, pesticides, disease and pests that create what are known as the 'steep sides' of the markets formed around these systems of regulation. These mechanisms include the establishment of quarantine areas, the right to make orders to take steps to eradicate or control a pest or disease, restrictions on the movements of stock and seeds, and restrictions on the right to sell stock or other commodities.

The *Plant Diseases Act* allows the Minister for Agriculture to make an order to an appropriate person for the purpose of treating or eradicating diseases and pests.<sup>74</sup> The Minister may declare a specified area to be a quarantine area.<sup>75</sup> Owners of quarantined land may then be subject to specific orders with respect to the grading, packing, branding and labelling of fruit, vegetables or other plants.<sup>76</sup> Further, the Minister may authorise an inspector to enter land and carry out work specified in the order for the purpose of prevention of any pest or

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68 *Seeds Act 1982* (NSW) s 5; *Seeds Regulation 1994* (NSW) reg 10 and sch 1 'Declared Weeds'. The maximum penalty for breach of this provision is 20 penalty units.

69 *Plant Diseases Act 1924* (NSW) ss 4, 5A.

70 *Pesticides Act 1999* (Cth) div 1.

71 *Pesticides Act 1999* (Cth) s 12. The maximum penalty is A\$60 000 for an individual.

72 *Pesticides Act 1999* (Cth) s 16. The maximum penalty is A\$10 000 for an individual.

73 *Pesticides Act 1999* (Cth) s 14. The maximum penalty is A\$60 000 for an individual.

74 *Plant Diseases Act 1924* (NSW) s 5A.

75 *Plant Diseases Act 1924* (NSW) s 6.

76 *Plant Diseases Act 1924* (NSW) s 28A.

disease.<sup>77</sup> Where there is non-compliance with an order by the Minister, or an inspector appointed under the *Plant Diseases Act*, the Minister is entitled to recover expenses associated with completion of the work by an inspector.<sup>78</sup>

The most extreme example of these procedures is the power granted to the Minister, under the *Exotic Diseases of Animals Act 1991* (NSW), to make a declaration of an 'infected place'. The effect of such a declaration is that a person is not permitted to enter or leave an infected place without authorisation by way of a permit.<sup>79</sup> Further the Minister may proceed to make a 'destruction order' for any domestic animal, which the Minister reasonably believes to be infected by an exotic disease.<sup>80</sup>

These broad schemes of regulation have 'steep sides' in the sense that it is easy for a landowner or other related person, for example the owner of a vehicle, to fall out of the market into a 'quarantined', non-market area. Where this happens the risks associated with the removal of access to the market are imposed on the landowner or other person.<sup>81</sup> The primary loss sustained by landowners in these circumstances will be loss of opportunity to sell or deal with the fruit, vegetable or stock.<sup>82</sup> As specified above, there may also be provisions for ensuring that the landowner bears the costs associated with the eradication or prevention of the pest or disease. It is quite likely that a landowner or other person may be subject to quarantine, or a similar order in circumstances where they are not personally responsible for the presence of the disease or pest.

In general terms the broad scheme of agricultural regulation is premised on relationships between strangers who have the capacity to adversely affect each other's access to commodity markets. This means that it is possible for any person in any industry to lose access to a market because of the activities of a person with whom they have no direct or indirect relationships. For example, the presence of pesticides in some small amounts of beef sold to the United States created the possibility that Australian beef farmers would lose all access to the United States market. The rationale supporting this broad scheme of regulation is that in order to protect the existence of a market it is preferable to act to deny all access to the relevant market for any producer who is, or who may be likely to be, affected by the presence of the relevant disease, pest or chemical.

Overall, this scheme of regulation of relationships between strangers has a number of important characteristics. The risk of loss of access to markets, associated with the presence of pests, diseases, or chemical residues, is imposed

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77 *Plant Diseases Act 1924* (NSW) s 13A.

78 *Plant Diseases Act 1924* (NSW) s 16.

79 *Exotic Diseases of Animals Act 1991* (NSW) ss 10, 12.

80 *Exotic Diseases of Animals Act 1991* (NSW) ss 32–4.

81 *Exotic Diseases of Animals Act 1991* (NSW) s 25 (prohibits a person from seeking compensation for the acts of an inspector, unless the acts of the inspector are wilful or negligent). An exception to this general proposition is *Exotic Diseases of Animals Act 1991* (NSW) pt 7, which provides for payment of compensation for animals destroyed pursuant to the Act. Note however that s 60 prevents recovery for loss of profit, loss of production or other consequential loss.

82 See, eg, *Stock (Chemical Residues) Act 1975* (Cth). Section 8 empowers the Minister to issue a detention notice to a person in charge of chemically affected stock. Section 11 empowers the Minister to make an order for the destruction of certain chemically affected stock.

on landowners and other market participants. As a result it is landowners and other market participants who are responsible for managing this risk. This applies not only to ensuring compliance with regulatory measures but also to the problem of managing the risks associated with the loss of a market. Thus landowners and others will have to be attuned to a variety of strategies for managing the risk of loss of access to particular markets. This may involve the purchase of insurance, the possibility of accessing different markets or the possibility of changing the products being grown and marketed.<sup>83</sup>

### **E    Is There Space for Negligence to Occupy?**

The above analysis of the systems regulating agricultural commodity markets suggests that one of the goals of this body of regulation is to encourage the development of risk management strategies by all market participants. The clear signal that landowners, service providers and other intermediaries bear the risk of loss of access to markets associated with the presence of pests, diseases or chemical residues is designed to encourage a better analysis of the risks associated with regulatory non-compliance. Any attempt to broadly reallocate the risk of harm arising out of non-compliance would therefore cut across an existing, well-developed regulatory structure. In this sense the scheme of regulation will not create space for the tort of negligence to occupy.<sup>84</sup>

These schemes of regulation do more than regulate relationships between people who are strangers except for their participation in particular markets. The declaration of quarantine areas, associated with the presence of pests, diseases or chemical residues, creates relationships of mutual interdependence. A person may lose all access to a market because of the actions of a stranger. However, a person can also lose access to a market, due to the declaration of a quarantine area, as a result of the actions of a person who understands the consequence that may follow a decision not to comply with a particular regulatory requirement.

Regulatory non-compliance resulting in the declaration of a quarantine notice will form the basis for a relationship of mutual interdependence where two conditions are met. First, where a person makes a decision not to comply with a particular regulatory requirement in circumstances where that person knows that a particular person or class of person may suffer loss as a result of their non-compliance. Secondly, where that person's neighbours have the expectation that they will not be exposed to a risk of loss by regulatory non-compliance. It is the very 'fragility' of agricultural commodity markets which produces this expectation.<sup>85</sup> It is this relationship of mutual interdependence that is formed in

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83 One of the potential sources of weakness in this form of regulation is the process for assessment of complex risks of harm that are associated with new agricultural practices that may pose significant risks of harm to public health, the environment and industry. Where regulators fail to assess the nature and extent of these complex risks this may produce massively important instances of regulatory failure, see, eg, Gavin Little, 'Reports: BSE and the Regulation of Risk' (2001) 64 *Modern Law Review* 730.

84 In the language of the tort of negligence, the creation of liability in these circumstances would create the problem of indeterminate liability.

85 Above n 52.

the context of the scheme of regulation that creates space for the tort of negligence.

In *Donoghue v Stevenson* the law of contract created the space for the creation of relationships of mutual interdependence between the manufacturer and the ultimate consumer. In a similar fashion, in agricultural commodity markets the declaration of quarantine areas creates relationships of mutual interdependence between some market participants. As in *Donoghue v Stevenson* it is the presence of relationships of mutual interdependence that is indicative of space that the tort of negligence may occupy.

The circumstances in *Perre v Apand* are just such an instance where the system of regulation produces a particular relationship of mutual interdependence. The 'salient features' identified by each of the justices indicate that Apand made a commercial decision to expose the Perre interests to the risk of harm created by the use of uncertified seed. This commercial decision exposed the Perre interests to a determinate risk of harm which could have been avoided had Apand used certified seed. The specific risk of harm to which the Perre interests were exposed included the loss of the lucrative Western Australian market for crisping potatoes.<sup>86</sup>

The particular approaches used by each of the justices to decide upon the existence of a duty of care were different. Each judge focused on a similar range of 'salient features' in deciding upon the existence of a duty of care, indicating that the justices were using similar tools to decide whether there was space for the tort of negligence to occupy. Independent of their broad approach to the duty of care, the justices used the ambiguity inherent in the principles defining the reach of the duty of care to explore the question of whether the complex relationship between the parties in *Perre v Apand* could support the existence of a duty of care.

## F Should Negligence Occupy the Space?

The second set of issues for a synergistic model of tort law is concerned with the question of whether tort law *should* recognise the existence of a duty of care and occupy the space created by the system regulating agricultural commodity markets. There are two separate sets of concerns for courts deciding whether to recognise the existence of a duty of care. The first deals with whether the recognition of the duty of care enhances the internal coherence of tort law. The second deals with the question of whether the recognition of a duty of care enhances the goals and policies of the external system of regulation.

The decision in *Perre v Apand* fell within an accepted category of recovery for pure economic loss. The High Court was not asked to reconsider its decision in *Caltex Oil (Australasia) Pty Ltd v The Dredge Willemstad* ('*Caltex Oil*'),<sup>87</sup>

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86 *Perre v Apand* (1999) 198 CLR 180, 194–5 (Gleeson CJ), 202 (Gaudron J), 236 (McHugh J), 258 (Gummow J), 289 (Kirby J), 307 (Hayne J), 327 (Callinan J).

87 *Caltex Oil (Australasia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529. See *ibid* 250–1 (Gummow J).

however the decision in *Caltex Oil* was affirmed by all of the justices.<sup>88</sup> The one issue of principle that was raised in *Perre v Apand* was whether it was possible to recognise a duty of care to prevent pure economic loss in relation to a duty owed to a determinate class rather than specific individual plaintiffs. The members of the Court had little difficulty in finding that it was possible to recognise a duty to exercise reasonable care to prevent a determinate class of plaintiffs sustaining pure economic loss.<sup>89</sup> This was however a relatively unimportant aspect of the decision.

The second issue was a critical part of the decision to recognise the existence of a duty of care in *Perre v Apand*. This involved an analysis of whether the recognition of a duty of care would enhance or detract from the capacity of the scheme of regulation to achieve its goals and objectives. This scheme of regulation dealt with the allocation of the risk of loss of access to markets caused by the presence of pests, diseases or unwanted chemical residues. An important goal of this scheme of regulation was to allocate these risks between persons who were, apart from their participation in the relevant markets, strangers. The recognition of a duty of care in *Perre v Apand* did not interfere with the allocation of these risks. The existence of a close relationship of mutual interdependence such as that between the Perre interests and Apand meant that the underlying rationale for the allocation of risk by the regulatory scheme was inapplicable. In this sense the recognition of the duty of care did not cut across the goals of this system of regulation.

In *Perre v Apand* the relationship of mutual interdependence between the Perre interests and Apand was formed around the Western Australian regulation which prohibited the import of potatoes grown and processed by the Perre interests.<sup>90</sup> In deciding whether the recognition of the duty of care enhances the objects of the broadly defined scheme of regulation it is not necessary to distinguish between the effect of the Western Australian or equivalent South Australian legislation. It is not necessary to show that the duty of care enhances the South Australian rather than the Western Australian legislation. There are two reasons for this.

The pattern of regulation created by State legislation (and where relevant Commonwealth legislation) in effect operates as a national system of regulation. Each State and the Commonwealth regulate roughly comparable activities in roughly comparable ways. For example, the *Fruit and Plant Protection Act 1968* (SA) prohibited the import of fruit and plants affected by disease. This legislation also empowered the Minister for Agriculture to proclaim quarantine areas which imposed restrictions on the movement or sale of potatoes affected by

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88 *Perre v Apand* (1999) 198 CLR 180, 192 (Gleeson CJ), 198–9 (Gaudron J), 204, 223 (McHugh J), 250–1 (Gummow J), 281–3 (Kirby J), 304 (Hayne J), 316–322 (Callinan J).

89 *Ibid* 202 (Gaudron J), 222 (McHugh J), 254 (Gummow J), 286–7, 289 (Kirby J), 304–5 (Hayne J), 322–3 (Callinan J).

90 Above n 45.

bacterial wilt.<sup>91</sup> In this context it does not matter whether the recognition of the duty of care enhances the Western Australian legislation rather than the South Australian legislation. By enhancing the operation of the Western Australian legislation the tort of negligence in effect supports a national regulatory matrix.

Secondly, it is artificial in the context of agricultural commodity markets to distinguish between regulation in the market of destination and regulation in the place where the product is produced. The relevant criterion from the perspective of those producing and marketing agricultural commodities is whether there is *any* applicable regulation dealing with pests, disease or chemical residues. The national and international markets for agricultural products are best seen as the combined operation of the regulatory systems governing the growing and marketing of these products. When considering the impact of the recognition of the duty of care the focus will be on whether this recognition will enhance the particular scheme of regulation affecting the particular product. This will not be limited to the regulatory scheme where the relevant products are produced or to the place where the plaintiff chooses to bring their cause of action against the defendant.

In addition to the consideration of whether the recognition of the duty of care cut across the goals of the regulatory scheme there are two specific indications that the duty of care actually complemented the scheme of regulation. First, there is no indication that the sanctions for non-compliance with restrictions on the movement or sale of potatoes affected by bacterial wilt were intended to be the only mechanism for limiting the spread of diseases such as bacterial wilt. Indeed it appears that recognition of a duty of care where a person has foresight that their non-compliance will cause damage to a particular class of persons could be the basis for a remedy that would encourage regulatory compliance. Furthermore, recognition of a duty of care in *Perre v Apand* would encourage market participants to develop better systems of risk management. It was always open to Apand to disclose their intention to carry on the experiment on the Sparnons' farm. If they had done so they would have been in a position to bargain with the Perre interests about who should bear the costs associated with the risk of the appearance of bacterial wilt on the Sparnons' farm.<sup>92</sup>

Finally, a goal of the broad system of regulation of agricultural product markets was to encourage development of awareness of the high degree of interdependence between people who were strangers apart from their

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91 *Fruit and Plant Protection Act 1968* (SA) s 4(1), (7). Bacterial wilt of potatoes was added to the list of proclaimed diseases on 1 October 1990. This Act was repealed by the *Fruit and Plant Protection Act 1992* (SA), which commenced operation on 1 February 1993. It included a comparable provision prohibiting the import of potatoes affected by bacterial wilt: s 13(2). Section 14 of the 1992 Act empowered the Minister to issue a quarantine notice restricting the removal of specified products from a given area. Bacterial wilt of potatoes was also proclaimed as a disease under this Act. Unlike the equivalent Western Australian legislation the South Australian provision required the issue of a notice by the Minister to initiate the creation of quarantine areas. The *Plant Diseases Regulations 1989* (WA), r 4(1), sch 1, pt B, item 14(1)(b) had the effect of automatically imposing a quarantine area around the Sparnons' farm, that is, this provision automatically prevented the importation into Western Australia of potatoes grown or processed within 20 kilometres of the Sparnons' farm.

92 For an example of this form of analysis, see Partlett, above n 38, 75–7.

participation in particular markets. The recognition of a duty of care in *Perre v Apand* reinforced the significance of the relationship of interdependence between Apand and the Perre interests. This included Apand's knowledge about the risk of harm associated with their use of uncertified seed and the reasonable expectation of the Perre interests that they would not be exposed to this risk without their knowledge or consent. The recognition of the existence of this relationship of mutual interdependence was in this sense consistent with the broad goals of the regulatory system.

While the High Court in *Perre v Apand* did not directly address the issue of whether the recognition of the duty of care was consistent with the scheme of regulation, the Court did address this issue indirectly in a number of ways. Firstly, each of the judges argued that the recognition of a duty of care did not create the potential for indeterminate liability.<sup>93</sup> The acknowledgement that the duty of care would impose a determinate level of liability on the defendant was bound up in the recognition by the Court that the Perre interests and Apand were in a mutually interdependent relationship that resulted from the decisions of Apand.<sup>94</sup>

In addition, different members of the Court identified different considerations, the effect of which was to suggest that the recognition of the duty of care would enhance the effectiveness of the regulatory scheme. Several justices stated that the recognition of a duty of care would not limit the autonomy of defendant to engage in legitimate commercial activity. This was because the act of bringing diseased potatoes into South Australia was prohibited by statute.<sup>95</sup> Gaudron J made a similar point by focusing on the right of the Perre interests to sell potatoes in Western Australia provided they met the standards set for that market.<sup>96</sup> Finally, Gummow J argued that the recognition of a duty of care would not 'cut across a well developed body of doctrine which already applied'.<sup>97</sup>

It is therefore possible to argue that the decision in *Perre v Apand* did not involve the *imposition* of a duty of care on the defendant. Rather, the regulatory system created a relationship of mutual interdependence that created space for the tort of negligence to occupy. The recognition of the duty of care was ultimately referable to the principle that it enhanced the goals and objectives of the scheme regulating agricultural commodity markets.

#### IV WHAT MAY BE ACHIEVED WITH TORT LAW REFORM

The synergistic model of the interaction between tort law and regulation is a principled response to the 'negligence as social welfare' argument developed by,

93 *Perre v Apand* (1999) 198 CLR 180, 195 (Gleeson CJ), 202 (Gaudron J), 234 (McHugh J), 258 (Gummow J), 290 (Kirby J), 304–5 (Hayne J), 326–7 (Callinan J).

94 *Ibid* 202 (Gaudron J), 226, 235 (McHugh J), 256–8 (Gummow J), 289, 290–1 (Kirby J), 305–7 (Hayne J), 328, 330–1 (Callinan J).

95 *Ibid* 235 (McHugh J), 261 (Gummow J), 290 (Kirby J), 307 (Hayne J), 328, 330 (Callinan J).

96 *Ibid* 201–2 (Gaudron J).

97 *Ibid* 253 (Gummow J).



amongst others, Chief Justice Spigelman.<sup>98</sup> This argument is one that sees tort law as an independent body of law expanding through the community and imposing on community members particular standards of distributive justice. As these standards of distributive justice are the outcome of decisions by courts and not parliaments they are regarded as illegitimate.

By contrast I have argued that the tort of negligence, far from being an independent actor in the legal system, facilitates the public policy choices that are embedded in the areas of regulatory law with which the tort of negligence interacts. In this sense the tort of negligence and regulatory law are in a synergistic rather than an antagonistic relationship. This model of negligence provides a framework defining the reach and scope of the tort of negligence. It makes better sense of the rules and principles that define this tort than the generally accepted one-dimensional model. There are two important consequences which flow from adopting a synergistic model of the interaction between tort law and regulation.

The first is that the perceived 'imperialistic' expansion of negligence is not the result of a failure of courts to impose sufficient controls on the neighbour principle. Rather, it is a function of the ever-widening attempts to use complex forms of regulation to achieve particular public policy outcomes. This broad social, political and economic process is evident in the field of health care, occupational health and safety, environmental regulation and financial services regulation. A synergistic model of tort law suggests that the expanded coverage of the tort of negligence will be an incidental consequence of the creation by those systems of regulation of spaces where the tort can apply.

A second consequence of the synergistic model of the interaction between negligence and regulation is simple but arguably crucial to the current debate about tort law reform. The argument that the tort of negligence and regulation function synergistically is not an argument that all regulatory systems function effectively. Nor is it an argument that the tort of negligence, or other rights to claim compensation for loss, are effectively integrated into schemes of regulation. Rather it is an argument that the insurance crisis, and perceptions about the arbitrariness and unpredictability of negligence, should be regarded as evidence of regulatory failure, and not treated as a failure of a particular, severable body of law, that is, tort law. Any failings of tort law in the cases should be regarded as evidence that failures within the broader regulatory framework have left tort law with either too much or too little work to do.

This is the crucial contribution that a synergistic model of the interaction between tort and regulation can make to the current debate on tort law reform. The current crisis is an opportunity to consider the whole matrix of laws and practices which 'regulate' particular fields of activity. Following such an evaluation, it is possible to begin the process of designing and implementing more effective systems of regulation of these activities. This approach is clearly applicable to the current 'hot spots', the regulation the delivery of health care services and broadly defined recreational activities. It is also an opportunity to

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98 Spigelman, above n 2.

integrate the right to claim damages in tort, or a more tailored form of right to claim compensation, into more effective regulatory structures.

This may appear to be too broad and diffuse an approach to the current crisis.<sup>99</sup> It may be thought that this is a medium or even long-term goal, which does not address the current crisis. In my submission though, failure to recognise the greater context and the interrelation of regulatory systems and tort law will mean that the causes of that crisis will not be fully addressed and the problems will remain to reappear in the future.

In the following section I shall highlight the inherent problems with the current approach to tort law reform. I shall also show how the broader regulatory perspective opens up a range of options for this reform that do not appear to be a part of the current reform agenda.

### A    Current Proposals for Reform

Many proposals for the reform of tort law have been canvassed in the *Review of the Law of Negligence Final Report* ('*Ipp Report*').<sup>100</sup> In this article I do not intend to address all of these proposals or attempt to deal with the full range of issues raised in the *Ipp Report*. Rather I focus on one set of proposals that are generally concerned with the 'self-assumption' of risk. In analysing this set of proposals I have two goals. First, that the response to the insurance crisis should be regulatory reform and not tort law reform. Second, that tort law reform is nonetheless a good *starting point* for encouraging the pursuit of regulatory reform.

The Terms of Reference for the Review of the Law of Negligence specified that the Panel of Eminent Persons was required to 'develop and evaluate proposals to allow self-assumption of risk to override common law principles'.<sup>101</sup> In particular, the Panel was asked to consider the proposals included in the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth) ('Liability for Recreational Services Bill'), that are designed to allow self-assumption of risk. Many of the recommendations of the *Ipp Report* have also been implemented in the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW).<sup>102</sup>

The Liability for Recreational Services Bill, the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) and the *Ipp Report* are examples of reliance on a one-dimensional model as the basis for proposing reform of tort law. All three assume that the reform of tort law can be considered and implemented without reference to broader regulatory concerns. Each is an emanation of the more general view that the way to fix the insurance crisis is to reduce both the incidence of liability in tort and related causes of action and the

99 Panel of Eminent Persons, above n 1, [1.17] (risk management and regulation being outside the scope of the Panel's Terms of Reference).

100 Ibid.

101 'Terms of Reference: Principles-Based Review of the Law of Negligence', Panel of Eminent Persons, above n 1, ix–xi, 3(b).

102 See, eg, Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) div 4 ('Assumption of Risk'), div 5 ('Recreational Activities').

quantum of any damages awarded where a defendant is found to be responsible for the plaintiff's injuries.

## B Recreational Services

The *Ipp Report* recommends that: 'The Provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as result of the materialisation of an obvious risk'.<sup>103</sup>

The central proposal in the Liability for Recreational Services Bill allows those supplying 'recreational services' to contract out of the implied warranties found in s 74 of the *Trade Practices Act 1974* (Cth) ('TPA').<sup>104</sup> The warranties implied into contracts for the supply of services in s 74(1) specify that the services 'will be rendered with due care and skill'. 'Recreational services' are defined very broadly in the proposed s 68B(2) to include, amongst other things, 'services that consist of participation in a sporting activity or similar leisure-time activity pursuits'. The Explanatory Memorandum for the Liability for Recreational Services Bill indicates that the amendment will 'permit self-assumption of risk by individuals who choose to participate in inherently risky activities'.<sup>105</sup> The Second Reading Speech states that the Bill aims to 'achieve a balance between protecting consumers and allowing them to take responsibility for themselves'.<sup>106</sup>

The Final Report of the Review of the Law of Negligence recommended that a proposed act embody the principle that 'a provider of a recreational service is not liable for personal injury or death suffered by voluntary participation in a recreational activity as a result of the materialisation of an obvious risk'.<sup>107</sup> The Liability for Recreational Services Bill includes a provision allowing for exclusion of warranties that would otherwise be included in contracts for the provision of recreational services. By contrast, the *Ipp Report* recommends that there be an exclusion of liability in relation to 'obvious' risks. However, both the *Ipp Report* and the Liability for Recreational Services Bill share the goal of allowing participants in recreational services to take a form of personal responsibility. The *Ipp Report* proposal is one that allows for persons

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103 Panel of Eminent Persons, above n 1 (Recommendations 11 and 12). These recommendations are reproduced in the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) div 4 ('Assumption of Risk').

104 Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW), proposed s 5N ('Waiver of Contractual Duty of Care for Recreational Activities').

105 Explanatory Memorandum, Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth) 4.

106 Commonwealth, *Parliamentary Debates*, Senate, 28 August 2002, 3671 (Senator Richard Alston).

107 Panel of Eminent Persons, above n 1, 3 (Recommendation 10). An 'obvious risk' is a risk that 'in the circumstances, would have been obvious to a reasonable person in the position of the participant': Recommendation 10.

participating in 'recreational activities' to take responsibility for risks that are 'obvious' to 'a reasonable person in the participant's position'.<sup>108</sup>

These proposals are written as if tort law reform were the only, or even the main, method for reaching an appropriate balance between consumer protection and personal responsibility. This is an instance of what I have described in this article as one-dimensional, and flawed, analysis of tort law. It is an oversimplification to assume that it is possible to remould a complex concept such as 'personal responsibility' by reforming one category of law without reference to the interaction between tort law and other bodies of law.

## 1 *The Cost of Waiver of Legal Rights*

There are number of other bodies of law, practice and regulation which significantly mould our understanding of 'personal responsibility' in relation to the activities covered by the proposals for reform noted above. On the most basic level it is doubtful that the Liability for Recreational Services Bill will allow those participating in recreational activities 'to decide whether or not to accept the risks involved'.<sup>109</sup>

One of the elements of any decision to waive a valuable legal right is the cost to the person deciding to waive the right. Neither the Liability for Recreational Services Bill, nor the *Ipp Report* appears to deal with this issue. There is as yet no empirical study indicating whether there is any market for first party insurance products, such as income protection, or accident and trauma, insurance for those participating in 'recreational activities'. This is fundamental to a person's decision to waive their legal rights because the cost of these policies provides the best marker of the price to the individual of waiving those rights. If there were no market, which is most likely to be the case for some 'inherently risky' activities, then there is a strong case for suggesting that the reform package should set up a process for creating such a market. Without the availability of these first party insurance products it is not at all clear that consumers are making informed decisions about accepting 'personal responsibility'.

## 2 *Waiver of Legal Rights as a 'Subsidy'*

The question of whether there is a real decision to waive these valuable legal rights is also affected by another major body of regulation. As is well known, damages in tort law are designed to compensate the plaintiff for the damage sustained as the result of the negligence of another.<sup>110</sup> There are three generally accepted heads of damages. The first relates to compensation for an existing capacity that is lost. This head of damage is usually measured by reference to the

108 Ibid 49. Recommendation 14 provides that no warning need be given in relation to 'obvious risks'. Unlike Recommendation 11, this applies outside of the context of the provision of recreational services: at 53–5. The definition of 'recreational services' in Recommendation 12 is narrower than that proposed in the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth).

109 Commonwealth, *Parliamentary Debates*, above n 106.

110 *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

extent to which the plaintiff's income-earning capacity is reduced as a result of the injury. The second head of damage is for needs created by the personal injury. Under this head the plaintiff will recover the cost of the full range of medical, nursing and ambulance services that the plaintiff will need to be able to recover, as far as is possible, from the injury. The third head of damages is referred to as non-pecuniary harm, pain and suffering or general damages.<sup>111</sup>

The *Public Liability Insurance* Report, which was prepared for the ministerial meeting on 27 March 2002, reviewed the proportions attributable to these three heads of damages out of the total amount of damages awarded to plaintiffs claiming compensation for personal injury. Where the total amount of damages was under A\$20 000 the first two heads of damages accounted for 13 per cent of the total amount of damages.<sup>112</sup> Where the total amount of damages was between A\$20 000 and A\$100 000, the first two heads of damages accounted for 44 per cent of the total.<sup>113</sup> Where the total amount of damages was between A\$100 000 and A\$500 000, the first two heads of damages accounted for 69 per cent of the total.<sup>114</sup> Where total damages was above A\$500 000, the first two heads of damages accounted for 85 per cent of the total.<sup>115</sup>

These figures are crucial to understanding the nature of the decision made by an individual about the waiver of their rights under s 74 of the *TPA*. The *Health and Other Services (Compensation) Act 1995* (Cth) provides that a person who receives compensation will be either prevented from accessing Medicare benefits, or be required to reimburse the Health Insurance Commission for any benefits obtained.<sup>116</sup> The *Social Security Act 1991* (Cth) provides that a person who receives compensation for loss of earning capacity is subject to a 'lump sum preclusion period'.<sup>117</sup> Section 1163 sets out the central elements of Part 3.14, which limits entitlement to certain 'compensation affected payments' where a person receives a lump sum compensation payment.

The overall goal of these provisions is to ensure that defendants in tort actions are responsible to the full extent possible for the cost of the damage sustained by the plaintiff. The rationale for imposing these costs is that defendants will be required to 'internalise' the cost of damages caused to the plaintiff by their negligent conduct. The process of 'internalising' costs is designed to encourage

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111 Luntz and Hambly, above n 8, 544–5, see generally 535, ch 8 'Damages'.

112 Atkins, Pearson and Rose, above n 3, 19–20 (heads of damages as a proportion of total amount of damages awarded by courts). The total cost of claims for personal injury and property damage in this range was less than 20 per cent of the total cost of claims: at 17.

113 *Ibid.* The total cost of claims for personal injury and property damage in this range was 33 per cent of the total cost of claims.

114 *Ibid.* The total cost of claims for personal injury and property damage in this range was 30 per cent of the total cost of claims.

115 *Ibid.* The total cost of claims for personal injury and property damage in this range was 20 per cent of the total cost of claims.

116 *Health and Other Services (Compensation) Act 1995* (Cth) s 7. See also Luntz and Hambly, above n 8, 586.

117 *Social Security Act 1991* (Cth) pt 3.14. See generally Harold Luntz, 'The Collateral Source Rule Thirty Years On' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 377.

defendants to introduce economically efficient practices to improve the safety of activities, which they control and from which they can benefit.<sup>118</sup>

This background renders the self-assumption of risk, whether by way of waiver of warranties or by exclusion of liability, suspect for two reasons. First, the self-assumption of risk in this context operates as a form of subsidy. The cost of compensating injured plaintiffs is shifted from the providers of recreational services to the Commonwealth government. There is a further subsidy insofar as the self-assumption of risk has the effect of reducing levels of expenditure by operators to prevent injuries occurring.<sup>119</sup> The Financial Impact Statement accompanying the Liability for Recreational Services Bill makes no reference to this cost to the Commonwealth.<sup>120</sup>

It is hard to see any justification for the provision of the subsidy in this form. There does not appear to have been any serious analysis of why providers of recreational services should receive a subsidy in this way — beyond the simple point that the insurance crisis has a dramatic and disproportionate effect on these groups.

There is a second important way in which this background to the award of damages renders suspect the proposals to encourage self-assumption of risk. The decision to assume responsibility for the risk is not made by the person who bears ultimate responsibility for its cost. It is hard to see how a decision to assume responsibility for risk by a consumer can be regarded as informed when it is the Commonwealth who will bear a significant proportion of the cost of the decision. This seems to be all the more apparent where the Commonwealth is making strenuous attempts to control the rate of increase in the costs of providing medical care.<sup>121</sup>

This analysis makes good the claim that notions of ‘personal responsibility’ are embedded in the regulatory space in which recreational activities take place. Tort law reform, without reference to the other laws and practices affecting the relevant conduct, will be unprincipled and will produce anomalous consequences. This is the problem at the heart of all simple tort law reform.

118 See generally Luntz and Hambly above n 8, 102–7; Australian Competition and Consumer Commission, *First Submission to the Principles Based Review of the Law of Negligence* (2002) 8–11, Submission No 47, <<http://www.revofneg.treasury.gov.au/content/subs/0471stACCC.pdf>> at 15 November 2002.

119 Australian Competition and Consumer Commission, above n 118, 16–22. The Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth) does not require service providers to adopt approved risk management practices: see Department of the Parliamentary Library, *Bills Digest No 12 2002–03, Trade Practices Amendment (Liability for Recreational Services) Bill 2002* (2002) 6–7, <<http://www.aph.gov.au/library/pubs/bd/2002-03/03bd012.pdf>> at 15 November 2002. See Senator Helen Coonan, Minister for Revenue, ‘Meeting Gives Tick to National Negligence Package’ (Press Release C119/02, 15 November 2002), <<http://assistant.treasurer.gov.au/atr/content/pressreleases/2002/119.asp?pf=1>> at 21 November 2002. The Minister has foreshadowed a focus on ‘risk management via professional standards legislation’.

120 Explanatory Memorandum, Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth) 2.

121 See, eg, Department of the Treasury, *Intergenerational Report 2002–03*, Budget Paper No 5 2002–03 (2002), <<http://www.budget.gov.au/2002-03/bp5/html/index.html>> at 15 November 2002.

### C Tort Law Reform Reconsidered

The claim that tort law reform, as currently proposed, is misconceived does not mean that the current system of compensation is entirely rational or broadly justifiable. There is good evidence that tort law alone is a very ineffective form of command and control regulation. The requirement that defendants 'internalise' the full cost of accidents does not translate into an effective system of regulation. For a range of reasons, including the lack of predictability of the incidence of tort liability and the opaque messages sent to defendants by individual negligence actions, the current system of regulation by tort law is arguably ineffective.<sup>122</sup> There are good reasons for doubting whether the current system of regulation and compensation does effectively balance the rights of consumers and their personal responsibility.<sup>123</sup>

The current insurance crisis is a good opportunity for reform of the regulation of many forms of activity which produce personal injury. However, this reform should be complex and multidimensional. It will need to be complex insofar as a process will have to be set up to determine which kinds of activities should be subsidised from public funds to ensure that those activities can continue. In the field of recreational services, for example, there may be a relevant difference between services provided by community not-for-profit organisations and services provided by commercial operators.

Equally importantly, the reform process will have to integrate two sets of concerns which have often been treated separately until now. One set of concerns is the regulation of activities themselves, for example health care services or recreational services. Appropriate standards must be set for the delivery of goods and services. The second set of concerns relates to defining the right to claim compensation for loss or harm caused by failure to meet those standards. Where the right to obtain compensation can be effectively integrated into the broader pattern of regulation, it can have an important role in improving the effectiveness of the system of regulation.<sup>124</sup>

An alternative approach to the regulation of recreational services would be to integrate rights to claim compensation with regulatory and institutional processes that are designed to ensure delivery of acceptable service quality levels. The standards for conducting activities by commercial operators and community

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122 Parker, above n 11. See also Angus Corbett, 'A Reformulation of the Right to Recover Compensation for Medically Related Injuries in the Tort of Negligence' (1997) 19 *Sydney Law Review* 141, 143–5; Angus Corbett, 'A Proposal for a More Responsive Approach to the Regulation of Corporate Governance' (1995) 23 *Federal Law Review* 277, 301–5.

123 Commonwealth, *Parliamentary Debates*, above n 106.

124 See, eg, Australian Securities and Investments Commission, *Enforceable Undertakings*, Practice Note 69 (1999), <<http://www.cpd.com.au/newcorp/asic/pn/pn069.pdf>> at 6 September 2002. Enforceable undertakings may be accepted by the Commission under *Australian Securities and Investment Commission Act 1989* (Cth) ss 93A, 93AA. Paragraph 69.17 provides a list of the kind of undertakings that ASIC may accept. The list includes an undertaking to pay damages to third parties, as well as undertakings dealing with a broad range of explicitly regulatory matters. This is an example of the right to recover compensation being integrated into a broader regulatory structure. See also Corbett, 'A Reformulation of the Right to Recover Compensation', above n 122, 165–7; Corbett, 'A Proposal for a More Responsive Approach to the Regulation of Corporate Governance', above n 122, 293–300.

organisations would be determined by a process of negotiation which included the operators, consumers and relevant government bodies. The right to obtain compensation would be part of the process for setting and enforcing relevant standards of conduct. The aim would be to ensure that the right to claim compensation for harm operated consistently with community expectations and with the expectations of those providing recreational services.<sup>125</sup>

A further example of this kind of regulatory reform concerns the *Ipp Report's* proposal in relation to the provision of information to patients by medical practitioners. The *Ipp Report* has proposed that the obligation to provide information be divided into two elements. The first is called the 'proactive duty to inform' and the second is the 'reactive duty to inform'. The proactive duty requires the medical practitioner to provide such information 'as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment'.<sup>126</sup> This obligation is tempered by the proviso that:

A medical practitioner does not breach the duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient.<sup>127</sup>

Consideration of this issue should arguably be transformed into a process for setting standards for professional conduct. As with other areas, for example the regulation of financial services, this process would include not only the relevant professions, but also consumers and government bodies. The right to obtain compensation for losses caused by professional negligence could then be aligned with the expectations of consumers, the professionals themselves and the broader community.

## **D    The Immediate Future of Tort Law Reform**

The process for regulatory reform needs to be multidimensional in a further important way. The kind of regulatory reform for which I have argued is a process which will take place in the medium to long-term. There is still the immediate problem of dealing with the existing insurance crisis. The goal of self-regulation is to establish the framework within which the parties will bargain and negotiate. The ultimate objective is for those negotiations to produce outcomes that are in line with the relevant public policy outcomes. It is these public policy outcomes which provide legitimacy to the overall system of regulation.<sup>128</sup>

This starting point provides an insight into the immediate steps which governments should take to further regulatory reform. The goal of reform in the short-term should be such as to give all of the parties an interest in the broader

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125 For an analysis of a process to achieve this outcome, see Ayres and Braithwaite, above n 13, 54–100 ('tripartism'). 'Tripartism is defined as a regulatory policy that fosters the participation of P[ublic] I[nterest] G[r]oups in the regulatory process': at 57.

126 Panel of Eminent Persons, above n 1, 53 (Recommendation 7(b)).

127 *Ibid* (Recommendation 7(d)).

128 Parker, above n 11, 31–61.



process of regulatory reform. One way of achieving this is to ensure that costs of supporting an effective system of insurance in the short-term are shared between government and service providers. Any such costs incurred by the government in supporting and maintaining effective insurance markets should then be disclosed in a full and transparent way.

As I have argued, the Liability for Recreational Services Bill includes a hidden subsidy to providers of recreational services.<sup>129</sup> Unless the subsidies necessary to support an effective market for insurance products are clearly disclosed, there will be no incentive for those providing the subsidies to engage in the process of regulatory reform. Each of the interested parties needs to have an incentive to develop a fairer and more effective system of regulation.

One way of setting up these incentives for consumers, insurance providers and governments is to ensure that the costs of maintaining effective insurance markets are shared between the parties. For example, it may be justifiable for the Commonwealth to bear *some* of the costs of compensating injured consumers of recreational services. This will provide the Commonwealth with an incentive for continuing with regulatory reform. This incentive will only be effective if information about the subsidies is disclosed in a full and transparent way. Thus cost-sharing and the disclosure of subsidies to insurance markets are mutually reinforcing reforms.

There are many ways in which the Commonwealth could share the costs of developing effective insurance markets in the short-term. These include accepting responsibility for bearing particular costs associated with personal injury, for example medical health care costs. In this way it would be possible to reduce the size of the total amount of damages payable to plaintiffs. An alternative form of cost-sharing may involve placing caps on the amounts payable under contracts of indemnity insurance. Where the total amount of damages is greater than the capped amount the extra amount could be paid by the States and Commonwealth. Each proposal would be designed to ensure that the Commonwealth, consumers and service providers had appropriate incentives to engage in the long-term project of regulatory reform.

## V CONCLUSION

The primary goal of this article is to outline a model of tort law which places tort in its natural context: within the changing dynamics of the legal system. I have argued that the expansion of the tort of negligence has been underpinned by the implicit understanding that this tort facilitates the operation of complex bodies of law regulating social, cultural and economic practices. This is a synergistic model of tort law and regulation because it highlights the degree of mutually reinforcing interdependence between tort law and regulation. This model emphasises the strengths of tort law — particularly the significance of ‘personal responsibility’ arising out of relationships characterised by mutual

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129 See above nn 118–21 and accompanying text.

interdependence where there are no other statutory or common law mechanisms to do this. This model also emphasises that tort law is not the sole, or even primary, forum for working out a concept as complex as 'personal responsibility'. The decision to recognise that one person owes a duty of care to another ultimately depends on whether the recognition of that duty enhances the goals of other bodies of law and regulation.

This synergistic model of tort law challenges the understanding of negligence as a form of social welfare. That characterisation of negligence is wrong and misleading. It is wrong because the tort of negligence is not capable of operating independently on a frolic of its own. It is arguable that the expansion in the coverage of negligence and the increasing number of compensation claims, together reflect much broader changes in the legal system. Expectations that those responsible for delivering goods and services will exercise higher standards of care arise out of many areas of law, not just tort law.

The contention that tort is to be regarded as a form of social welfare is misleading because it suggests that the problems encountered by many parts of the community as a result of the insurance crisis can be resolved by tort law reform. Neither the 'problems' nor the resolutions to these problems are solely, or even primarily, tort related. For example, tort law reform will not address the very real issues concerning the regulation of recreational services, or the delivery of health care services. Nor will tort law reform deal with the problem of sustaining the full range of community and not-for-profit organisations. These activities are deeply embedded in legal and cultural practices and the problems signalled by the presence of tort liability will need to be resolved with reference to this broad range of considerations.

Tort law reform conceived without an understanding of this broader context may achieve a number of other outcomes. It will adversely affect those who will be prevented from claiming compensation for injuries because of the reform proposals. This will be devastating for the small, but important, group of catastrophically injured plaintiffs. Specific reforms, recommended by the *Ipp Report* and implemented in the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW), will provide unjustifiable government subsidies to various groups, such as recreational service providers. It is likely that, without significant investment in regulation, these service providers will provide services of a lower quality than that which they currently provide. Misguided tort law reform may increase the cost of health services to the community, reduce the quality of some goods and services, and leave some of those injured in a materially worse position than that which they currently occupy.

Finally, tort law reform will, if it follows the path currently set out by the federal and State governments, miss an opportunity to initiate informed discussion about the most effective and efficient ways of regulating conduct that may cause harm. More effective regulation does not mean imposing unreasonable, bureaucratic restrictions on community groups and commercial organisations. It does mean engaging in a process to assess the full extent of the

costs of carrying on activities that may cause harm. It also involves further analysis of who should bear these costs.