unless assistance can be derived from prior legal principle and judicial precedent.[39]

If the decision in *Coleen's* case[40] is representative of a future trend in the nature and scope of judicial review, their lordships' judgments are not altogether then free from difficulty. The apparent generality of the decision and the adoption of a practical pragmatic approach by the Court of Appeal, though commendable in some instances, may give rise to doubt and confusion. Justice demands certainty and predictability, but this decision fails to produce a rational legal principle with some overall purpose and coherence. The situation has arisen where the courts have a growing discretion of their own as to whether to intervene, and in many cases the choice will depend upon the prevailing climate of judicial opinion.

J. E. MIDDLETON

CATERSON v. COMMISSIONER FOR RAILWAYS[1]

Negligence — Duty of Care — Causation — Remoteness — Novus Actus Interveniens — Contributory Negligence.

This recent case, although not adding significantly to existing learning, is worthy of note as it provides a clear exposition of the law in relation to the tort of negligence.

The action was initially brought in the Supreme Court of New South Wales by the plaintiff (Caterson) seeking damages for personal injuries sustained by him by reason of the negligence of the defendant Commissioner. The action was tried by a judge sitting with a jury and a verdict was entered for the plaintiff. On appeal the Court of Appeal ordered that the verdict be set aside. The plaintiff successfully appealed to the High Court of Australia. Gibbs J. delivered the leading judgment[2] and the facts presented hereunder are drawn from His Honour's judgment.

The plaintiff had driven forty miles to a railway station. He was accompanied by his son and a friend. The friend intended to, and did, catch an express train due to depart from the station. It was on departure of the train that the plaintiff was injured. The train was to arrive at 7.44 p.m. and depart at 7.51 p.m. and did arrive on or ahead of time. Because its length was greater than that of the platform it made two stops to allow people to enter their carriages. The first stop was twice as long as the second and it was during the second stop that the plaintiff entered a carriage with his friend. The plaintiff placed his friend's luggage on a rack, shook hands and without wasting time commenced to walk out of the carriage to rejoin his son who was waiting on the platform. When he got to the door he noticed that the train had started to move. The next station at which the train would stop was about eighty miles

[39] Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal*, 468, 472.

[40] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049.

[1] [1972-3] A.L.R. 1393; (1973) 47 A.L.J.R. 249, High Court of Australia, Full Court, Barwick C.J., McTiernan, Menzies, Gibbs and Stephen JJ.

[2] Barwick C.J., Menzies and Stephen JJ. specifically concurring.

away. The plaintiff thought of his son on the platform, forty miles from home, and 'instinctively' and without giving any thought to the risk involved tried to alight from the carriage by jumping onto the platform and running with the train while holding a vertical bar placed near to the door of the carriage. There was a minor conflict of evidence as to the speed of the train but the jury had evidence before it allowing a conclusion that the train was not travelling fast. The plaintiff fell between the train and the platform and sustained injuries. Whilst on the train with his friend the plaintiff did not look at his watch to check the time nor did he or other witnesses hear any warning that the train was about to depart. On discovering that the train was moving it did not occur to him to find a communication cord which, if pulled, would stop the train.

THE DUTY TO TAKE CARE

> Liability was placed on a general duty of care—
> arising out of the circumstances that the defendant had the management of the train; that the appellant was properly upon it; that he was of a class of persons of whose presence on the train the respondent must be taken to have been aware; and that such persons would require adequate time to leave the train whilst it was stationary.[3]

The jury was entitled to conclude from the evidence that the respondent should have foreseen that some people, other than passengers, would board the train while it was halted and would seek to alight from it before it resumed its journey. It was not contested that it was foreseeable that if such a person, finding himself on the train when it started to move, tried to get back onto the platform, he would be likely to suffer injury. *Prima facie,* one would think that a duty to take care of the people temporarily on the train existed. The New South Wales Court of Appeal thought differently however. It was there held that it was not foreseeable that a man would do anything so dangerous as to jump from a moving train except to protect himself from a danger on the train itself and that the act of jumping was not a likely result of any earlier act or omission of the respondent. The Court of Appeal thus held that there was no duty to take care in the circumstances and alternatively if a relevant duty be assumed there was no breach of that duty which caused the plaintiff's injuries. The High Court, and with respect correctly, disagreed. The majority of the court[4] concurred in the view that it was foreseeable that a person, other than a passenger, who found himself on an express train which started to move without warning, might jump from it even though he was in no danger in remaining on the train. The inconvenience of being carried on to another station, definite reasons for wanting to get off (such as a child on the platform forty miles from home), the initial slow speed of the train, the 'heat' of the moment and the avoidance of embarrassment which might result from pulling the communication cord were reasons given to make the plaintiff's actions foreseeable.[5]

[3] [1972-3] A.L.R. 1393, 1395; (1973) 47 A.L.J.R. 249, 250 *per* Barwick C.J. *cf. Commissioner for Railways* v. *McDermott* [1967] 1 A.C. 169 (P.C.).

[4] Barwick C.J., Gibbs, Stephen and Menzies JJ. The remaining judge, McTiernan J., placed liability on the defendant by simply applying Lord Atkin's famous 'neighbour' test and the indisputable law that it is not necessary to show that the particular accident which occurred was foreseeable; it is enough if it was reasonable in a general way to foresee the kind of thing that occurred.

[5] See [1972-3] A.L.R. 1399; (1973) 47 A.L.J.R. 252-3 *per* Gibbs J.

The Chief Justice, in his judgment, gave good warning that when reading cases care must be taken not to erect a particular expression in a judgment (which may be apposite to the facts resulting in *that* judgment) into a formula or part of a formula unless such expression is designed accurately to formulate a general principle. He then stated his opinion[6] that liability in tort (*i.e.* the tort of negligence) will be possible if the event which has occurred and the damage therefrom were both foreseeable by the person sought to be made liable and of such a kind as he ought to have realized were *not unlikely* to occur, subject only to the exception constituted by the decision in *Bolton* v. *Stone*.[7]

THE BREACH OF DUTY

It was for the jury at trial to decide (a) if the defendant had breached its duty or (b) if the defendant was entitled to disregard as a small risk not calling for precautionary measures the possibility that a person such as the plaintiff would not use the communication cord and would run the risk of trying to leave the train when he found it was moving off.[8] The jury found the defendant to be negligent. The High Court supported the verdict explaining that *Bolton* v. *Stone* applied only where there was a valid reason for neglecting a risk.[9] The gravity of the consequences and the expense or inconvenience incurred in eliminating a risk were factors to be 'weighed' by a reasonable man when deciding what action (if any) was necessary to avert the risk. In the present case, the jury, having decided there was a risk, was entitled to (i) weigh the inconvenience to the defendant of allowing the train to stop a little longer at the platform or (ii) the expense of providing a warning to the plaintiff of the train's departure, against that risk. The jury was entitled to find the defendant to be in breach of the duty owed to the plaintiff.

CAUSATION OF DAMAGE

Did the defendant's breach of duty cause the injuries to the plaintiff? The defendant contended that although it could be foreseen that the plaintiff might jump from the train nevertheless his actions amounted to a *novus actus interveniens*.[10] The contention, although appropriate in some circumstances, did not find support in this case. There is cogent authority for the proposition that if a plaintiff suffers injury by a defendant's default damages may be recovered despite the fact that the injury would not have been sustained but for some action of the plaintiff's. However, the plaintiff's action must be in the ordinary course of things, the natural and probable result of the defendant's breach and generally speaking not blameworthy.[11] The High Court considered that the jury was entitled to consider that the plaintiff's actions were 'in the ordinary course of things' and 'the very kind of thing' likely to happen as a result of the defendant's negligence.

[6] Stephen J. concurring.

[7] [1951] A.C. 850; adopting Lord Reid's formula in *C. Czarnikow Ltd* v. *Koufos* [1969] 1 A.C. 350, 385-6.

[8] *I.e.* the *Bolton* v. *Stone* [1951] A.C. 850 situation.

[9] See [1972-3] A.L.R. 1399-400; (1973) 47 A.L.J.R. 253, Gibbs J. citing Lord Reid in *Overseas Tankship (U.K.) Ltd* v. *Miller Steamship Co. Pty Ltd* [1967] 1 A.C. 617, 642-3.

[10] Relying on *Chapman* v. *Hearse* (1961) 106 C.L.R. 112 and *McKew* v. *Holland & Hannan & Cubitts (Scotland) Ltd* [1969] 3 All E.R. 1621, 1623 where Lord Reid said 'it is often easy to foresee unreasonable conduct or some other novus actus interveniens as being quite likely. But that does not mean that the defender must pay for damage caused by the novus actus.'

[11] *Summer* v. *Salford Corporation* [1943] A.C. 283; *Haynes* v. *Harwood* [1935] 1 K.B. 146 and *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004.

CONTRIBUTORY NEGLIGENCE

At the time when the plaintiff sustained his injuries contributory negligence was a complete defence in New South Wales. This may have influenced the jury but as arbiter of fact the jury was entitled to negate the defendant's suggestions that the plaintiff was negligent in failing to keep a close eye on the time whilst he was on the train. Indeed, the plaintiff's evidence was that he acted 'instinctively' and the findings on duty and causation were that his actions were foreseeable and the very kind of thing likely to happen. It follows that the decision to jump could be said not to be negligent. Nevertheless the defendant bravely contended that in the *act* of jumping the plaintiff acted unreasonably and without due care for his own safety. There seem to be inherent difficulties in distinguishing an instinctive or impulsive decision to act from the act itself but the court entertained the contention. It was put that it is never reasonable to take a risk of injury merely to avoid an inconvenience, however great. The so called 'doctrine of alternative danger'[12] had no application to the present case as the plaintiff had merely to choose between danger and inconvenience not danger and danger. Gibbs J. succinctly answered the contention.

> Where a plaintiff has by reason of the negligence of the defendant been so placed that he can only escape from an inconvenience by taking a risk, the question whether his action in taking the risk is unreasonable is to be answered by weighing the degree of inconvenience to which he will be subjected against the risk he takes in order to try to escape from it.[13]

The question was a jury one and from the evidence before it the jury could assess the inconvenience against the risk and find in the plaintiff's favour, i.e. that his injuries were not caused or contributed to by any negligence on his part. The appeal was thus allowed.

The case is instructive from the students' viewpoint. It is a clear example of the application of the law relating to negligence to a relatively common fact situation. It echoes, on analysis, Lord Denning's comments in *Roe* v. *Minister for Health,*

> the three questions, duty, causation and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same problem . . . Is the consequence fairly to be regarded as within the risk created by the negligence?[14]

The practitioner here finds forceful authority repeating much of the law relating to negligence and reducing confusion surrounding the 'doctrine of alternative danger' by unequivocally and sensibly extending it to situations where the danger can be 'weighed' against inconvenience.

NEAL B. CHAMINGS

[12] As seen in *Jones* v. *Boyce* (1816) 1 Stark 493; 171 E.R. 540.
[13] [1972-3] A.L.R. 1393, 1401; (1973) 47 A.L.J.R. 249, 254; See also *Robson* v. *North Eastern Railway Co.* (1875) L.R. 10 Q.B. 271 and *Sayers* v. *Harlow Urban District Council* [1958] 1 W.L.R. 623.
[14] [1954] 2 Q.B. 66, 85 (C.A.).