#  Motor and Traffic Law, New South Wales

*Originally published by Butterworths (now LexisNexis Australia) 1994, continuing looseleaf and online publication.  Years of publication 1994-2024 and continuing, originally published as a single volume, now in 3 volumes; also published online by LexisNexis as Lexis Advance, 2012 -2024 and continuing.*

Author and editor of publication throughout: Dr Elwyn Elms OAM.  LL B, Dip Crim (Syd), BA (Hons), Ph D (Macq)

 **Foreword by the Honourable Michael Kirby AC CMG**

*Originally* *written for the release of the text when it was first published in hardcopy in 1994 at pages 51-53 at a time when His Honour (as he then was) was President of the Court of Appeal, Supreme Court of New South Wales; subsequently a Justice of the High Court of Australia, 1996–2009*

FOREWORD

The motor vehicle and Federation have been companions to the Australian people for the whole of this century. At the time the finishing touches were being put upon the new Constitution to establish a united people “in one indissoluble Federal Commonwealth under the Crown”, the horseless carriage began to appear on the streets of Sydney and Melbourne. By 1902, losing little time, the new Commonwealth imposed a customs duty on imported motor bodies in order to encourage local industry based upon the established coach building craft. The customs duty did not stem the tide of this popular import. In a new country of large distances, the motor vehicle was immediately embraced with enthusiasm.

It did not take long for a multitude of legal problems to present themselves. New criminal offences were created. Regulations to control the flow of traffic were made. But the bulk of the law, designed to sort out the respective entitlements of people injured by fast moving vehicles, was left to the courts. Fatefully for the development of the law, the common law of England, in the last phase of horse-drawn carriages, had adopted a principle that a person injured on the highway could not recover in the absence of negligence.**[1](#Forward_fnref_MTN.FOREWORD.FTN1-R)** This principle involved a fiction that those who enter the highway (or are immediately adjacent to it) accept the risk of unavoidable accidents. But for the invention of this fiction, just prior to the invention of the motor car, it is possible that the tort which would have been developed and applied by the common law for motor vehicle accidents would have been trespass. That tort is actionable per se, ie without proof of negligence. A faultless trespass was actionable at common law unless the defendant could show that the accident was inevitable.

Had the common law developed in this way, the spreading of the risks of the advent of the “devil waggon” — inevitable in the unequal conflict between fast moving metal and human flesh — would have been quite different. Professor John Fleming has observed that, in retrospect “the wisdom of discarding strict liability for highway accidents seems less obvious today, since the advent of the motor car, than it was in the days of more tranquil traffic a century ago”.**[2](#Forward_fnref_MTN.FOREWORD.FTN2-R)**

However that may be, the law in England, and its counterpart in Australia, responded to the enormous social challenge of civil damages claims with the tort of negligence. The basic features of that tort have remained unchanged. But it can scarcely be denied that the necessary advent of widespread, and then compulsory and universal, insurance has had its impact upon the judicial decisions determining whether an injured person will recover damages for the fault of a driver.**[3](#Forward_fnref_MTN.FOREWORD.FTN3-R)**

Numerous attempts were made in the 1970s to despatch the great industry of motor vehicle negligence actions. The most potent was the report of the National Committee of Inquiry into Compensation & Rehabilitation in Australia.**[4](#Forward_fnref_MTN.FOREWORD.FTN4-R)** This proposed a National Compensation Act and no fault liability, similar to that adopted in New Zealand. But the proposal fell with the Whitlam Federal Government in 1975. It was never revived by Government.

What attempts to cut the costs of delivering the compensation dollar and to reduce the administrative burden of litigation could not achieve, pressure from Treasury and insurers and cost-cutting moves of governments of different political persuasions brought about with statutory changes in the late 1980s. Thus in New South Wales, the Transport Accidents Compensation Act 1987 was replaced by the Motor Accidents Act 1988. These statutes and companion reform of workers compensation law have significantly altered the profile of motor vehicle litigation and, indeed, civil damages litigation generally. None the less, the Motor Accidents Act provided a limited restoration of common law rights with retrospective operation. This has meant that those who threw out their old texts and thought the old law could be discarded, must think again. It is to provide a practitioner’s summary of that law, in a handy accessible form, that Dr Elms has written this book.

He rightly cautions about the need for care in thinking that the solution to the proof of negligence in a particular case is the invocation of other earlier cases in the “wilderness of single instances”. Of necessity, the facts of every case are different. Most appellate courts are very reluctant to explore judicial dicta in other cases as providing any solution to the entitlement of parties in a different fact situation.**[5](#Forward_fnref_MTN.FOREWORD.FTN5-R)** By the same token, there are a number of reasons why it is useful to collect like cases under convenient headings. Whereas facts are infinitely various, the basic rules of law are not. The dicta may suggest arguments which will help to persuade the decision-maker. In a court of relatively stable composition (such as the Court of Appeal), there is an inevitable judicial search for consistency. The advent of new specialised series for reporting tort cases generally, or motor vehicle cases specifically, rescues judicial opinions from the oblivion of unreported manuscripts. Some judges even occasionally find a reference to the resolution of a claim in earlier like circumstances to be helpful. I am one of them. So long as slavish devotion to authority does not blind the practitioner, or the judge, to the peculiarities of the particular case, a resort to past decisions, particularly one’s own, in the search for the decision in a new case is, after all, the familiar normative methodology of our judiciary. It is the way we discipline the whims of the decision-maker to the rule of law.

The same can be said about Dr Elms’ collection of the principles that govern damages for personal injury based upon Professor Harold Luntz’s work on the same subject. The High Court of Australia has strongly discouraged the comparison of apparently like claims.**[6](#Forward_fnref_MTN.FOREWORD.FTN6-R)** All that a court can do is to draw upon its own judicial experience in comparing apparently like cases. In *Moran v McMahon***[7](#Forward_fnref_MTN.FOREWORD.FTN7-R)** while adhering to *Planet Fisheries*, I suggested that the court should strive to achieve greater consistency in the awards of damages. My appeal for a new approach went unheeded. Yet I feel that this may have contributed to the eventual demise of the uncontrolled damages verdict and the substitution of statutory maxima and the abolition of some entitlements. However that may be, my later attempt to introduce comparisons between verdicts in defamation cases**[8](#Forward_fnref_MTN.FOREWORD.FTN8-R)** seems to have fallen upon more receptive ears.**[9](#Forward_fnref_MTN.FOREWORD.FTN9-R)**

The close of the twentieth century is now advancing fast. The Australian Constitution is under scrutiny. But the motor vehicle reigns. It has been a liberator a symbol of individual adulthood, an essential means of work in the economy and a great source of work for lawyers. It seems safe to predict that Australians will drive into the new century. They will have accidents and sometimes breach the rules of the road. To solve the problems which then ensue will be the role of the lawyer. Both for his reference to a vast mass of legal principles (some of it otherwise unreported) and for his attempts to stamp order and consistency on the authorities, I am sure many lawyers will be grateful to Dr Elms. As this work plainly demonstrates the law which has accumulated around the motor vehicle is substantial and not always simple. It is a garden in which many have laboured. And the work is by no means over.

Court of Appeal

Sydney

26 April 1994

**[1](#Backward_fnref_MTN.FOREWORD.FTN1-R)** See eg *Holmes v Mather* [*[1875] LR 10 Ex 261*](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1875+LR+10+Exch+261) Goodhart & Winfield “Trespass & Negligence” (1933) 49 LQR 359.

**[2](#Backward_fnref_MTN.FOREWORD.FTN2-R)** See J G Fleming, *The Law of Torts*, 7th ed. Law Book Co Ltd, Sydney, 1987, p 18.

**[3](#Backward_fnref_MTN.FOREWORD.FTN3-R)** For the impact of insurance on the developments of the law of torts, see eg *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 518; (1987) Aust Torts Reports 80-120 (CA) and cases there cited.

**[4](#Backward_fnref_MTN.FOREWORD.FTN4-R)** AGPS, Canberra, July 1974.

**[5](#Backward_fnref_MTN.FOREWORD.FTN5-R)** See *Smith v Harris* [1939] 3 All ER 960 at 965 (CA); 4 Halsbury’s Laws of England, Vol 26, 292f (para 573).

**[6](#Backward_fnref_MTN.FOREWORD.FTN6-R)** *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124F; 42 ALJR 237; BC6800620 .

**[7](#Backward_fnref_MTN.FOREWORD.FTN7-R)** (1985) 3 NSWLR 700 at 709; (1985) Aust Torts Reports 80-762; (1986) NSWJB 25  (CA).

**[8](#Backward_fnref_MTN.FOREWORD.FTN8-R)** See *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259 at 273 (CA); *Australian Consolidated Press v Ettingshausen* (CA (NSW), Gleeson CJ, Kirby P, Clarke JA, 3 October 1993, CA 40079/93, unreported).

**[9](#Backward_fnref_MTN.FOREWORD.FTN9-R)** See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 56; 113 ALR 577; 67 ALJR 634; BC9303554  (HC of A).


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