A Century of Torts: Western Australian Appeals to the High Court 1903-2003

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IN the field of torts, what is the High Court's record in hearing appeals from the Supreme Court of Western Australia, and what effect have the Western Australian appeals had on the development of the law? The impact of Western Australian cases on the law of negligence has never been greater than in the past decade. Since 1991 there has been a series of important decisions: *Bennett*, *Nagle*, *Schellenberg*, *Jones*, *Rosenberg*, *Woods*, *Annetts* and *De Sales*.[1] However, my aim is to range a little more widely and assess the impact of the Western Australian cases over the whole of the period under examination. Let us begin by asking: just how many High Court torts cases involving appeals from Western Australia are there? By my counting (which is restricted to cases reported in the Commonwealth Law Reports), there are 32, plus six workers' compensation cases dealing with vicarious liability issues.[2] Most of the 32 are negligence cases, but included also are cases on breach of statutory duty,[3] nuisance,[4] deceit,[5] defamation[6] and loss of consortium.[7]

In these days of performance indicators, one indicator of the performance of the Supreme Court of Western Australia might be the number of cases in which its

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1. References are given later in this paper.
2. There will shortly be a 33rd: on 6 August 2004, the High Court granted special leave in *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322, dealing with employers' liability for work stress causing psychiatric injury. The case was heard on 27 October 2004.
3. *London & West Australian Exploration Co Ltd v Ricci* (1906) 4 CLR 617.
4. *Perth Corporation v Halle* (1911) 13 CLR 393; *Eastern Asia Navigation Co Ltd v Fremantle Harbour Trust Commissioners* (1951) 83 CLR 353 (also involving liability for fire under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330); *Hargrave v Goldman* (1963) 110 CLR 40 (see below p 111).
5. *Commercial Banking Co of Sydney Ltd v R H Brown & Co* (1972) 126 CLR 337.
6. *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211.
7. *Toohey v Hollier* (1955) 92 CLR 618.

judgments have been upheld by the High Court. Remarkably, of the 24 torts cases in which appeal has been taken to the High Court from the Full Court, in 12 the Full Court's decision was affirmed or special leave was refused following a full hearing, and in 12 its decision was reversed or varied – which makes working out its average relatively simple. In the other 14 cases, the appeal was from a single judge: these were all before 1976, in the days when it was possible to appeal from a single judge as of right.[8] In eight cases, the single judge's decision was upheld. It would be wrong to undertake a comprehensive study of the performance of individual judges, but Dwyer J (later Chief Justice) had an enviable record: in three of the five cases in which his judgments were appealed directly to the High Court, the High Court said he was right. In a fourth, *Buckle v Bayswater Road Board*,[9] the High Court affirmed his decision that highway authorities were immune from liability for nonfeasance but, unlike Dwyer J, found some misfeasance in the facts of the case. That immunity survived until the recent decision in *Brodie v Singleton Shire Council*,[10] and since then has been reintroduced by statute in most jurisdictions, including Western Australia.[11] Less enviable was the record of another Western Australian Supreme Court judge (now deceased): in the one torts case in which his decision was appealed to the High Court, the decision was reversed and Kitto J said of his judgment: 'It is hardly a satisfactory document, being distinguished by an odd disregard of technical distinctions and even of conventional grammar'.[12]

As everybody knows, the modern law of negligence can be said to begin with Lord Atkin's neighbour principle and the decision in *Donoghue v Stevenson*.[13] Before then, some held that there was no such thing as a tort of negligence,[14] though I would disagree and would maintain that the true beginning of the modern tort of negligence happened in the 1830s.[15] However, notions of duty of care were hazy

8. See J Crawford *Australian Courts of Law* 3rd edn (Melbourne: OUP, 1993) 183-184.
9. (1936) 57 CLR 259.
10. (2001) 206 CLR 512.
11. See Civil Liability Act 2002 (WA) s 5Z, inserted by the Civil Liability Amendment Act 2003 (WA); Civil Liability Act 2002 (NSW) s 45; Transport Act 1983 (Vic) s 37A; Civil Liability Act 2003 (Qld) s 37; Civil Liability Act 1936 (SA) s 42; Civil Liability Act 2002 (Tas) s 42; Civil Law (Wrongs) Act 2002 (ACT) s 113.
12. *Public Trustee (WA) v Nickisson* (1964) 111 CLR 500. The judge was Negus J.
13. [1932] AC 562.
14. Eg J Salmond *The Law of Torts* 6th edn (London: Sweet & Maxwell, 1924) (the last edition written by Salmond himself) contains no chapter on negligence, only a discussion of negligence as part of the general principles of liability. In the preface to the 8th edition in 1934, WTS Stallybrass commented: 'In no branch of the law has the development during the twentieth century been more marked than in the law relating to the action of negligence. Sir John Salmond was still able in 1924 to deny the existence of any such action.... In 1934 ... Sir John Salmond's fundamental thesis is frankly untenable.'
15. Specifically, with the decision in *Williams v Holland* (1833) 10 Bing 112, 131 ER 848, which held that the action on the case for negligence was available for direct as well as indirect injuries. See MJ Prichard 'Trespass, Case and the Rule in *Williams v Holland*' [1964] Camb LJ 234.

until the first attempt to define some sort of general principle in *Heaven v Pender* in 1882[16] – quickly departed from as too wide[17] – and until *Donoghue v Stevenson* the position appeared to be that there was a limited number of defined duty-situations. We can perhaps call this the 'primeval era' of negligence. There are several Western Australian appeals to the High Court which belong to this period. It is worthy of note that the first case in the Commonwealth Law Reports indexed under the heading of negligence is a Western Australian case, *Commissioner of Railways v Leahy.*[18] The plaintiff was run over by a train at a level crossing in Kalgoorlie. The judge had directed a verdict for the defendant on the ground of the plaintiff's contributory negligence – at the time, a complete defence unless the defendant had the last opportunity of avoiding the harm. The High Court held that the issue of contributory negligence should not have been withdrawn from the jury. Between 1905 and 1916 there were three further negligence appeals from Western Australian courts.[19] These cases generally reflect the world of the early 20th century. For example, in *Sermon v Commissioner of Railways,*[20] sparks from a railway engine started a bush fire, and in *Commissioner of Railways (WA) v Davis Bros,*[21] the plaintiff's horses died from eating wheat thrown out of a train following a derailment.[22]

Donoghue v Stevenson was not initially welcomed by the High Court. In *Australian Knitting Mills Ltd v Grant* [23] (the case of the defective underpants, which caused the plaintiff to suffer itching around his ankles), it was only the dissenting judge, Evatt J, who was prepared to apply the general principle of what he called the *Snail Case* to impose a duty on the manufacturer. Thus it was not until the Privy Council reversed the High Court's decision in 1935[24] that the neighbour principle was accepted into Australian law, marking the dawn of the modern era. Two Western

16. (1883) 11 QBD 503. The main issue in this period was defining the standard of care in terms of the 'reasonable man': see *Vaughan v Menlove* (1837) 3 Bing (NC) 468, 132 ER 490; *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, 156 ER 1047. In *Hargrave v Goldman* (1963) 110 CLR 40, 62-65 Windeyer J contributed a valuable historical survey of duty of care in negligence.
17. *Le Lievre v Gould* [1893] 1 QB 491.
18. (1904) 2 CLR 54.
19. Plus *London & West Australian Exploration Co Ltd v Ricci* above n 3, a case on breach of statutory duty which affirmed that where an employee sued his employer for a tort committed by a fellow employee, the employer could plead the defence of 'common employment'. This defence was abolished by the Law Reform (Common Employment) Act 1951 (WA).
20. (1907) 5 CLR 239. The defendant successfully pleaded the defence of statutory authority.
21. (1916) 21 CLR 142. The Court refused special leave to appeal against a judgment in the plaintiff's favour.
22. The remaining case is *Metcalf v Great Boulder Proprietary Gold Mines Ltd* (1905) 3 CLR 543, dealing with the effect of the Employers' Liability Act 1894 (WA) on the defence of common employment.
23. (1933) 50 CLR 387.
24. *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49.

Australian appeals were among the early cases heard by the High Court in the wake of these developments, possibly before their full impact had been appreciated. One was *Buckle v Bayswater Road Board*,[25] which has already been referred to. The other was *Commissioner of Railways v Stewart*,[26] notable chiefly for the length of time (49 years) between the negligent construction of a railway embankment at York in 1885 and the resulting damage suffered in 1934 following a heavy downpour. It was held that the Commissioner of Railways was liable in negligence and that the defence of Act of God was not available.

Turning to more modern times, it is possible to identify two great initiatives in the development of theories relating to duty of care for which the High Court has been responsible, both distinctively Australian. The more recent of these is the concept of the 'relationship of proximity' as a unifying principle. In 1984, Deane J, when first outlining this concept, saw proximity as 'a touchstone and a control of the *categories* of case in which the common law will admit the existence of a duty of care'.[27] From 1986 onwards[28] this principle was endorsed by the whole court (except for Brennan J), but soon after Deane J's departure for Yarralumla in 1995 the Court began to abandon it.[29] *Nagle v Rottnest Island Authority*,[30] a case which is generally regarded as one of the high water marks of the proximity era, neatly illustrates the division of views on the High Court at this time. The majority viewed the Rottnest Island Authority as just like any other occupier, and said that by encouraging swimming at the Basin the Authority brought itself into proximity of relationship with those who swam there. Given that the risk of injury from diving was foreseeable, the defendants were in breach by failing to give a warning of the dangers of diving from the ledge in question. Brennan J dissented, characterising the defendants as a public authority rather than an ordinary occupier, and the general public as persons exercising a public right to be there. On this interpretation, the question whether a warning would have averted the risk of injury became less significant. Ten years and one insurance crisis later, it is clear that in *Nagle* the High Court went too far. Justice Ipp's report makes a point of saying that the case would be decided differently under the Negligence Review Panel's recommendations,[31] which are now being implemented in most jurisdictions.[32] The seductive power of the general proximity

25. 'The emergence of a coherent law of negligence had not occurred when *Buckle* fell to be decided in this Court in 1936': *Brodie v Singleton Shire Council* (2001) 206 CLR 512, Kirby J 589.
26. (1936) 56 CLR 520.
27. *Jaensch v Coffey* (1984) 155 CLR 549, 585.
28. *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.
29. See *Hill v Van Erp* (1997) 188 CLR 159.
30. (1993) 177 CLR 423. See J Allen & M Dixon 'Foreseeability Sinks and Duty of Care Drifts: The High Court Visits Rottnest' (1993) 23 UWAL Rev 320.
31. *Review of the Law of Negligence: Final Report* (Sep 2002) para 4.30. See also DA Ipp 'Policy and the Swing of the Negligence Pendulum' (2003) 77 ALJ 732, 741.
32. See the legislation referred to in n 11 above.

principle caused the High Court to take one step too many, in much the same way as the House of Lords did in relation to pure economic loss[33] under the influence of the so-called '*Anns* two-step'.[34] The Lords subsequently jettisoned both the ruling on economic loss[35] and the general principle.[36]

The High Court in the Gleeson era is not now prepared to recognise a duty of care so readily, or to concede that such duties have been breached. *Woods v Multi-Sport Holdings Pty Ltd*,[37] where the plaintiff was hit in the eye by a cricket ball when playing indoor cricket, can be instructively compared with *Nagle*. Once again, there was a split between different factions on the High Court, but this time only two of the five judges were prepared to hold that the defendants were in breach of duty by failing to put up a warning notice. Again, there was a difference in the way the situation was characterised, the majority seeing the defendants as a sporting organisation while the minority viewed them as carrying on business for profit. The division reflects what often seems to happen on the Court in negligence cases: McHugh and Kirby JJ were the dissenters, while the three more recently appointed judges, Gleeson CJ, Hayne and Callinan JJ, represented the majority view.[38]

A cricket ball connects *Woods* with an earlier decision of the High Court on appeal from Western Australia: *Whittingham v Commissioner for Railways (WA)*,[39] where a worker at the Midland Junction Railway Workshops, taking a stroll during the lunch break, was struck in the eye by a cricket ball hit by a fellow worker who was playing cricket. It was held that the injured man was not entitled to workers' compensation because the accident did not arise out of or in the course of his employment.[40] This was just one of a number of Western Australian cases in which the High Court examined vicarious liability issues such as course of employment[41]

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33. See *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.
34. *Anns v Merton London Borough Council* [1978] AC 728. For the provenance of this 'neologism', see M Davies 'Liability for Negligently Caused Economic Loss: A Restatement' (1985) 16 UWAL Rev 209, 216.
35. *Murphy v Brentwood Urban District Council* [1991] 1 AC 398.
36. *Caparo Industries Plc v Dickman* [1990] 2 AC 605.
37. (2002) 208 CLR 460. See K Amirthalingam 'Duty? – It's Just Not Cricket' (2002) 10 Tort L Rev 163.
38. For comment on the High Court's current direction in torts cases, see H Luntz 'Torts Turnaround Downunder' (2001) 1 Oxford Uni Cth LJ 95.
39. (1931) 46 CLR 22.
40. This was not the High Court's first contact with mishaps on the cricket field. It is well known that Barton J, one of the first three judges, was Prime Minister of Australia before he became a judge. It is less well known that he was also a cricket umpire, and that he umpired in a notorious match in 1879 between New South Wales and the visiting English team at the Sydney Cricket Ground (NSW v Lord Harris' XI, 7-10 Feb 1879), which was halted by a riot which came close to severing cricketing relations between Australia and England: see C Harte *A History of Australian Cricket* (London: Lansdowne Press, 1993) 109-118.
41. See also *Light v Mouchemore* (1915) 20 CLR 647; *Pearson v Fremantle Harbour Trust* (1929) 42 CLR 320; *Henderson v Commissioner of Railways* (1937) 58 CLR 281.

and borrowed servants[42] in a workers' compensation context.[43]

The other innovative development in negligence law for which the High Court is responsible is earlier in time and belongs to the Dixon era. I refer to the idea that, even though an occupier of land might not owe a duty of care to a trespasser qua occupier, liability in negligence might be based on some other overriding duty. This concept was developed in a series of cases commencing in the 1950s.[44] More generally, some of the most significant High Court decisions on negligence have been made in the context of duties concerned with the occupation of property – for example, Deane J's rejection of the old occupiers' liability categories in favour of a general duty of care in negligence.[45] Two Western Australian cases are significant in the context of duties stemming from property ownership. *Hargrave v Goldman*[46] (the only Western Australian torts case appealed from the High Court to the Privy Council),[47] deals with the liability of property owners for negligently failing to eliminate dangers on the property – in that case, a tree in Gidgegannup struck by lightning. Windeyer J's judgment is a classic exposition of this area of negligence liability and of the differences between negligence and nuisance. Moreover, his summary of how a court determines whether a duty of care exists in a novel situation[48] seems like a case of back to the future: it would serve pretty well as a description of what the High Court does in 2003, despite all that has happened in the intervening 40 years. More recently, *Jones v Bartlett*[49] has confirmed the nature of the duty owed by a landlord to persons injured on tenanted property. The case settled the controversy arising from the earlier decision in *Northern Sandblasting Pty Ltd v Harris*,[50] which could only be justified on the basis of one or other of two propositions each of which was rejected by a majority. As such, *Jones* contains valuable statements on how to deal with a High Court case which has no ratio[51] – a situation which is all too likely to occur when all seven judges sit and give separate judgments. The case is also noteworthy because it is the only High Court case discussing the interpretation of two important Western Australian statutory provisions: section 11 of the Property Law Act 1969, and the Occupiers' Liability Act 1985.

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42. See *Fogarty v Dowerin Road Board* (1935) 53 CLR 510.
43. A more modern vicarious liability case is *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, raising borrowed servant and independent duty issues in relation to the pilot of a ship.
44. *Thompson v Bankstown Corporation* (1953) 87 CLR 619; *Rich v Commissioner for Railways* (1959) 101 CLR 135; *Commissioner for Railways v Cardy* (1960) 104 CLR 274; *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1.
45. *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.
46. Above n 4.
47. See *Goldman v Hargrave* (1966) 115 CLR 458.
48. (1963) 110 CLR 40, 64-66.
49. (2000) 205 CLR 166. See P Handford 'Through a Glass Door Darkly: *Jones v Bartlett* in the High Court' (2001) 30 UWAL Rev 75.
50. (1997) 188 CLR 313. See P Handford 'No Consensus on Landlord's Liability' (1998) 6 Tort L Rev 105.
51. See (2000) 205 CLR 166, Gummow & Hayne JJ 223-225, Kirby J 231-234.

There are important recent Western Australian decisions on other aspects of negligence, such as *Bennett v Minister of Community Welfare*[52] on causation, *Schellenberg v Tunnel Holdings Pty Ltd*[53] on res ipsa loquitur, and *Rosenberg v Percival*[54] on doctors' duties to warn. One or two earlier decisions are also of lasting importance, such as *Hamilton v Nuroof (WA) Pty Ltd*[55] on employers' liability.[56] But I want to refer briefly to two important Western Australian decisions dealing with the assessment of damages for negligence. *Skelton v Collins*[57] deals with the basis on which general damages for non-pecuniary loss are to be assessed in cases involving unconscious plaintiffs. Hale J in the Supreme Court of Western Australia held, and the High Court confirmed, that assessment should be subjective and so awards for claimants incapable of appreciating their loss should be minimal.[58] The particular significance of this case is that it was the first decision in which the High Court exercised the freedom to depart from House of Lords decisions, following Dixon CJ's well-known obiter dictum in *Parker v R*[59] freeing it from the view adopted in *Piro v W Foster & Co Ltd*[60] that the House of Lords had the function of laying down the common law for 'the Empire', and the High Court should simply follow suit. More recently, *De Sales v Ingrilli*[61] has brought the assessment of Fatal Accidents Act damages into line with modern notions of gender equality by holding that damages should not be reduced on the ground of the remarriageability of a widow, reversing the view taken in the earlier Western Australian case of *Willis v Commonwealth*.[62]

I have left till last the case which I consider is perhaps the most important High Court decision ever to emerge from Western Australia in the field of torts: *Annetts v Australian Stations Pty Ltd*.[63] As is well known, *Annetts* held that in psychiatric

52. (1993) 176 CLR 408.
53. (2000) 200 CLR 121.
54. (2001) 205 CLR 434.
55. (1956) 96 CLR 18.
56. Other decisions on negligence are *Sibley v Kais* (1967) 118 CLR 424 (standard of care); *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149 (liability of insurance brokers and insurers); *Gardiner v Motor Vehicle Insurance Trust* (1955) 95 CLR 120 (incidental contributory negligence issues).
57. (1966) 115 CLR 94.
58. Another case on the assessment of personal injury damages is *Miller v Jennings* (1954) 92 CLR 190.
59. (1963) 111 CLR 610, 632.
60. (1943) 68 CLR 313.
61. (2002) 212 CLR 338. See J Sippe 'Discounting Damages in an Action for Wrongful Death Brought by a Surviving Spouse' (2004) 12 Tort L Rev 98.
62. (1946) 73 CLR 105. Other cases on the Fatal Accidents Act are: *Williams v Usher* (1955) 94 CLR 450; *Public Trustee (WA) v Nickisson* above n 12.
63. Two proceedings were heard together: *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317. For comment on the likely outcome, see P Handford 'When the Telephone Rings: Restating Negligence Liability for Psychiatric Illness' (2001) 23 Syd LR 597. For an analysis of the decision, see P Handford 'Psychiatric Injury: The New Era' (2003) 11 Tort L Rev 13.

injury cases direct perception, sudden shock and normal fortitude are no longer to be regarded as essential requirements of duty, which is to be based essentially on whether this kind of injury was reasonably foreseeable. This decision was an enormous source of satisfaction to Nicholas Mullany and myself, because for the past 10 years, ever since the publication of our book *Tort Liability for Psychiatric Damage*,[64] we have been advocating removal of these barriers.[65] Though the judgments were handed down in the middle of the 'insurance crisis', the High Court refused to bow to the forces of conservatism and ensured that the law relating to psychiatric injury in Australia is now in a much more satisfactory state than in England.[66] It is to be hoped that the mental harm provisions in the statutes which implement the Ipp recommendations[67] will not detract too much from the position taken by the High Court or cause courts to retreat to a more conservative view. *Annetts* highlights an issue which I think is central to the subject of this paper – the differing roles of intermediate and final appellate courts. The Full Court in *Annetts*, like Heenan J, held that no duty was owed to Mr and Mrs Annetts. The Full Court's decision was more conservative than some other intermediate appeal court decisions on this topic, but Malcolm CJ and Ipp J were quite clear as to the Full Court's role. Malcolm CJ said: 'Given the current state of authorities it is not for this Court as an intermediate appellate court to extend the scope of the liabilities for psychiatric injury or nervous shock any further than the authorities to date have indicated'.[68] The High Court took up the baton which had been passed to it, reversed the decision of the Full Court and restated the modern law of psychiatric damage in terms appropriate for the 21st century.

It is not profitable to attempt to assess the Western Australian torts appeals to the High Court by trying to estimate their influence on the law as compared with, say, those of New South Wales or Victoria. What can be said is that among a fairly small corpus of cases from one of the outlying states are some decisions of significance. This is true not only of the rapid development of torts over the past 10 years, but also at important earlier points in its history. As this paper has sought to show, right from the early days of the High Court, Western Australian cases have had an important impact at key points in the evolution of tort law.

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64. NJ Mullany & PR Handford *Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'* (Sydney: Law Book Co, 1993).
65. For subsequent collaborations, see P Handford & N Mullany 'Hillsborough Replayed' (1997) 113 LQR 410; P Handford & N Mullany 'Moving the Boundary Stone by Statute – The Law Commission on Psychiatric Illness' (1999) 22 UNSWLJ 350.
66. Compare *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Page v Smith* [1996] 1 AC 155; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.
67. Eg Civil Liability Act 2002 (WA) Pt 3, inserted by the Civil Liability Amendment Act 2003 (WA).
68. *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35, 40; see also Ipp J 47.