

LACUNAE AND LITIGANTS: A STUDY OF NEGLIGENCE CASES IN THE HIGH COURT OF AUSTRALIA IN THE FIRST DECADE OF THE 21ST CENTURY AND BEYOND

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This article examines a snapshot in time of appeals in negligence cases to the High Court during the first 11 years of the 21st century. In total, 78 negligence cases decided by the High Court during this period are analysed. Cases granted leave to appeal to the High Court are exceptional, raising novel or difficult issues of law and depend upon an injured plaintiff's practical and financial ability to access legal services. This article analyses the gender and age of litigants, and the accident type in these appeals in order to determine what, if anything, can be learnt about tort litigation patterns. This study found that more men litigated in High Court appeals in the period under study than any other group. When analysed against the background of existing evidence as to: the nature and type of injuries suffered in Australia which require hospitalisation; who is injured; who litigates at first instance; who appeals; and the nature of negligence cases, it becomes clear that adult male plaintiffs appear more often in tort law than women and children due to more men being injured as a group and female and child injuries happening more often in no-fault contexts. The data also indicate that plaintiffs are far less likely to succeed in negligence appeals to the High Court than defendants. It is argued that this emphasis upon personal responsibility in the tort of negligence seems set to continue in light of the statutory tort law reforms which took place across Australia in 2002.

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I INTRODUCTION

This article examines particular features of cases in negligence law that find their way to the High Court. The analysis in this article is based upon a database constructed through identifying and coding High Court cases from the beginning of 2000 to the close of 2010, where the cause of action was the tort of negligence.¹ This article discusses data findings as to the plaintiff attributes of age, gender, accident type and litigant success rates.²

The difficulties in accessing negligence compensation in a timely, just and effective manner through the Australian court system have been oft-analysed and deeply lamented.³ The findings of this study support this long history of critical scholarly writing, promoting a rethink of the framework of compensation for tortious conduct. This article contributes empirical analysis of the law to this debate, such analysis having traditionally been relatively rare in legal research⁴ and in the study of the tort of negligence in particular.⁵ Importantly, however, there are limitations as to the inferences and implications that can be

¹ This analysis includes cases which discuss vicarious liability and non-delegable duty. See the Appendix for a full list of the cases coded. The High Court cases selected were all decisions where the substantive issues decided by the High Court related to liability in the tort of negligence, although the data set includes cases where the High Court appeal was not determinative of liability or quantum of damages, including cases which resolved an issue between defendants, a procedural issue or a revocation of special leave.

² See Part IV below for a discussion as to methodology and coding of success rates.

³ See, eg, Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions — Wrong Answers' (2002) 25 *University of New South Wales Law Journal* 836; Harold Luntz, 'A View from Abroad' [2008] *New Zealand Law Review* 97; Regina Graycar, 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages' (1997) 31 *University of British Columbia Law Review* 17; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) ('*The Hidden Gender of Law* (2nd ed)').

⁴ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) 72 [1.43]. There are trending exceptions to this: see, eg, Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2010) 34 *University of New South Wales Law Journal* 1030.

⁵ There are prominent exceptions: see, eg, Luntz, 'A View from Abroad', above n 3; Harold Luntz, 'Turning Points in the Law of Torts in the Last 30 Years' (2003) 15 *Insurance Law Journal* 1, 22; Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford University Commonwealth Law Journal* 95, 96–8; E W Wright, 'National Trends in Personal Injury Litigation: Before and after "Ipp"' (2006) 14 *Torts Law Journal* 233.

drawn from empirical studies. In this study, for example, High Court decisions only reveal the litigants who were given special leave to appeal. As such, this study does not examine the general population of people who suffered injuries for whom somebody else might bear responsibility, nor the litigants who could not afford to pursue their claim, were denied leave to appeal, settled, or did not have the resilience to go on. The numbers presented in this article are therefore not intended as an end in themselves but rather to provide a foundation for more detailed consideration.

Indeed, it is perhaps ambitious to test any hypothesis as to which features of cases may result in High Court appeals, given the very small number of not necessarily representative cases that end up in that court. For this reason, the findings of the study are placed in the wider context of available relevant evidence of personal injury and litigation. Part II therefore begins by discussing Australian hospital admission statistics as to gender- and age-based accident rates and types. These data indicate that women and children are not injured in the same way as men. The evidence presented adds weight to the view that the disparity between men, and women and children with respect to negligence claims may be due to the architecture of the tort system itself. Part III draws together evidence on litigation rates, and age and gender. The choice to litigate involves decisions as to time, cost, and emotional energy, and an appeal no doubt intensifies such experiences. The motivation and ability to litigate are complex phenomena and are seemingly not explained by any one factor — including plaintiff characteristics such as age and gender.

Following this background, Part IV details the outcomes and methodology of the study. The study examines plaintiffs who have suffered personal injury and are parties to High Court appeals, as either the appellant or the respondent, in cases where the cause of action is negligence. It evidences that adult males are involved in more High Court negligence actions than women and children combined.⁶ The findings also support the work of tort law scholars suggesting a shift in the ideology of High Court negligence decisions towards personal responsibility.⁷ Indeed, in this study, defendants were successful in

⁶ This finding is not out of step with international research on this issue, where women and children are two of many groups historically identified as disadvantaged in seeking access to justice. For example, it has been suggested that litigants with limited resources are less likely to succeed on appeal than their better-resourced counterparts: see Donald R Songer and Reginald S Sheehan 'Who Wins on Appeal? Uppercuts and Underdogs in the United States Courts of Appeals' (1992) 36 *American Journal of Political Science* 235.

⁷ See Luntz, 'Turning Points in the Law of Torts in the Last 30 Years', above n 5; Chief Justice JJ Spigelman, 'Tort Law Reform: An Overview' (2006) 14 *Tort Law Review* 5, 8; Justice G L Davies, 'Negligence: Where Lies the Future?' (Speech delivered at the Supreme and

64 per cent of High Court appeals over the 11-year period. It is argued that this relatively poor success rate for injured plaintiffs is unlikely to change, especially given that the objective of the 2002 tort law reform legislation⁸ was to redress a perceived imbalance in the law of negligence favouring the plaintiff over the defendant.⁹ Part IV details the restrictive impact of tort law reform legislation upon access to compensation for personal injury through another's negligence with a particular focus on age and gender. It concludes that the tort law reforms may more adversely affect the ability of women and children to pursue negligence actions than that of men. This study thus provides a platform which may be built upon by future studies to shed light on the development of the law of negligence and possible limitations in the architecture of the law of negligence.

II (IN)JUSTICE AND THE LAW OF NEGLIGENCE: ACCIDENT LOCATIONS

The law of negligence has the primary objectives of compensation, deterrence and loss spreading,¹⁰ yet there remains a large residue of injuries which are non-compensable. In 2011, a Productivity Commission inquiry into disability noted that

Australia-wide, only about half of catastrophic injuries are compensated through insurance, with the supports required for the remainder covered

Federal Court Judges' Conference on the Ipp Report, Adelaide, 23 January 2003); Barbara McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 *Torts Law Journal* 268; Prue Vines, 'Fault, Responsibility and Negligence in the High Court of Australia' (2000) 8 *Tort Law Review* 130. See generally Kylie Burns, 'Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective' (2007) 15 *Torts Law Journal* 195; David Partlett, 'Of Law Reform Lions and the Limits of Tort Reform' (2005) 27 *Sydney Law Review* 417; Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 *Oxford Journal of Legal Studies* 393; Andrew Field, "'There Must Be a Better Way": Personal Injuries Compensation since the "Crisis in Insurance"' (2008) 13 *Deakin Law Review* 67.

⁸ See *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

⁹ Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002) 25–6 [1.4]–[1.6] ('*Ipp Report*').

¹⁰ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 375 [123] (Gummow J).

through (generally inadequate) taxpayer-funded health and disability services.¹¹

Injuries that result in negligence litigation are likely to be serious or catastrophic and to occur in circumstances where loss will be recouped through insurance. Negligence litigation may only be pursued where the injury results in the kind of disability which is recognised by law as falling within one of the traditional heads of damage giving rise to valuable compensation. This is confirmed by the Productivity Commission inquiry, which states that reliance on common law compensation will only succeed if a plaintiff 'can identify a negligent and solvent first party as the cause of the accident' and that

[t]he practical consequence for people acquiring disability is that the amount, nature and timeliness of support depends on the type of accident, its exact circumstances and location. This can have very lasting impacts for people with catastrophic injury.¹²

Thus, the location of injury and the consequent ability of a plaintiff to attribute fault to a solvent defendant are two of the driving explanations behind the initiation of negligence litigation.

Consequently, tort law compensates negligently caused disabilities, which occur more frequently to men than to any other group. Luntz et al explain this gendered disparity of Australian personal injury claims as follows:

Men and women do not suffer personal injuries statistically in identical or often even similar ways. Women are considered to be significantly more risk averse than men. Men are injured and killed more than women, particularly from injuries which arise from risk-taking behaviours and hazardous occupations.¹³

Luntz et al have drilled through the data as to hospital separations¹⁴ to focus on community injury incidents (that is, injuries typically sustained in places

¹¹ Productivity Commission, 'Disability Care and Support' (Inquiry Report No 54, 10 August 2011) 820.

¹² Ibid 790.

¹³ Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 7th ed, 2013) 84 [1.6.1].

¹⁴ The Australian Institute of Health and Welfare ('AIHW') defines 'separation' as 'the episode of admitted patient care, which can be a total hospital stay (from admission to discharge, transfer or death) or a portion of a hospital stay beginning or ending in a change of type of care (for example, from acute care to rehabilitation)' and 'the process by which an admitted patient completes an episode of care by being discharged, dying, being transferred to another hospital or by a change of care type': AIHW, 'Australian Hospital Statistics 2010–11' (Health Services Series No 43, April 2012) 14.

such as the home, workplace or street),¹⁵ noting that the Australian Bureau of Statistics ('ABS') confirmed that '[i]n 2010 men were far more likely than women to die from an external cause (such as transport accident, fall, poisoning, suicide)'.¹⁶ The ABS has also stated that '[m]ales are ... more prone to risky behaviours, particularly in early years of adult life, which together result in higher death rates due to accidents'.¹⁷

The point made above, that men are more likely to suffer an injury which may be compensated through a negligence action, is further underlined through an examination of injuries which occur at home. In order to maintain an action in negligence, there must be a person other than the victim at fault and the wrongdoer must be solvent. As Graycar observes, at home 'there is rarely anyone that can be sued'.¹⁸ Accordingly, claims at home will generally only be made if there is some form of product liability. As most household insurance will be third party (there to protect the homeowner from the liability that would flow from injuring someone else) rather than first party, it will not necessarily respond to the injury of a resident. While a large number of injuries that occur at home require hospitalisation, this figure is gendered. The 2009–10 Australian hospital data identify more women than men being injured at home:

Where information was available, 26% of all hospitalised community injuries occurred in the home. A higher proportion of female injuries occurred in the home compared with male injuries (35% versus 19%) or in a residential institution (9% versus 3%). Males were more likely than females to have been injured on a street or highway, as well as in sports and athletics, trade and service, and industrial and construction areas and farms.¹⁹

¹⁵ However, this data is not comprehensive as '[a] larger number of generally minor cases do not receive medical treatment. In addition, a smaller number of severe injuries that quickly result in death go unrecorded in terms of hospital separations, but are captured in mortality data': Renate Kreisfeld and James E Harrison, 'Hospital Separations Due to Injury and Poisoning 2005–06' (Injury Research and Statistics Series No 55, AIHW, 2010) 1.

¹⁶ Luntz et al, above n 13, 84 [1.6.1] n 182, citing ABS, *Causes of Death, Australia, 2010* (ABS Catalogue No 3303.0, 20 March 2012).

¹⁷ ABS, *Gender Indicators, Australia, Jan 2012* (ABS Catalogue No 4125.0, 7 February 2012).

¹⁸ Reg Graycar, 'Teaching Torts as if the World Really Existed: Reflections on Harold Luntz's Contribution to Australian Law School Classrooms' (2003) 27 *Melbourne University Law Review* 677, 679.

¹⁹ Amanda Tovell et al, 'Hospital Separations Due to Injury and Poisoning, Australia: 2009–10' (Injury Research and Statistics Series No 69, AIHW, 2012) v.

This supports the argument that women, due to the location of their injury, may be less able than men to litigate in negligence.

This evidence is further supported by general data on the frequency of injury leading to hospitalisation. Generally, if women are less likely to be injured than men in the first place, they will be less likely to litigate negligence actions and there will be fewer women in the legal system. The same is true in reverse.²⁰ However, here it is interesting to note that Australian females actually have more hospitalisations than males. In 2010–11, overall there were about 4.6 million separations for females compared with about 4.2 million separations for males.²¹ In terms of hospital emergency admissions, in 2011–12 males accounted for only slightly more than half of emergency presentations.²² These data have remained fairly constant over time.²³ Simply put then, it is possible that women may not litigate — not because they are injured less often — but because they are injured less often in common law categories of claim.

Replicating Luntz et al's approach to the use of hospital admission data, children may also be differentiated from men in terms of statistical type and location of injury. The 2011–12 Australian hospital emergency admissions data show that the most common age group reported for the 6.5 million emergency department presentations was 0–4 years (12 per cent), followed by 20–24 years (8 per cent).²⁴ In 2005–06,

²⁰ See the discussion of the gender difference in injuries to women historically, caused by the clothing they wore, when boarding and disembarking from trains: Margo Schlanger, 'Injured Women before Common Law Courts, 1860–1930' (1998) 21 *Harvard Women's Law Journal* 79, 114–18.

²¹ AIHW, 'Hospital Statistics 2010–11', above n 14, 148. The AIHW also reported that during this period 'there were more separations per 1,000 population for females than for males aged 15 to 54'. At 30 June 2010, the sex ratio of the total population for Australia was 99.2 males per 100 females: ABS, *Population by Age and Sex, Australian States and Territories* (ABS Catalogue No 3201.0, 21 December 2010).

²² AIHW, 'Australian Hospital Statistics 2011–12: Emergency Department Care' (Health Services Series No 45, December 2012) 9.

²³ In 1998–99, females accounted for 53 per cent of total separations in public hospitals and 56 per cent in private hospitals: AIHW, 'Australian Hospital Statistics 1998–99' (Health Services Series No 15, 2000) 75–6. Females also accounted for more patient days than males: at 76. Similarly, national hospital data for 2009–10 show 4.5 million hospital separations for females as opposed to 4.1 million separations for males: AIHW, 'Australian Hospital Statistics 2009–10' (Health Services Series No 40, April 2011) 142.

²⁴ AIHW, 'Hospital Statistics 2011–12: Emergency Department', above n 22, 9. Overall it is difficult to accurately state the number of separations for children (persons aged under 18) in hospital as the data is grouped as persons aged 5–14 years and then 15–24 years: AIHW, 'Hospital Statistics 2010–11', above n 14, 188.

for very young children aged 0–4 years, the most common specific causes of injury were falls (39%) and poisoning by drugs (7%). Falls were also the most common injury for older children aged 5–14 years (43%), followed by transport accidents (19%). The most common causes of injury for young adults aged 15–24 years were transport accidents (21%), falls (12%), assault (11%) and intentional self-harm (10%).²⁵

At first blush, these data replicate the statistics with respect to women, in that the location of injury for a child tends not to be where a third party defendant is readily recognisable. Similarly to women, the above statistics reveal that it is common for children's injuries to occur at home. Medical data from 2005–06 confirms that children aged 0–14 years were most likely to sustain fall injuries in the home, followed by at school, and in sports and athletic areas.²⁶ Similarly, poisoning by drugs (7 per cent of total injuries) is most likely to occur at home. As noted previously, it is unlikely that claims will be made for children's injuries sustained at home unless there is a defective product involved, as the parents are likely to be the only identifiable defendants.²⁷ A now dated 1978 United Kingdom Royal Commission report offered two possible explanations for such lack of compensation available for children through tort law in England, noting:

It is rare for tort compensation to be obtained on behalf of injured children, the proportion of injuries where tort payments are made being only 1 per cent. This small proportion is partly due to a high proportion of cases where the injury is not anyone else's fault, and partly due to the difficulty a child may have in giving a coherent account of an accident on which a claim could be based.²⁸

Men therefore have more accidents which result in the possibility of a tortious action than either women or children. The only comprehensive published study on this point — as to the features of accidents which result in negligence actions — is a now 30-year-old United Kingdom study which confirms that personal injury litigation is largely driven by accident type. This was a long-term and wide-ranging national study undertaken in 1984 by Harris et

²⁵ Kreisfeld and Harrison, above n 15, iv.

²⁶ Ibid 28.

²⁷ Courts have been reluctant to hold that parents owe general duties of care to children: see *Hahn v Conley* (1971) 126 CLR 276; *Robertson v Swincer* (1989) 52 SASR 356.

²⁸ United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 2, 70 [254] ('*Pearson Report*').

al.²⁹ It compared the experience of those disabled through accidents of all categories and those disabled through illness. The study found that the accident victims who received legal damages had access to advice about claiming compensation which they often received unsolicited.³⁰ It was found that road and work accident victims were ‘more likely to be involved in formal or semi-formal procedures for reporting the accidents’³¹ and therefore were more likely to receive legal advice.³² The study concluded that the

characteristics of those people who succeeded in obtaining some damages for their injuries through the tort system, however, by no means reflect the characteristics of those suffering accidents. The single most important factor associated with a successful claim for damages was the type of accident suffered. While fewer than one in three of road accident victims, and one in five of work accident victims obtained some damages, fewer than one in fifty of the victims of all other types of accident obtained any damages, despite the fact that this represented by far the largest category of accidents suffered.³³

While this study has not been replicated in Australia, some findings have support in local studies. For example, Harris et al observed that

victims under the age of 16 and over the age of 65 rarely made claims for damages. Despite the fact that these age-groups together represented about one-third of the total sample of accident victims, they comprised only 11 per cent of successful claimants.³⁴

This finding is mirrored in the most recent 2012 ‘Legal Australia-Wide Survey: Legal Need in Australia’ study (‘LAW Survey’) which found that across most Australian jurisdictions ‘the two youngest and the oldest age groups tended to have the lowest percentages for taking action, while the middle age groups tended to have the highest’.³⁵ Harris et al found that of the almost 90 per cent of all United Kingdom accident victims who were not compensated for their injuries, ‘the vast majority’ had not accessed legal

²⁹ Donald Harris et al, *Compensation and Support for Illness and Injury* (Clarendon Press, 1984).

³⁰ Ibid 76.

³¹ Ibid.

³² Ibid 66–7, 76.

³³ Ibid 50–1 (citations omitted).

³⁴ Ibid 52.

³⁵ Christine Coumarelos et al, ‘Legal Australia-Wide Survey: Legal Need in Australia’ (Access to Justice and Legal Needs vol 7, Law and Justice Foundation of New South Wales, August 2012) 189.

services.³⁶ Similarly, the LAW Survey, while not focusing upon personal injury, determined that in this country there is no ‘rush to law’, with less than 10 per cent of legal problems across Australia being finalised by formal courts or tribunals.³⁷

III (IN)JUSTICE AND THE LAW OF NEGLIGENCE: LITIGATION

As Part II identifies, existing evidence indicates that men suffer injuries which are actionable in negligence more often than those which befall women and children. This Part shows that it is not known whether women and children are also less likely to litigate for their negligently inflicted injuries than men.

Of course, internationally, the barriers to groups other than men participating in litigation have been recognised. In relation to women, Catherine Branson, then President of the Australian Human Rights Commission, observed in 2011 that

[n]onetheless, women as litigants continue to face many barriers in accessing justice; these include their lack of knowledge of their rights, their reduced economic capacity, and their dependence on male relatives for resources, not to mention the stigma that can attach to women if they seek or threaten legal recourse.³⁸

This comment is supported by international and Australian tort law scholarship which evidences a lack of gender neutrality in both the substantive and procedural aspects of tort law.³⁹ For example, authors such as Chamallas and Wriggins have suggested that the discriminatory operation of tort law is

³⁶ Harris et al, above n 29, 65.

³⁷ Coumarelos et al, above n 35, 39.

³⁸ Catherine Branson, “‘Women as Agents of Change’: Balancing the Scales” (Speech delivered at the Commonwealth Law Ministers’ Meeting, New South Wales Government House, Sydney, 13 July 2011) <<https://www.humanrights.gov.au/news/speeches/president-speech-women-agents-change-balancing-scales>>, citing Laura Turquet et al, ‘2011–2012 Progress of the World’s Women: In Pursuit of Justice’ (Report, United Nations Entity for Gender Equality and the Empowerment of Women, 2011) 52–5.

³⁹ Leslie Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 *Journal of Legal Education* 3, 20–5, 30–7; Joanne Conaghan, ‘Law, Harm and Redress: A Feminist Perspective’ (2002) 22 *Legal Studies* 319, 333–8; Wendy Parker, ‘The Reasonable Person: A Gendered Concept?’ (1993) 23 *Victoria University of Wellington Law Review* 105; Thomas Koenig and Michael Rustad, ‘His and Her Tort Reform: Gender Injustice in Disguise’ (1995) 70 *Washington Law Review* 1. See generally Lucinda M Finley, ‘A Break in the Silence: Including Women’s Issues in a Torts Course’ (1989) 1 *Yale Journal of Law and Feminism* 41; Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 3.

fundamentally due to the construction of tort around fault-based physical and economic harm rather than emotional and non-economic harm.⁴⁰ Further scholarship suggests that law which appears neutral⁴¹ may, due to gender inequalities which exist in wider society, be unequal in application.⁴² For example, Smart argues that women who go to law are characterised by their relationships as ‘mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on. They are not simply women (as distinct from men), and they are most definitely not ungendered persons’.⁴³ Other scholars have suggested that women’s lack of visibility in litigation is because many women litigants must bring their children to court, being ‘further burdened by the lack of day care facilities and flexibility in court schedules’.⁴⁴

Such observations as to structural obstacles of tortious litigation have similarly been observed in relation to children. In Australia, generally a child will not have lost earnings and will be able to access free medical care. The same general legal principles are used to assess damages to compensate injured children as for adults. One difficulty for children is therefore that the claim will be more speculative. In 1987, the Ontario Law Reform Commission stated that

[i]n the case of younger children, who have not yet formulated a career plan, the courts look at any evidence as to the child’s capabilities. Degree of success in school is important in this regard. The most difficult cases are those of very young children who have not yet displayed any particular aptitude. There seems to be no doubt that many such plaintiffs are undercompensated. In some cases, no award was made at all under this head. ... The result of the current approach

⁴⁰ Martha Chamallas and Jennifer B Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (New York University Press, 2010) 2.

⁴¹ See Robin West, *Caring for Justice* (New York University Press, 1997) 29.

⁴² See generally Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 3.

⁴³ Carol Smart, ‘Law’s Truth/Women’s Experience’ in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen & Unwin, 1990) 1, 7, quoted in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1st ed, 1990) 176.

⁴⁴ ‘Gender Bias Study of the Court System in Massachusetts’ (1990) 24 *New England Law Review* 745, 758. In an Australian context, the necessity for women to take their children to court has some support from ABS data, which confirms that while the amount of time men spend on caring for children and household work has increased over the years, women are still doing the majority of household and caring work: ABS, *How Australians Use Their Time, 2006* (ABS Catalogue No 4153.0, 21 February 2008). In 2009, 16.3 per cent of all employed men had made a request for flexible working arrangements to help with caring responsibilities, compared with 29.1 per cent of women: Barbara Pocock, Natalie Skinner and Reina Ichii, ‘Work, Life and Workplace Flexibility: The Australian Work and Life Index 2009’ (Report, Centre for Work + Life, University of South Australia, July 2009) 4.

is that infant plaintiffs generally receive much lower awards for loss of earning capacity than most adult plaintiffs.⁴⁵

Consequently, parents or guardians may see no use in claiming unless the injuries are catastrophic and ongoing. Even where a claim is made, an injured child may have any damages which are awarded reduced for contributory negligence⁴⁶ and a defendant will completely avoid liability if it is held that the child was entirely responsible for his or her own loss.⁴⁷

The obstacles which apply in any litigation are compounded for a child plaintiff. It is recognised that ‘children and young people are a largely disenfranchised group, and among the least “rights-conscious” members of society’,⁴⁸ Schetzer and Henderson list the barriers facing the child litigant as including:

- lack of specialist legal services for young people
- lack of awareness of rights and legal entitlements
- reliance on adults to mediate their access to legal services
- fear of being disbelieved or not taken seriously by service providers
- most solicitors lack skills in dealing with children and young people
- intimidating and formal atmosphere of many legal services
- lack of information strategies which specifically target children and young people.⁴⁹

Further, as would be the case in many personal injury claims, children with disabilities ‘often have to work through a carer to obtain legal advice. In some circumstances the interests of the carer and those of the young person are not

⁴⁵ Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) 42 (citations omitted).

⁴⁶ See *McHale v Watson* (1966) 115 CLR 199; *Kelly v Bega Valley County Council* (Unreported, New South Wales Court of Appeal, Hope, Glass and Samuels JJA, 13 September 1982); *Commonwealth v Introvigne* (1982) 150 CLR 258; *Gunning v Fellows* (1997) 25 MVR 97; *Ryan v State Rail Authority of New South Wales* [1999] NSWSC 1236 (16 December 1999); *Sainsbury v Great Southern Energy Pty Ltd* [2000] NSWSC 479 (26 May 2000); *Traynor v Australian Capital Territory* [2007] ACTSC 38 (18 June 2007).

⁴⁷ See, eg, *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.

⁴⁸ Louis Schetzer and Judith Henderson, ‘Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW — Stage 1: Public Consultations’ (Report, Law and Justice Foundation of New South Wales, August 2003) 67 [2.105].

⁴⁹ *Ibid* xvii–xviii.

the same'.⁵⁰ In terms of the court process, children, characterised as being of legal incapacity, may not carry on or even commence a legal proceeding except by way of a tutor. If carers too readily accept that an injury suffered by a child is the result of the child's own carelessness, this may also result in no legal action being pursued.

However, as noted at the outset to this Part, there is an absence of empirical evidence to confirm that the Australian system of litigation is biased as to either gender or age. Australian data as to the characteristics or motivations of litigants in civil cases are sparse.⁵¹ A 1985 study by Cranston et al into the Supreme Courts of New South Wales, Victoria and the Australian Capital Territory notes that personal injury cases occupy a substantial part of the administrative and judicial resources of those courts.⁵² Interestingly, Cranston et al observed that '[a]lthough personal injury cases comprise a relatively small proportion of matters commenced, they comprise a substantial number of the cases entering lists and getting as far as a trial'.⁵³ The same study established that

[c]ompared with the number of matters commenced in the Supreme Courts [of New South Wales, Victoria and the Australian Capital Territory], the number of appeals is extremely small. ... [L]ess than one in a hundred of the cases commenced in the courts go on appeal.⁵⁴

Appeals to the High Court are considerably rarer than those in the Supreme Courts. Importantly, an appeal to the High Court is not as of right as the Court has discretionary jurisdiction to grant special leave to appeal and thus controls which matters it hears. Section 35A of the *Judiciary Act 1903* (Cth) does not make the characteristics of the litigant a determinative issue as to whether a case is selected for hearing:

In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:

⁵⁰ Ibid 71 [2.113].

⁵¹ It is difficult to obtain court data as to litigants' gender except in criminal matters: see, eg, ABS, *Criminal Courts, Australia, 2012–13* (ABS Catalogue No 4513.0, 27 March 2014).

⁵² Ross Cranston et al, 'Delays and Efficiency in Civil Litigation' (Report, Australian Institute of Judicial Administration, June 1985) 126 [12.1].

⁵³ Ibid 126 [12.2].

⁵⁴ Ibid 155 [15.1].

- (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
 - (i) that is of public importance, whether because of its general application or otherwise; or
 - (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

After 10 years on the High Court, Justice Kirby observed:

I will not pretend that the process of judging special leave applications is wholly logical or scientific. An inescapable element of intuition, wrapped in experience, within an exercise of judgment produces the outcomes. As lawyers and judges, we may strive to minimise the human elements, with their risks of personal attitudes and values. Yet we deceive ourselves if we think that we can eliminate them altogether from the equation.⁵⁵

Despite this acknowledgment of the personal element in choice making, his Honour acknowledged that certain issues tend to favour a grant of special leave, but gender and age did not appear as relevant factors in this discussion.⁵⁶ It has never been determined whether the special leave process itself is biased as to gender or age.⁵⁷

It is unfortunate that little Australian legal scholarship exists as to why litigants proceed with civil cases and even less on the impact of factors such as gender and age on any such decision. In one of the only Australian studies in this area, Delaney and Wright investigated plaintiffs' experience of the fairness of the New South Wales court system.⁵⁸ The study interviewed 255 plaintiffs whose personal injury claims were resolved at trial, arbitration, pre-trial conference or private mediation. Fifty-six per cent of participants were

⁵⁵ Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30 *University of New South Wales Law Journal* 731, 731.

⁵⁶ *Ibid* 743–7.

⁵⁷ An empirical examination of who brings special leave applications and the success or failure rates upon special leave is needed and is beyond the current study.

⁵⁸ Marie Delaney and Ted Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (Law Foundation of New South Wales, 1997).

women and forty-four per cent were men.⁵⁹ However, the limited nature of the demographic in this study means there is a limited extent to which we can use these figures to generalise as to whether there is a greater representation of male plaintiffs in claims resolved in the lower courts in New South Wales.

Children provide focus for research and scholarship in areas such as family law and criminal law (that is, children as victims of sexual assault or as part of family law proceedings). Personal injury and negligence claims by children are one area that requires further research.⁶⁰ Two basic assumptions behind this lack of investigation may be: firstly, that legal scholars generally accept that people litigate and appeal because they are ‘interested only in winning’;⁶¹ and secondly, that traditional and alternative dispute resolution procedures assume that law and legal institutions ‘should be blind to the personal characteristics of those who come before the courts’.⁶²

One significant exception to the lack of empirical research on legal needs is the recent Australian study into who takes legal action or seeks legal advice as a result of legal problems. Based upon over 20 000 telephone interviews, the LAW Survey found that age is relevant to legal problems such that

different ages or life stages were associated with different types of legal problems. In most jurisdictions, accidents, crime, personal injury and rights problems peaked between 15 and 24 years of age, and credit/debt and family problems peaked between 25 and 44 years of age.⁶³

The report also considered gender, stating that

[r]egression analyses have not typically revealed a link between gender and overall prevalence of legal problems. Occasionally, however, regression analyses have produced gender differences on some types of legal problems. For exam-

⁵⁹ Ibid 16 [32].

⁶⁰ Australian commentators have called for further research into children’s views as to legal services: see Nicola M Ross, ‘Legal Representation of Children’ in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 544, 572 n 144. For a direct discussion of children in the High Court in the tort of negligence, see Pam Stewart and Geoff Monahan, ‘Roads and Traffic Authority of New South Wales v Dederer: Negligence and the Exuberance of Youth’ (2008) 32 *Melbourne University Law Review* 739.

⁶¹ Scott Barclay, *An Appealing Act: Why People Appeal in Civil Cases* (Northwestern University Press and the American Bar Foundation, 1999) 2.

⁶² E Allan Lind, Yuen J Huo and Tom R Tyler, ‘... And Justice for All: Ethnicity, Gender and Preferences for Dispute Resolution Procedures’ (1994) 18 *Law and Human Behaviour* 269, 269.

⁶³ Coumarelos et al, above n 35, xv; see generally at 168–73.

ple, the [New South Wales Legal Needs Survey] found higher rates of accident/injury problems for males.⁶⁴

This report thus reinforces the significance of the material discussed in Part II. However, it has limited application here due to its focus upon access to addressing legal needs rather than on personal injury, courts and litigation.

Litigating in Australia it is both time-consuming⁶⁵ and expensive. Any person who pursues an action in negligence will suffer all the stress and pressure of litigation. This is compounded by the nature and expense of litigation. These difficulties were recognised by the High Court in *Waterways Authority v Fitzgibbon*:

the extreme and well-known difficulties which injured plaintiffs without assets have in mounting complex litigation against defendants who, without impropriety, are seeking to take every step the law affords them to preserve their positions. They may have to marshal lay witnesses not necessarily sympathetic to them. They may have to seek documents from the defendants, or from third parties who may not be amenable to that course. They may have to find expert witnesses and persuade solicitors to pay them. They may have to appeal to the charity of legal advisers prepared to fund litigation without any certainty that either the just fees of the unpaid advisers will ever be paid, or the other expenditures which have been made by those advisers will ever be reimbursed.⁶⁶

In Australia, cost is a significant barrier to obtaining legal advice and representation.⁶⁷ In particular, the cost of pursuing litigation to the High Court is a significant constraint. Moreover, in Australia, being a jurisdiction where costs

⁶⁴ Ibid 17 (citations omitted).

⁶⁵ As well as type of injury, duration of litigation is also an important barrier to compensation with '[t]he duration of claims from accident to finalisation rang[ing] from less than one year to 16 years, the median was six years': Delaney and Wright, above n 58, 36 [66].

⁶⁶ (2005) 221 ALR 402, 413 [45] (Kirby and Heydon JJ).

⁶⁷ Coumarelos et al, above n 35, 195. This is formally acknowledged by the legal system in that certain individuals will be exempt from payment of filing and hearing fees associated with proceedings in the High Court (for example, persons who hold a concession card issued by Centrelink or the Department of Veterans' Affairs, inmates of prisons, children under the age of 18 and persons in receipt of study benefits): High Court of Australia, *Annual Report 2010–2011* (2011) 32. In 2010–11, the High Court waived \$580 421 on fees, waiving payment of two-thirds of the fee in 218, or approximately 31 per cent, of cases: at 33. However, Legal Aid is not generally available for civil claims. For example, in New South Wales, Legal Aid is not available for matters involving personal injury, medical negligence or public liability: Legal Aid New South Wales, 'Civil Law Policy — Family Provision Claims, Personal Injury, Medical Negligence and Others' (Policy Bulletin No 6/12, 2012).

follow the event,⁶⁸ the cost implications of losing play a key role in any decision to litigate.

Much of the available empirical research undertaken with respect to litigant motivations, age and gender is based in the United States.⁶⁹ This research is of limited application in Australia, as United States costs considerations are not comparable to the Australian context. This is because of the United States position on contingency fees and also because, as noted earlier, in Australia costs generally follow the event (not the case in the United States). Barclay, in an early 1990s United States study, asked the question: why do individuals appeal in civil cases?⁷⁰ From his study of 125 interviews with appellants, his conclusion was: 'individuals are less interested in winning their cases than we have been traditionally led to believe. Instead, I posit that the litigants are motivated primarily by the desire to be treated fairly'.⁷¹ Barclay's study observes a differentiation only with respect to women, noting that only 30 per cent of the 125 interviews were with women.⁷² Barclay stated that 'the project specifically targeted women for interviews' in 'bias ... designed to mediate the possibility that the project would be left with an insufficient sample of women litigants to make comparisons based on gender differences'.⁷³ Barclay suggests that the factors which contribute to reduced numbers of female appellants may include systemic bias in terms of court procedure. Barclay posits that the issue of being treated fairly may be intimately connected with the personal characteristics of those who come before the court. Speaking of the United States court system, he notes that 'women may not have high expectations of receiving justice in a court system that until recently sanctioned and upheld racist and sexist policies'.⁷⁴

In earlier United States research Lind and Tyler, in a study of 286 tort litigants (at first instance), also found that the litigant's original expectation of

⁶⁸ The general rule that the losing party pays the winning party's costs has been legislatively codified in some jurisdictions: *Uniform Civil Procedure Rules 2005* (NSW) r 42.1; *Uniform Civil Procedure Rules 1999* (Qld) r 681; *Supreme Court Civil Rules 2006* (SA) r 263(1); *Rules of the Supreme Court 1971* (WA) O 66 r 1.

⁶⁹ For a comprehensive coverage of interdisciplinary scholarship, see Tamara Relis, 'Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know about the Litigation Experience of Individual Litigants' (2002) 25 *Studies in Law, Politics and Society* 151.

⁷⁰ Barclay, above n 61.

⁷¹ *Ibid* 3.

⁷² *Ibid* 32.

⁷³ *Ibid*.

⁷⁴ *Ibid* 82.

fairness was dependent upon perceptions of outcomes.⁷⁵ The study by Lind and Tyler describes how procedural justice may be 'explained by a social psychology of informed self-interest',⁷⁶ and observes that this reason alone is not sufficient to explain the psychology of procedural justice: 'the traditional assumption that people are continually and centrally concerned with maximizing their outcomes must inevitably lead to a model that fails to capture the unique qualities associated with justice'.⁷⁷

Similarly, other studies have found aspects other than age and gender to be important motivators for litigation, extending to taking action even when the litigant's case is not legally valid but the action is motivated by a moral claim to the remedy being pursued.⁷⁸ Other possible motivations put forward are less noble, such as revenge: that people suffering negligent injury from another party often want to punish that party through financial penalties with the aim of 'making them pay'.⁷⁹ Some aims are unknowable, with research by Relis finding that in torts cases, litigants 'frequently have important hidden agendas and unrevealed aims, which may be their cardinal goals'.⁸⁰ Generally, the existing empirical research into the motivation of litigants supports the broad assertion that the objectives of litigants are 'diverse and complex. Moreover, as litigants' perceptions of their needs change throughout litigation, so too may their goals [if they have any]'.⁸¹

Some of these United States studies have noted gender as a factor in decisions to litigate. A now dated 40-year-old United States study revealed that 'of 166 seriously injured male accident victims, 38 percent filed suit; whereas of 178 seriously injured female accident victims, only 30 percent filed suit'.⁸² Nagel and Weitzman posit that the reason for the differences in filing suit between men and women might be due:

⁷⁵ E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

⁷⁶ *Ibid* 226.

⁷⁷ *Ibid* 230.

⁷⁸ Relis, above n 69, 154.

⁷⁹ This refers to the payment of damages by the party that caused the negligence being punishment. However, it has been said that this is no longer effective due to insurance: Productivity Commission, above n 11, 830.

⁸⁰ Relis, above n 69, 156.

⁸¹ *Ibid* 155 (citations omitted).

⁸² Stuart S Nagel and Lenore J Weitzman, 'Women as Litigants' (1971) 23 *Hastings Law Journal* 171, 184, citing Alfred F Conard et al, *Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation* (University of Michigan Press, 1964) 259.

(1) to a possibly higher rate of precomplaint settlements where females are involved or (2) to a possible tendency of females to suffer slighter injuries than males. Perhaps a more meaningful explanation is that women are encouraged to be less aggressive in asserting their legal rights in personal injury cases ...⁸³

This view has been reflected in an Australian context, where Graycar writes that women are 'less likely to contemplate the possibility of a legal remedy for their injuries, less likely to seek legal advice when they have a potentially compensable claim and less likely to recover damages for their injuries'.⁸⁴

IV STUDY OUTCOMES AND METHODOLOGY

Given the background evidence discussed in Parts II and III it may not be surprising that this study, which analyses all negligence actions before the High Court from 2000–10, confirms that adult males are involved in more High Court negligence actions than women and children combined. This conclusion is drawn from plaintiffs in the High Court, whether they are appellants or respondents. It examines the numbers of plaintiffs and not the separate question of who appeals to the High Court of Australia. This article does not, however, draw a link between the material discussed in Parts II and III and the results of this study. Indeed, the data set discussed in this Part is restricted to High Court appeals during a limited time period and is thus a small and unrepresentative sample of people who pursue remedies for personal injury. There is no necessary correlation between the cases that end up in the High Court and the incidence of injuries, or even between those cases in which litigation is commenced and the incidence of injuries. Currently there is no way of determining how the age and gender distribution of plaintiffs in High Court negligence appeals compares with the gender distribution of people who initiate litigation. This becomes even more difficult to determine given that the vast majority of cases commenced are settled, with those that go to the High Court being a tiny fraction of possible negligence actions.

Further, as noted in Part III, there is an absence of Australian empirical studies on the motivation of High Court litigants to appeal in negligence actions. Much care is therefore taken in this Part in making related claims as a result of the data presented. As the mainly United States scholarship identified in the preceding Part observes, the choice to litigate — whether at first

⁸³ Nagel and Weitzman, above n 82, 184.

⁸⁴ Graycar, 'Teaching Torts as if the World Really Existed', above n 18, 684.

instance or on appeal — is motivated by complex considerations that may be unrelated to the personal characteristics of the plaintiff, such as gender and age.

The analysis below is based upon a database constructed with the assistance of research assistants through reading all High Court negligence decisions over an 11-year period from 1 January 2000. Generally cases were excluded from the research where substantive legal issues pertaining to the law of negligence were not the subject of the appeal.⁸⁵ In all, 78 negligence cases were examined and coded for the purposes of the research. However, the 5 cases where the damage was purely economic are excluded from examination in this article, which examines personal injury.⁸⁶

Thus, the complete data set was of 78 cases in which judgments were delivered by the High Court between 1 January 2000 and 31 December 2010 where negligence was a cause of action. From the total 78 cases, the data set identifies 73 High Court decisions which involve negligence actions concerning personal injury. These 73 personal injury negligence cases involved a total of 88 individual plaintiffs.

Importantly, these figures represent total numbers of plaintiffs. This means that in cases with multiple plaintiffs, each plaintiff was counted individually. For example, in a case such as *Modbury Triangle Shopping Centre Pty Ltd v Anzil*⁸⁷ where there were multiple plaintiffs (one female and one male), each plaintiff is counted separately. Thus, the variables were counted as separate instances of appearances of men, women and children.⁸⁸ This was done as the aim of the data analysis was not to distinguish whether gender or age were factors in the Court arriving at a decision, but rather to identify the characteristics of the individual litigants. Thus, multiple litigants are counted separately

⁸⁵ So for example, decisions were excluded where, although the case was based on a claim in negligence, the High Court judgment was solely concerned with matters such as a statute of limitations: see *Queensland v Stephenson* (2006) 226 CLR 197; *Davison v Queensland* (2006) 226 CLR 324; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; *Blunden v Commonwealth* (2003) 218 CLR 330; *Russo v Aiello* (2003) 215 CLR 643; *Commonwealth v Cornwell* (2007) 229 CLR 519. As to the gendered impact of limitation periods in tort law, see Joanne Conaghan, 'Tort Litigation in the Context of Intra-Familial Abuse' (1998) 61 *Modern Law Review* 132, 140–4.

⁸⁶ See *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1.

⁸⁷ (2000) 205 CLR 254.

⁸⁸ Note here that in the case of *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, the male plaintiff is counted in each of the three separate actions. This is indicated in the Appendix.

for the data analysis of age and gender which appears in the following graphs. The Appendix identifies the number and gender of the plaintiffs in each case.

Adjustments were made in actions taken by dependants following the death of an individual through the alleged negligence of the defendant. These actions are taken under legislation (for example, s 4 of the *Compensation to Relatives Act 1987* (NSW)). Here the gender of the adult plaintiff (the person holding the legal cause of action) is counted. Consequently, the gender of the deceased (the actual person injured) is not included and neither are dependent children. This is relevant in four cases. First, in the High Court decision of *Sydney Water Corporation v Turano* ('*Turano*'),⁸⁹ the gender of the adult female is counted and her two dependent children are not included.⁹⁰ Second, in *Amaca Pty Ltd v Ellis* ('*Amaca*'),⁹¹ the adult female executor who brought the action under the *Fatal Accidents Act 1959* (WA) is counted but her four daughters (aged 5–16) are not.⁹² Third, in *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* ('*CAL No 14*')⁹³ the female plaintiff who brought the action under the *Fatal Accidents Act 1934* (Tas) is counted, rather than the male plaintiff who died in the motor accident. Fourth, in *Stuart v Kirkland-Veenstra* ('*Stuart*')⁹⁴ Mrs Kirkland-Veenstra brought the claim on behalf of her deceased husband. These cases are noted in the Appendix.

There were various cases which were heard together, and where the High Court delivered judgments in separate matters simultaneously which were reported together. In some instances it was difficult to decide whether these kinds of cases should be recorded as one case, with the different plaintiffs counted separately, or as separate cases. The Appendix demonstrates how all the cases in our research were counted.

In some instances, there were cases heard together with different plaintiffs where the defendant, the event giving rise to each claim, the evidence, the legal issues and the outcome were the same. These were counted as one case with separate plaintiffs (for example, *Wicks v State Rail Authority of New*

⁸⁹ (2009) 239 CLR 51. Note here that the gender of the children represented in *Turano* are ignored for the purpose of data collection, as the gender or identifying features of the children were not made obvious by any superior court. The result for our data is to exclude *Turano* from the gender discussion as to children.

⁹⁰ Identified as 'Christopher' and 'Sophia' in the Commonwealth Law Reports headnote. Thank you to the Editors of this journal for that point.

⁹¹ (2010) 240 CLR 111.

⁹² See also the first instance judgment: *Ellis v South Australia* [2006] WASC 270 (8 December 2006).

⁹³ (2009) 239 CLR 390.

⁹⁴ (2009) 237 CLR 215.

*South Wales; Sheehan v State Rail Authority of New South Wales*⁹⁵ and *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*⁹⁶).

In other instances there were multiple cases heard together where the cases had the same outcome and involved identical considerations of law, even though the cases involved different parties and events. These cases were also counted as one case with several separate plaintiffs (for example, *Agar v Hyde; Agar v Worsley*⁹⁷ and *Sullivan v Moody; Thompson v Connan*⁹⁸). Where, however, cases involved different parties, events and evidence, and the *outcomes* were different, they were counted as separate cases (for example, *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*⁹⁹ and *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council*¹⁰⁰).

Generally, in cases where there was a single plaintiff but multiple defendants, we counted the case as one case with one plaintiff, on the basis that the plaintiff's claim was against concurrent tortfeasors. The decision in *Graham Barclay Oysters Pty Ltd v Ryan* ('*Graham Barclay Oysters*'),¹⁰¹ however, presented some difficulties in counting. The three appeals heard together (where Ryan was the plaintiff) were counted separately because there were significant differences between the claims made against New South Wales and the Great Lakes Shire Council, on the one hand, and those made against the Barclay companies, on the other. The plaintiff was ultimately unsuccessful in each case, but for very different reasons, so we counted them separately.

Our approach to counting the cases is deliberately plaintiff-focused. There are different approaches to counting cases before the High Court. We have not been able to locate a uniform methodology in this area. Here we also note that other legal authors who have engaged in this style of systematic study have not listed the cases they have included.

Graph 1 depicts a simple representation of the breakdown of females and males involved as plaintiffs in personal injury negligence litigation in the High Court from 2000–10. As Graph 1 shows, of the total raw number of 88 plaintiffs, 36 were female and 52 were male.

⁹⁵ (2010) 241 CLR 60.

⁹⁶ (2009) 239 CLR 420.

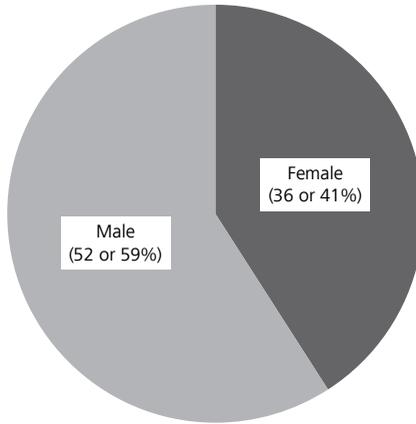
⁹⁷ (2000) 201 CLR 552.

⁹⁸ (2001) 207 CLR 562.

⁹⁹ (2002) 211 CLR 317.

¹⁰⁰ (2001) 206 CLR 512.

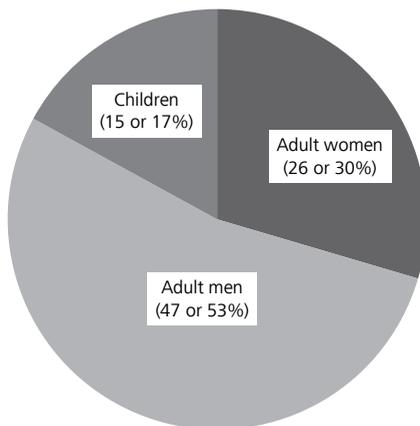
¹⁰¹ (2002) 211 CLR 540.



Graph 1: Gender of Injured Party (Excludes Entities)

This evidences lower numeric proportions of female plaintiffs as compared to males. It confirms fewer females appeared as plaintiffs (whether as appellant or respondent) before the High Court as opposed to all males in personal injury negligence litigation.

When children¹⁰² (10 female and 5 male) are isolated from these figures, the breakdown between adult women, adult men, and children as a proportion of all 88 individuals injured in the 11 years of decisions analysed, is as follows:



Graph 2: Characteristic of Injured Party (Excludes Entities)

¹⁰² Defined here as people under the age of 18.

Graph 2 shows that adult men outnumber both women and children in High Court appeals. Of the 73 High Court decisions, 15 of the 88, or just over 17 per cent, of all plaintiffs before the High Court were children. Thus, a significantly lower proportion of litigants are under the age of 18 than those over 18. There is a discrepancy, with more adult males being represented as plaintiffs in the High Court than any other group. However, when it comes to children, overwhelmingly girls appear more often than boys. The reasons for this disparity between the genders of child litigants are not clear.

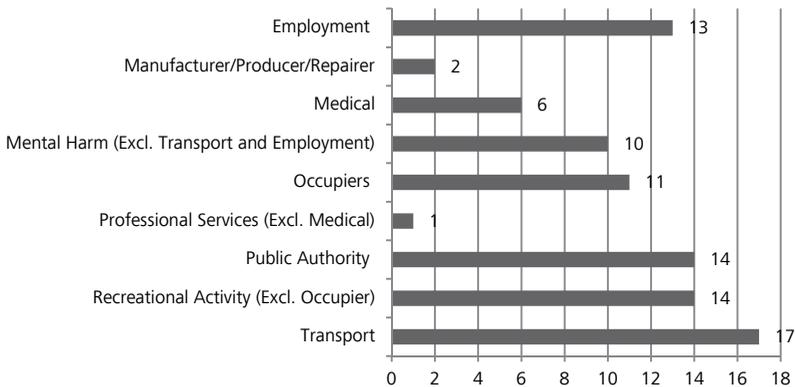
Generally women do not appear as plaintiffs in High Court cases as frequently as men, and children do not appear in the same numbers as adults. These facts alone do not indicate that the operation of the law of negligence is biased towards a certain group. Indeed, while the advantage of statistics is to provide a general scheme or pattern of conduct, the data, in taking a systemic view, inherently fail to explain why a lower proportion of women and children are plaintiffs in negligence cases appealed to the High Court.

Graph 3 below provides a breakdown of the 88 individual plaintiffs in terms of category of case, by reference to the type of accident in which the plaintiff was involved or the type of defendant responsible for the plaintiff's injury. Categorisation of cases in this way is at times complex — a case may sit comfortably in more than one category. For example, the plaintiff in *Fox v Percy*, who was injured by a motor car while riding a horse,¹⁰³ could have their injury categorised as both a transport accident and a recreational activity. Also, some cases do not fit comfortably in any of the nine categories allocated. In such instances the coding is discretionary and such cases are coded according to the activity during which, or location where, the plaintiff sustained his or her injury, rather than the legal issue. For example, the legal issue in *Scott v Davis* was whether the owners of a recreational plane could be held vicariously liable for the deceased pilot's negligent flying of that plane,¹⁰⁴ but for the purposes of analysis the case has been coded under recreational activity. It should be noted that the methodology for selecting one category in preference to another is based upon two central considerations. Firstly, to ascertain where the claims by men, women and children lie in terms of types of injuries commonly suffered by women and children and the places where those injuries occur. This is particularly relevant for the analysis of hospital admissions data. This means that the type and location of the injury were prioritised over the type of defendant (for example, the categorisation of

¹⁰³ (2003) 214 CLR 118.

¹⁰⁴ (2000) 204 CLR 333.

Pledge v Roads and Traffic Authority ('Pledge')¹⁰⁵ as a transport case). Secondly, categories were chosen in recognition of the significant impact of the tort law reform legislation introduced across Australian jurisdictions from 2002. This means that the nature of the activity was coded as being more important than the type of defendant. For example, the category of 'recreational activity' results in decisions such as *Vairy v Wyong Shire Council*¹⁰⁶ and *Mulligan v Coffs Harbour City Council*¹⁰⁷ being classified as recreational activity cases rather than statutory authority cases. These methodological choices were made to further enhance the discussion of the gender and age of plaintiffs rather than the nature of the defendants. Due to this discretionary categorisation of cases, the category allocated to each case is identified in the Appendix.



Graph 3: Categories of Cases and Total Plaintiff Numbers

Graph 3 shows that in the period of this study, 50 per cent of all 88 plaintiffs in the High Court on appeal for personal injury claims were injured in the three categories of workplace accidents, recreational activity and motor accidents. Once claims against public authorities are added, the rate is just over two-thirds, or 67 per cent. Graph 3 shows that the most common form of injury claimed for was transport accidents (where the total number was 17). As was discussed in Part II, the prevalence of claims involving public authorities, employment and recreational activities may very well be related to the

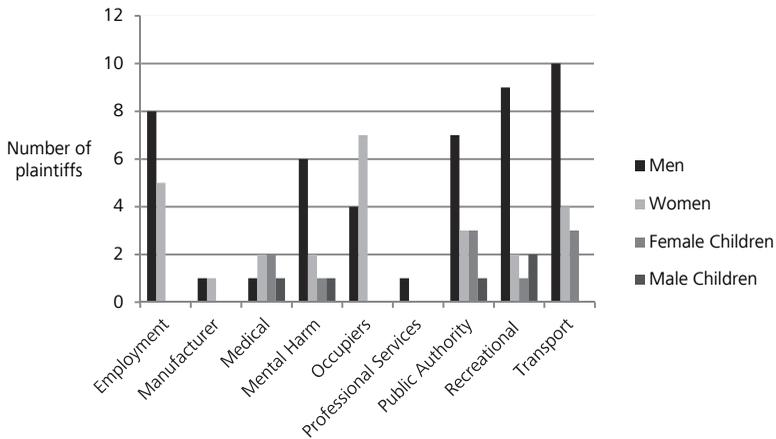
¹⁰⁵ (2004) 205 ALR 56.

¹⁰⁶ (2005) 223 CLR 422.

¹⁰⁷ (2005) 223 CLR 486.

location of the injury, and may also demonstrate the significance of initiating actions against a defendant with the capacity to pay through insurance.

In Graph 4, the gender and age of plaintiffs are mapped against the category of case. This reveals that the features as to who is represented in the High Court in negligence claims is not dissimilar to the observations as to hospital data outlined in Part II. Graph 4 shows the breakdown of the 88 plaintiffs in terms of age and gender across the selected case categories of the 73 cases analysed.



Graph 4: Categories of Cases and Characteristics of Plaintiffs

Of all negligence appeals to the High Court between 2000–10, two women and one female child were injured in recreational activities.¹⁰⁸ This contrasts with the higher numbers of nine men and two male children being injured through recreation. Thus, 21 per cent of all male plaintiffs in the 73 cases analysed were injured in recreational activities as opposed to 8 per cent of females. As previously noted, this supports the analysis of hospital data in Part II, as it is likely a reflection of the fact that most (77 per cent) sports-

¹⁰⁸ Note this depends upon case categorisation. Included in this count are the woman and female child in *Frost v Warner* (2002) 209 CLR 509 and the woman in *Scott v Davis*. This count excludes possible recreational injuries such as the use of the flying fox in *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161, which is counted as a public authority case, and the injury suffered by the female struck by a car while riding a horse in *Fox v Percy*, which is counted as a transport accident: see Appendix.

related injury hospitalisations are of males.¹⁰⁹ Further, in the two cases involving the three female plaintiffs, each female constituted part of a group containing an adult male who claimed for damages resulting from the same accident. In *Frost v Warner* there were three plaintiffs — a husband and wife, and their female child¹¹⁰ — and in *Scott v Davis* again there were three plaintiffs — a husband and wife, and their male child.¹¹¹ It is also worth noting again that in the four cases of *Amaca*, *CAL No 14*, *Turano* and *Stuart*, the actions are counted as being brought by an adult female even though the person killed was male (categories of case being: one workplace, two transport, and one statutory authority).

Graph 4 shows that the single category where women outnumber men is with respect to injury litigation involving negligence of an occupier. In this category of case, seven women were represented in appeals to the High Court as opposed to four men. Or, perhaps more markedly, from the nine cases classified as involving an occupier, seven involved claims by women.¹¹² Only two cases involved claims by men alone.¹¹³ This is a puzzling difference. Based upon the scholarship on procedural justice based on the social psychology of justice discussed in Part III, it may be hypothesised that women may feel more entitled to bring an action against a party they believe has not kept premises in a safe manner.¹¹⁴ However, it seems a curious position to adopt, and perhaps a more logical answer is the more general one that any plaintiff is more prepared to litigate against a party who can pay — for example, an occupier such as a shopping centre, movie theatre, or club, with the benefit of public liability insurance.

The data — as noted above — are limited and support a cautious approach with respect to over-generalising differences between men and women. For example, in this study eight men as opposed to five women were involved in High Court personal injury claims for work injuries. This is a ratio of nine per cent of men to seven per cent of women: not discernibly different.¹¹⁵ The

¹⁰⁹ See Kreisfeld and Harrison, above n 15, 93.

¹¹⁰ (2002) 209 CLR 509.

¹¹¹ (2000) 204 CLR 333.

¹¹² Only one case involved two individuals where the woman was claiming loss of consortium: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

¹¹³ *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; *Jones v Bartlett* (2000) 205 CLR 166.

¹¹⁴ See Lind and Tyler, above n 75.

¹¹⁵ One partial explanation may be the construction of variables in the data set. For example, the decision in *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 ('*Thompson*') is one of occupiers' liability. In this case, the female appellant conducted a bread delivery service,

similarity in the statistical proportion of High Court cases between men and women in these areas may support the finding that claims may be explained irrespective of gender by reference to the nature of the injury.

Graph 4 also details children and the category of case in which their injury falls. Of course, in relation to cases involving children, it should be noted that in the vast majority of these cases, the plaintiffs are children in name only. The cases are usually directed and funded by adults, which negates issues such as the practical difficulty of children suing.

Examining the 13 cases counted in the data set which involved child plaintiffs in High Court appeals, there was the following proportion of injuries: recreational or fall injuries (31 per cent);¹¹⁶ transport accidents (23 per cent);¹¹⁷ medical (23 per cent);¹¹⁸ vicarious liability for statutory authority for assault (15 per cent);¹¹⁹ and psychiatric injury caused by death of a parent (8 per cent).¹²⁰ Here, two obvious points of similarity emerge between these data and those of emergency admissions to hospital which were outlined in Part II. Firstly, the almost equivalent litigation rate for transport accidents (23 per cent of all appeals to the High Court, yet 21 per cent of hospital emergency admissions) and secondly, the litigation rates for falls (31 per cent of all appeals to the High Court and 40 per cent of injuries).

However, this similarity should not be overstated. There is difficulty drawing links between High Court appeals and injuries, and indeed between High Court appeals and causes of action. As a very early international study into children and tort compensation, the 1978 report of the United Kingdom

making daily deliveries to the respondent's store via a loading dock and injured her back when attempting to move the bins in order to hasten delivery one morning. This injury, and one sustained two weeks earlier, aggravated a pre-existing degenerative condition. The appellant commenced an action against Woolworths on the basis of occupiers' liability. However, any hospital admission would be counted as a workplace accident. For the purposes of this particular point of data analysis in this article, *Thompson* has therefore been counted as a workplace injury. Elsewhere in the article it is included as an occupiers' liability case.

¹¹⁶ *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; *Scott v Davis* (2000) 204 CLR 333; *Frost v Warner* (2002) 209 CLR 509.

¹¹⁷ *Pledge* (2004) 205 ALR 56; *Fergusson v Latham* (2008) 246 ALR 463; *Derrick v Cheung* (2001) 181 ALR 301; *Frost v Warner* (2002) 209 CLR 509.

¹¹⁸ *Harriton v Stephens* (2006) 226 CLR 52; *Waller v James* (2006) 226 CLR 136; *Tabet v Gett* (2010) 240 CLR 537.

¹¹⁹ *New South Wales v Lepore* (2003) 212 CLR 511, which was heard along with *Samin v Queensland* and *Rich v Queensland*.

¹²⁰ *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

Royal Commission on Civil Liability and Compensation for Personal Injury (*'Pearson Report'*), observed:

In theory, a child has the same opportunities of seeking tort compensation as does an adult ... In practice, few children seek tort compensation. According to our survey about one per cent of children injured after birth, as compared with about seven per cent of injured adults, obtain any reparation or payment through tort.¹²¹

There is a lack of Australian data as to whether the number of child personal injury cases before the High Court during the period of this study is out of step with personal injury litigation at large. This is particularly the case as the proportion of children in this study who are represented before the High Court simulates population data as at June 2006. At that time, 'the median age of the Australian population was 37 years. One in five Australians (20%) were children aged under 15 years, and 13% were aged 65 years and over'.¹²²

Tentative conclusions may be drawn which are not based upon linking the data of the study to injury data in any formal way. For example, in the data set, a fall involving playground equipment constituted only 4 per cent of all fall injuries for any age group, however for children aged 0–14 years it was the most common cause of injury; in this age band, 59 per cent of child fall injuries were from playground climbing equipment.¹²³ Generally, there will be third parties involved in the provision of playgrounds (schools and councils are the most obvious) yet only one case in our study involved injury on school or public playground equipment. Returning to the explanation in the *Pearson Report*, the most obvious explanation for this may be attribution of fault, as the low rate of personal injury appeals involving children may be due to a high proportion of cases where the injury is not anyone else's fault. The disparity between litigation statistics and the high number of injuries occurring on playground equipment through falls can be explained by the fact that these accidents are 'blameless' in the sense that there is no person at fault, at least in a legal sense. Of course, another explanation may be that High Court decisions are not related in any formal way, being unique cases selected for the development of legal doctrine.

¹²¹ *Pearson Report*, above n 28, vol 1, 313 [1494]. This was with respect to children under the age of 16 and those under 19 undergoing full time education: at 312 [1490].

¹²² ABS, *A Picture of the Nation: The Statistician's Report on the 2006 Census* (ABS Catalogue No 2070.0, 29 January 2009) 6.

¹²³ Kreisfeld and Harrison, above n 15, 21.

The data confirm the lack of success of the child plaintiff before the High Court. Success was coded according to whether the plaintiff in the original proceedings was ultimately successful in the High Court (whether as appellant or respondent) in obtaining or retaining a finding of liability or an award of damages against a defendant party to the original proceedings. Also included as plaintiffs' successful outcomes were cases where the High Court decision was 'neutral' to the plaintiff's case, so that decisions which were not determinative of liability or quantum of damages were included as successful if the plaintiff's position was not adversely affected. These included cases which resolved an issue between defendants, a procedural issue or a revocation of special leave. Cases where the plaintiff lost on a procedural matter were therefore counted as unsuccessful.¹²⁴

Over the period of the study, when child plaintiffs were involved in appeals to the High Court they were successful in 2 cases out of a total of 13 High Court decisions brought by child plaintiffs (15 per cent of cases) in comparison to the adult litigants, who were successful in 24 out of a total of 60 cases brought by adult plaintiffs (40 per cent of cases).

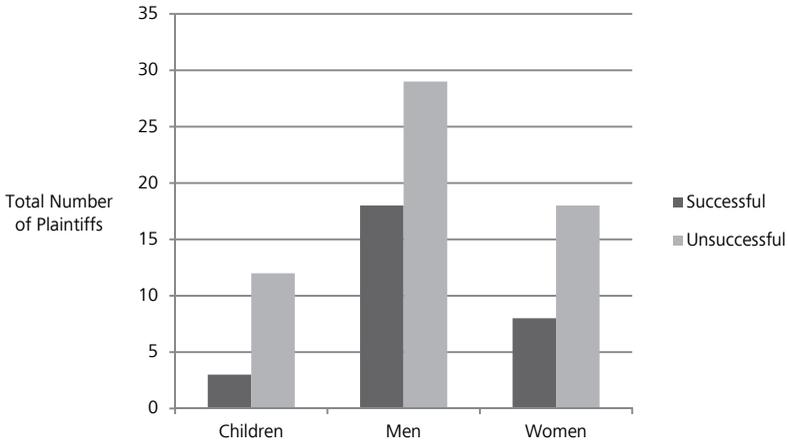
Of the 73 decisions in this study, 14 cases (approximately 19 per cent) involved children either as the single injured plaintiff or as one of several plaintiffs in a suit. Specifically, of the 14 cases before the High Court which dealt solely with child plaintiffs, 12 were decided in favour of the defendant.

In all but two of these cases — *Pledge* and *Gifford v Strang Patrick Stevedoring Pty Ltd* ('*Gifford*')¹²⁵ — the children were unsuccessful. Of the two successful child litigant cases, one was not concerned with the question of the child's right to compensation as it resolved a dispute between defendants over contribution (*Pledge*) and the other concerned the application of statutory law concerning psychiatric harm, which in all likelihood would have succeeded for the defendant if it had been considered under the current tort law reform legislation (*Gifford*). Thus, ignoring *Pledge*, there was only one successful appeal where children received compensation.

Graph 5 shows that this success rate contrasts with the absence of significant statistical difference in terms of men and women plaintiffs winning on appeal. There were 88 plaintiffs overall and 15 children in total.

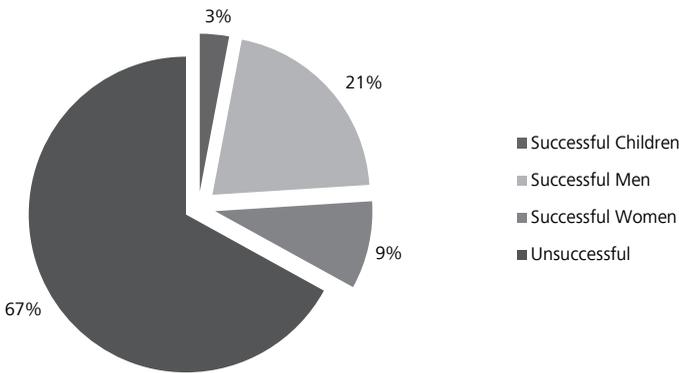
¹²⁴ See, eg, *Fergusson v Latham* (2008) 246 ALR 463.

¹²⁵ (2003) 214 CLR 269.



Graph 5: Success Rates and Litigant Types

Graph 6 represents the proportion of successful plaintiffs overall: 67 per cent of the total number of 88 plaintiffs were unsuccessful in the High Court, and of successful plaintiffs children represented only 3 per cent, women 9 per cent and men 21 per cent.



Graph 6: Success of Plaintiffs

Referring back to Graph 2, it is clear that these success rates reflect the diminishing number of overall cases as between men, women and children. In other words, it is to be expected that fewer children than men will be successful, as fewer children are involved in High Court litigation overall. Neverthe-

less, only three per cent of successful plaintiffs reflects a dramatic loss rate by children as opposed to the proportions of women and men.

The nature of the cases on appeal to the High Court concerning children may be more critical in the lack of success for children rather than other factors such as gender or age.¹²⁶ Failed cases for children include the very contentious wrongful life cases (which count as two failures: *Harriton v Stephens*,¹²⁷ *Waller v James*¹²⁸), and the novel 'loss of a chance' in the causation case *Tabet v Gett*.¹²⁹ It is likely here that the fact there were child plaintiffs was very much secondary to the highly controversial legal issues involved. This was also the case with the three cases involving sexual abuse, statutory authorities and difficult principles of negligence law.¹³⁰ Of the other cases, it could be suggested that the failure of the child in *Roads and Traffic Authority of New South Wales v Dederer*¹³¹ was very predictable. It followed two cases where the High Court had denied recovery in swimming and diving cases to adults.¹³² It is arguable that the lack of success for the plaintiff in the three cases, which involved transport accidents (*Fergusson v Latham*¹³³ and *Derrick v Cheung*¹³⁴) and recreational activities (*Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba*),¹³⁵ were similarly unsurprising.

As Graph 6 identifies, success rates for plaintiffs overall are unequal. Of the 73 negligence cases which involved personal injury, plaintiffs lost in 47 cases, or 64 per cent of cases. This means that in only 26 cases, or 36 per cent, a plaintiff was ultimately successful.¹³⁶ These figures show a significant loss rate by plaintiffs: for every three personal injury negligence cases which went on appeal to the High Court, a plaintiff was successful in only one of them.

¹²⁶ Thank you to an anonymous reviewer for this point.

¹²⁷ (2006) 226 CLR 52.

¹²⁸ (2006) 226 CLR 136.

¹²⁹ (2010) 240 CLR 537.

¹³⁰ *New South Wales v Lepore* (2003) 212 CLR 511, which was heard along with *Samin v Queensland* and *Rich v Queensland*. The judgments for the cases were dealt with and reported together although they were cases which were separately appealed.

¹³¹ (2007) 234 CLR 330.

¹³² *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486.

¹³³ (2008) 246 ALR 463.

¹³⁴ (2001) 181 ALR 301.

¹³⁵ (2005) 221 CLR 161.

¹³⁶ It must be noted here that the methodology counted 'neutral' cases as successful plaintiff actions: see above n 124 and accompanying text.

Interestingly, the appeal to the High Court in 42, or 58 per cent, of the 73 personal injury cases was brought by the plaintiff and in 31 cases, or 42 per cent, by defendants. When the defendant appealed, the win rate was higher. Of the total 73 cases, the defendant was the appellant in 31 cases. Of those, the plaintiff respondent lost in 24 cases. In other words, the defendant succeeded in 77 per cent of defendant-instigated appeals and lost only 7 cases to a plaintiff respondent. When plaintiffs appealed, the win rate was only a little more evenly distributed. Plaintiffs were appellants in 42 of the 73 cases in our study and 25 appellant plaintiffs lost their appeals (just under two-thirds or 60 per cent). Of the 42 plaintiff appellants, a total of 17 plaintiffs won their appeals, giving them a 40 per cent success rate.

It is difficult to predict whether this rate of diminishing returns for plaintiffs on appeal will be the case in the future. It is an understatement here to observe that the introduction of the tort law reform legislation or civil liability laws in every Australian jurisdiction from 2002¹³⁷ was not aimed at increasing plaintiff success. Australia-wide, smaller numbers of injured individuals are now commencing litigation as a result of the tort law reform legislation introduced following the Panel of Eminent Persons' ('Panel') review of the law of negligence ('Ipp Review')¹³⁸ from 2002.¹³⁹

Of the 78 cases analysed during the period of our study, there were only 3 negligence cases which were governed by substantive tort reform legislation, being the *Civil Liability Act 2002* (NSW) in each case. These were: *Adeels Palace Pty Ltd v Moubarak*;¹⁴⁰ *Wicks v State Rail Authority of New South Wales*;¹⁴¹ and *Turano*.¹⁴² In terms of the focus of this article, only 1 of these cases, *Turano*, concerned a female plaintiff who was ultimately unsuccessful on appeal to the High Court. However, as *Turano* concerned a duty of care question, and was a case where the woman appealing was not herself injured

¹³⁷ The relevant legislation in each jurisdiction is: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

¹³⁸ *Ipp Report*, above n 9. This was the second of two reports that the Panel produced and contains the recommendations for substantive reform of the tort of negligence.

¹³⁹ Wright, above n 5.

¹⁴⁰ (2009) 239 CLR 420.

¹⁴¹ (2010) 241 CLR 60.

¹⁴² Although the claim was subject to the *Civil Liability Act 2002* (NSW), the case was decided on the duty of care question, rather than any provision of the legislation. The High Court referred to s 43A but made the point that it was *not* relied upon: see *Turano* (2009) 239 CLR 51, 64 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

but rather was claiming under dependants legislation, it is not possible to make any claims with respect to the possible impact of the legislative reforms upon women.

V DISCUSSION

Even in the absence of a significant number of High Court cases interpreting the tort law reform legislation, it may be predicted that future negligence litigation is unlikely to favour women, children or men as plaintiffs. As Vines has written, these laws introduced throughout Australia were premised on an 'insurance crisis',¹⁴³ the concept being that the crisis was 'caused by an ever-increasing level of litigation, ever-increasing damages awards and an extremely litigious society composed of individuals who are not prepared to take responsibility for their own actions'.¹⁴⁴ As Vines notes, '[t]he present Australian tort reform process is based largely on a simple desire to cut costs and to ensure predictability for insurers. On its own this is not enough to create principled tort law or effective reform'.¹⁴⁵ When the Bill which formed the basis of the tort law reform was introduced into the New South Wales Parliament in 2002 by the then Premier Bob Carr, it was described as 'a triumph for commonsense'¹⁴⁶ and 'a proposal for the most important reform of the laws of negligence in 70 years'.¹⁴⁷ However, since the introduction of this legislation, questions have arisen about exactly for whom the reforms were a triumph. Subsequent criticism directed at the reforms has been harsh, with the President of the Law Council of Australia observing that the tort law reform has diluted fair and just compensation for injured people and diminished responsibility for tortious conduct amongst wrongdoers.¹⁴⁸

¹⁴³ Prue Vines, 'Tort Reform, Insurance and Responsibility' (2002) 25 *University of New South Wales Law Journal* 842, 842.

¹⁴⁴ Ibid 843. See also Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649.

¹⁴⁵ Vines, 'Tort Reform, Insurance and Responsibility', above n 143, 843.

¹⁴⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, *Hansard*, 5764 (Bob Carr).

¹⁴⁷ Ibid 5767 (Bob Carr).

¹⁴⁸ John North, 'Tort Law: What's the Point?' (Speech delivered at the Inaugural ACT Branch Conference of the Australian Lawyers Alliance, Australian Capital Territory, 24 June 2005). See generally E W Wright, 'National Trends in Personal Injury Litigation: Before and after "Ipp"' (Report, Law Council of Australia, 26 May 2006), which concludes that there could have been no empirical basis for the 'increase' in litigation rates that contributed to the tort law reforms.

Given that the triggers for the legislative reform across Australia were a perceived 'crisis in insurance'¹⁴⁹ and a series of judicial decisions in New South Wales which received media attention as 'proof' that the tort of negligence in Australia favoured plaintiffs,¹⁵⁰ was out of step with community understanding of personal responsibility and was in danger of creating an overzealous United States-style litigious system,¹⁵¹ it was unlikely that the legislative change would advantage any particular class of plaintiffs. Indeed the generic aim of reducing damages without any reference to ensuring substantive parity amongst injured plaintiffs is reflected in the opening statement of the terms of reference for the Ipp Review:

The 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. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.¹⁵²

The Panel was not tasked to investigate inequality in the award of damages for personal injury. Indeed, the narrow terms of reference for the Panel invited retention of the existing legal framework, and any existing inequality within it, rather than addressing socio-economic inequity as an outcome.¹⁵³ Clearly the aim of the tort law reform was not to strive for fair and just compensation for plaintiffs generally or for individual classes of plaintiffs. Legislative reform focused upon ensuring that injured people were made personally responsible for their own careless conduct, rather than on considerations of fairness or the differential impact that universal legislative reform may have had upon particular groups of people. This was despite existing international research

¹⁴⁹ See Cane, 'Reforming Tort Law in Australia', above n 144.

¹⁵⁰ See, eg, ABC Local Radio, 'The World Today', *Public Liability Costs Soar*, 2 October 2002 (Jo Mazzochi) <<http://www.abc.net.au/worldtoday/stories/s691337.htm>>; *Swain v Waverley Municipal Council* (2005) 220 CLR 517. Public discourse has played a large part in the debate surrounding tort law reform: see Justice D A Ipp, 'Policy and the Swing of the Negligence Pendulum' (Speech delivered at the Government Risk Management Conference, Perth, 15 September 2003), cited in Chief Justice Paul de Jersey, 'A Review of the *Civil Liability Act* and Tort Reform in Queensland' (Speech delivered at the Queensland Law Society Personal Injuries Conference, Queensland, 29 June 2007) 1.

¹⁵¹ Rob Davis, 'The Tort Reform Crisis' (2002) 25 *University of New South Wales Law Journal* 865.

¹⁵² *Ipp Report*, above n 9, ix.

¹⁵³ For a comment on the gendered nature of law reform generally, see Reg Graycar and Jenny Morgan, 'Law Reform: What's in It for Women?' (2005) 23 *Windsor Yearbook of Access to Justice* 393.

which identified that tort law reform undertaken in the United States discriminated against certain classes of individuals, such as women.¹⁵⁴ Further, it has been observed that '[w]omen have been victimized in the past by "neutral" reform legislation which ignored gender differences'.¹⁵⁵

Accordingly, the *Review of the Law of Negligence: Final Report* ('*Ipp Report*') discusses identifiable groups of litigants such as women, children and people with disabilities in only limited instances. This is the case notwithstanding that children and people with disabilities were specifically referred to in the context of reform to limitation periods in one of the five terms of reference of the Panel.¹⁵⁶ In the 255-page report, children are referred to in three instances across four pages: firstly, when the Panel recommends limitation periods running against minors;¹⁵⁷ secondly, when the need for adjustment of contributory negligence standards between children and adults is confirmed;¹⁵⁸ and finally, when the recreational activity defence as it applies to children is adjusted for the 'reasonable person in the position of the participant', as 'many participants in recreational activities are children, whom most people would think need and deserve special protection from risks of personal injury and death'.¹⁵⁹ The reference to recreational activities is seemingly the single point in the report where disadvantage is noted, the Panel stating that:

these [legislative provisions] should give ample room for the law to develop flexibly to provide protection for people who are not in as good a position as a fully capable adult to take care for their own physical safety or to discern the

¹⁵⁴ For example, research undertaken in the United States by Finley has shown that caps on non-economic loss (one of the aspects of the Australian tort law reform) have a negative impact upon compensation for women as opposed to men: Lucinda M Finley, 'The Hidden Victims of Tort Reform: Women, Children, and the Elderly' (2004) 53 *Emory Law Journal* 1263.

¹⁵⁵ Koenig and Rustad, above n 39, 9.

¹⁵⁶ *Ipp Report*, above n 9, x–xi. The fifth term of reference asked the Panel to:

Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons. In developing options the Panel must consider: (a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and (b) establishing the appropriate date when the limitation period commences.

¹⁵⁷ *Ibid* 95–6 [6.48].

¹⁵⁸ *Ibid* 124 [8.12].

¹⁵⁹ *Ibid* 63 [4.14].

risks of recreational activities in which they participate or which they observe.¹⁶⁰

The only mention of women specifically in the *Ipp Report* was in relation to the discussion of the rule in *Bolam v Friern Hospital Management Committee*¹⁶¹ as to liability in cases of professional negligence, and the 1988 report concerning the treatment of cervical cancer in New Zealand,¹⁶² where the authors pointed out that under the original formulation of the rule the practitioners who failed to treat women with cervical cancer would not have been negligent.¹⁶³

In the United States context, Koenig and Rustad suggest that tort reformers are ‘currently reshaping tort remedies in ways that will be contrary to women’s interests’.¹⁶⁴ In Australia, the terms of reference of the *Ipp Report* were universally applied, beginning from an assumption that there was a need to limit ‘liability and quantum of damages arising from personal injury and death’.¹⁶⁵ In this context, and in accord with Koenig and Rustad’s observation, it is important to note that certain legislative changes may act in the future to actively exclude women and children from personal injury litigation.

An example of such change is the substantive legislative reforms, in some jurisdictions, which place a cap on damages for non-economic loss for personal injury or death.¹⁶⁶ While such caps apply equally to all plaintiffs, the argument made by United States researchers such as Finley¹⁶⁷ and Korzec¹⁶⁸ is that such non-economic loss caps significantly disadvantage women. This is because the law of torts values loss of paid working capacity over other loss.¹⁶⁹

¹⁶⁰ Ibid.

¹⁶¹ [1957] 1 WLR 582, 587 (McNair J).

¹⁶² Committee of Inquiry into Allegations concerning the Treatment of Cervical Cancer at National Women’s Hospital and into Other Related Matters, *The Report of the Cervical Cancer Inquiry* (1988).

¹⁶³ *Ipp Report*, above n 9, 39 [3.10].

¹⁶⁴ Koenig and Rustad, above n 39, 5.

¹⁶⁵ *Ipp Report*, above n 9, 25 [1.3].

¹⁶⁶ See *Civil Liability Act 2002* (NSW) s 16(2); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 27; *Civil Liability Act 2003* (Qld) ss 61–2; *Civil Liability Act 1936* (SA) s 52; *Wrongs Act 1958* (Vic) s 28G.

¹⁶⁷ Finley, ‘The Hidden Victims of Tort Reform’, above n 154.

¹⁶⁸ Rebecca Korzec, ‘Maryland Tort Damages: A Form of Sex-Based Discrimination’ (2007) 37 *University of Baltimore Law Forum* 97.

¹⁶⁹ See Lucinda M Finley, ‘Female Trouble: The Implications of Tort Reform for Women’ (1997) 64 *Tennessee Law Review* 847.

As a result, incapacity caused by injuries to women is often categorised as non-economic loss. In addition, the law of torts has historically categorised the loss of a woman's domestic working capacity (that is, being a housewife) as a loss to her husband of '*servitium*' rather than to herself as a worker.¹⁷⁰

A further example of legislative change which disadvantages a minority is the requirement in New South Wales that minors who are in the custody of a 'capable parent or guardian' do not have the benefit of the suspension of the limitation period.¹⁷¹ This change was based upon recommendation 25 of the *Ipp Report*, which was justified on the basis of 'persuasive evidence from several sources about difficulties that are experienced by reason of the rule that limitation periods do not run against minors and mentally incapacitated persons'.¹⁷² The report gave two examples of such difficulties: public liability and professional indemnity insurers who would face uncertainty in assessment of premiums; and obstetricians who may face a claim '20 years or more after the relevant event', even after retirement.¹⁷³ Despite stating that it was 'not in a position to verify this assertion', the Panel recommended the change to the limitation period for minors, as 'many people clearly perceive[d] it to be correct'.¹⁷⁴ The time limit has been described as 'not only both inefficient and ineffective, but also grossly unjust and ill-considered' as it reduces the time available to gather evidence as to quantum of damages,¹⁷⁵ meaning that parents may not be able to assert their child's rights effectively within the reduced time frame.

VI CONCLUSION

The study of High Court negligence appeal cases in the first 11 years of the 21st century demonstrates that the law of negligence does not generally favour plaintiffs, and that some groups of plaintiffs appear less often in negligence litigation before the High Court than others. However, it is important to observe that appeal cases are not representative of all cases and we should not 'ignore the problem of the representativeness of appellate decisions or

¹⁷⁰ Graycar, 'Hoovering as a Hobby and Other Stories', above n 3, 26–31.

¹⁷¹ *Limitation Act 1969* (NSW) s 50F(2)(a). This provision existed in Tasmania prior to the 2002 reforms: *Limitation Act 1974* (Tas) s 26(6).

¹⁷² *Ipp Report*, above n 9, 94 [6.41].

¹⁷³ *Ibid* 94–5 [6.42]–[6.43].

¹⁷⁴ *Ibid* 95 [6.44].

¹⁷⁵ Keith Tronc, 'A Plaintiff Lawyer's Guide to Gambling on the Future: The Looming Debacle of Reduced Time Bars for Injured Babies and Children' (2003) 56 *Plaintiff* 36, 38.

presume representativeness'.¹⁷⁶ Caution must be exercised in inferring, for example, that because there is a smaller number of personal injury cases involving women in the High Court than men, there must be fewer negligence actions instigated by women overall. At least three interrelated concerns arise from this study which merit future investigation: firstly, the issue of whether the ideology of the High Court favours personal responsibility, coupled with the future impact of the tort law reform legislation; secondly, the framework of the operation of tort law and resulting inequality more generally; and thirdly, in light of the two previous issues, the possibility of a renewal of calls for reform of the law of negligence.

In relation to the first issue, this study identified that between 2000–10 only one in three plaintiffs were successful in High Court appeals. As observed in Part IV, it seems likely that Australian tort law reform will perpetuate these unequal success rates of plaintiffs in appeals to the High Court. Justice Ipp, who chaired the Panel, was described in 2007 as having labelled the compensation laws which had been introduced as a result of the tort law reform legislation as 'inconsistent, unbalanced and unfair to injured people'.¹⁷⁷ He has since observed that '[c]ertain of the statutory barriers that plaintiffs now face are inordinately high'.¹⁷⁸ The pendulum of responsibility has clearly swung towards individual injured persons.

In relation to the second issue of the framework of the law of tort, it is not yet evident whether certain classes of plaintiff — in particular women and children — are, or will be, more adversely affected than others by the tort law reforms. Part II of this article drew upon empirical material indicating that a negligence action may be dependent upon the nature, type and location of injury. These factors are biased as to both gender and age: that is, more men, than either women or children, suffer injuries in circumstances where the harm inflicted can be the subject of a claim in negligence. This evidence suggests structural differences based upon age and gender in the existing framework of tort law. Of course, as emphasised at the outset of this conclu-

¹⁷⁶ George L Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (Report, Institute for Civil Justice, RAND Corporation, 1984) 3. See also George L Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) 13 *Journal of Legal Studies* 1, 3.

¹⁷⁷ Geoffrey Provis, 'From the President: A Source Worth Saving' (2007) 81(7) *Law Institute Journal* 4, 4, citing Justice David Ipp, 'The Politics, Purpose and Reform of the Law of Negligence' (Paper presented at the Conference of the Australian Insurance Law Association, Noosa, 17 May 2007).

¹⁷⁸ Justice D A Ipp, 'The Metamorphosis of Slip and Fall' (2007) 29 *Australian Bar Review* 150, 150, quoting Justice David Ipp, 'Themes in the Law of Torts' (Speech delivered at the Conference Celebrating 80 Years of the *Australian Law Journal*, Sydney, 16 March 2007).

sion, limitations exist in extrapolating from the raw numbers in these rare cases of High Court appeals that develop the law of negligence.

The system of tort litigation is expensive and slow, and a 'significant number of people who are injured in an accident do not receive any compensation'.¹⁷⁹ Part III of the article examined the obstacles in the way of all plaintiffs — and particularly to children and women — to commencing and pursuing litigation for personal injury. In New Zealand, the Royal Commission into compensation for personal injury — responsible for the introduction of the universal no-fault compensation scheme for accidents in that country — noted that '[t]he negligence action is a form of lottery'¹⁸⁰ and, damningly, that '[t]he toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole'.¹⁸¹

This then leads to the third point — that the time may be approaching to consider the possibility of a no-fault system in future reform of Australian tort law. This could be in the form of a universal compensation scheme,¹⁸² or further legislative reform to the law of negligence with emphasis placed upon procedural and substantive equity in access to compensation for the negligent acts of others. The data in this study evidence that the pendulum has well and truly swung away from what Kirby J called 'communitarian concepts of mutual legal responsibility'¹⁸³ for accident compensation. The success rate of defendants in this study underlines the shift in emphasis away from the community bearing the cost of personal injuries back to the individual taking personal responsibility. This raises the question as to whether the pendulum

¹⁷⁹ Talina Drabsch, 'No Fault Compensation' (Briefing Paper No 6/05, New South Wales Parliamentary Library Research Service, May 2005) 5.

¹⁸⁰ New Zealand, Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (1967) 19 ('Woodhouse Report'). Scholarly calls for change to the law of tort have been longstanding and international: see generally P S Atiyah, *The Damages Lottery* (Hart Publishing, 1997); Terence G Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (Staples Press, 1967); Ian Malkin, 'Unequal Treatment of Personal Injuries' (1990) 17 *Melbourne University Law Review* 685; Harold Luntz, 'Proposals for a National Compensation Scheme' (1981) 55 *Law Institute Journal* 745.

¹⁸¹ *Woodhouse Report*, above n 180, 19.

¹⁸² See Productivity Commission, above n 11, ch 18; Treasury, Australian Government, *National Injury Insurance Scheme* <<http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/National-Injury-Insurance-Scheme>>; David Weisbrot and Kerry J Breen, 'A No-Fault Compensation System for Medical Injury is Long Overdue' (2012) 197 *Medical Journal of Australia* 296.

¹⁸³ *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 379 [166].

has swung too far and if the community should assume more responsibility for those catastrophically injured.

VII APPENDIX

2010

- 1 *Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of New South Wales* (2010) 241 CLR 60 (16 June 2010) (2 adult males, plaintiffs won) (Mental harm)
- 2 *Tabet v Gett* (2010) 240 CLR 537 (21 April 2010) (1 female child, plaintiff lost) (Medical)
- 3 *Amaca Pty Ltd v Ellis; South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis* (2010) 240 CLR 111 (3 March 2010) (1 adult female bringing action as dependant, 4 female children not included in data, plaintiff lost) (Employment)

2009

- 4 *Zheng v Cai* (2009) 239 CLR 446 (9 December 2009) (1 adult female, plaintiff won) (Transport)
- 5 *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Ltd v Fox* (2009) 240 CLR 1 (2 December 2009) (1 adult male, plaintiff lost) (Employment)
- 6 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 (10 November 2009) (2 adult males, plaintiffs lost) (Occupier)
- 7 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board; CAL No 14 Pty Ltd v Scott* (2009) 239 CLR 390 (10 November 2009) (1 adult female, bringing action as dependant, plaintiff lost) (Transport)
- 8 *Sydney Water Corporation v Turano* (2009) 239 CLR 51 (13 October 2009) (1 adult female, bringing action as dependant, 2 children 'Christopher' and 'Sophia' not included in data, plaintiff lost) (Public authority)
- 9 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 (22 April 2009) (1 adult female, bringing action as dependant, plaintiff lost) (Public authority)

2008

- 10 *Lujans v Yarrabee Coal Co Pty Ltd* (2008) 249 ALR 663 (16 October 2008) (1 adult female, plaintiff won) (Transport)
- 11 *Imbree v McNeilly* (2008) 236 CLR 510 (28 August 2008) (1 adult male, plaintiff won) (Transport)

- 12 *Fergusson v Latham* (2008) 246 ALR 463 (20 May 2008) (1 female child, plaintiff lost) (Transport)
- 13 *Roads and Traffic Authority v Royal* (2008) 245 ALR 653 (14 May 2008) (1 adult male, plaintiff won) (Transport)
- 14 *Collins v Tabart* (2008) 246 ALR 460 (16 April 2008) (1 adult male, plaintiff lost) (Transport)

2007

- 15 *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 (30 August 2007) (1 male child, plaintiff lost) (Recreational activity)
- 16 *New South Wales v Fahy* (2007) 232 CLR 486 (22 May 2007) (1 adult female, plaintiff lost) (Employment)
- 17 *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 (27 February 2007) (1 adult male, plaintiff lost) (Statutory authority)

2006

- 18 *Cooté v Forestry Tasmania* (2006) 227 ALR 481 (13 June 2006) (1 adult male, plaintiff won) (Employment)
- 19 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 (16 May 2006) (1 adult female, plaintiff lost) (Manufacturer/Producer/Repairer)
- 20 *Waller v James; Waller v Hoolahan* (2006) 226 CLR 136 (9 May 2006) (1 male child, plaintiff lost) (Medical)
- 21 *Harriton v Stephens* (2006) 226 CLR 52 (9 May 2006) (1 female child, plaintiff lost) (Medical)
- 22 *CSR Ltd v Della Maddalena* (2006) 224 ALR 1 (2 February 2006) (1 adult male, plaintiff lost) (Employment)

2005

- 23 *Manley v Alexander* (2005) 223 ALR 228 (14 December 2005) (1 adult male, plaintiff won) (Transport)
- 24 *New South Wales v Bujdoso* (2005) 227 CLR 1 (8 December 2005) (1 adult male, plaintiff won) (Public authority)

- 25 *Neindorf v Junkovic* (2005) 222 ALR 631 (8 December 2005) (1 adult female, plaintiff lost) (Occupier)
 - 26 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 (16 November 2005) (Excluded: Pure economic loss)
 - 27 *CSR Ltd v Eddy* (2005) 226 CLR 1 (21 October 2005) (1 adult male, plaintiff lost) (Employment)
 - 28 *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486 (21 October 2005) (1 adult male, plaintiff lost) (Recreational activity)
 - 29 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 (21 October 2005) (1 adult male, plaintiff lost) (Recreational activity)
 - 30 *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 (5 October 2005) (1 adult male, plaintiff lost) (Recreational activity)
 - 31 *Laybutt v Glover Gibbs Pty Ltd* (2005) 221 ALR 310 (29 September 2005) (1 adult female, plaintiff won) (Employment)
 - 32 *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161 (15 June 2005) (1 female child, plaintiff lost) (Public authority)
 - 33 *Commissioner of Main Roads v Jones* (2005) 215 ALR 418 (20 May 2005) (1 adult male, plaintiff lost) (Transport)
 - 34 *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 (21 April 2005) (1 adult female, plaintiff won) (Occupier)
 - 35 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 (6 April 2005) (1 adult female, plaintiff lost) (Employment)
 - 36 *Czatyрко v Edith Cowan University* (2005) 214 ALR 349 (6 April 2005) (1 adult male, plaintiff won) (Employment)
 - 37 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 (10 March 2005) (1 adult male, plaintiff lost) (Non-medical professional service)
 - 38 *Swain v Waverley Municipal Council* (2005) 220 CLR 517 (9 February 2005) (1 adult male, plaintiff won) (Recreational activity)
- 2004
- 39 *Anikin v Sierra* (2004) 211 ALR 621 (9 December 2004) (1 adult male, plaintiff won) (Transport)

- 40 *Cole v South Tweed Heads Rugby Club* (2004) 217 CLR 469 (15 June 2004) (1 adult female, plaintiff lost) (Occupier)
- 41 *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 (15 June 2004) (1 adult male, plaintiff won) (Employment)
- 42 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 (1 April 2004) (Excluded: Pure economic loss)
- 43 *Pledge v Roads and Traffic Authority* (2004) 205 ALR 56 (11 March 2004) (1 female child, plaintiff won) (Transport)

2003

- 44 *Hoys Pty Ltd v Burns* (2003) 201 ALR 470 (9 October 2003) (1 adult female, plaintiff lost) (Occupier)
- 45 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 (11 September 2003) (Excluded: Pure economic loss)
- 46 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 (3 September 2003) (1 adult female, plaintiff lost) (Employment)
- 47 *Suvaal v Cessnock City Council* (2003) 200 ALR 1 (6 August 2003) (1 adult male, plaintiff lost) (Public authority)
- 48 *Cattanach v Melchior* (2003) 215 CLR 1 (16 July 2003) (1 adult male, 1 adult female, plaintiffs won) (Medical)
- 49 *Joslyn v Berryman* (2003) 214 CLR 552 (18 June 2003) (1 adult male, plaintiff lost) (Transport)
- 50 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 (18 June 2003) (1 adult male, 1 male child, 1 female child, plaintiffs won) (Mental harm)
- 51 *Shorey v PT Ltd* (2003) 197 ALR 410 (28 May 2003) (1 adult female, plaintiff won) (Occupier)
- 52 *Fox v Percy* (2003) 214 CLR 118 (30 April 2003) (1 adult female, plaintiff lost) (Transport)
- 53 *New South Wales v Lepore* (2003) 212 CLR 511 (6 February 2003) (1 male child, plaintiff lost) (Public authority)
- 54 *Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511 (6 February 2003) (2 female children, plaintiffs lost) (Public authority)

2002

- 55 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (5 December 2002) (1 adult male, plaintiff lost) (Manufacturer/Repairer/Producer)
- 56 *Ryan v Great Lakes Council* (2002) 211 CLR 540 (5 December 2002) (1 adult male, plaintiff lost) (Public authority)
- 57 *New South Wales v Ryan* (2002) 211 CLR 540 (5 December 2002) (1 adult male, plaintiff lost) (Public authority)
- 58 *De Sales v Ingrilli* (2002) 212 CLR 338 (14 November 2002) (1 adult female, plaintiff won) (Occupier)
- 59 *Goldsmith v Sandilands* (2002) 190 ALR 370 (8 August 2002) (1 adult male, plaintiff lost) (Transport)
- 60 *Tame v New South Wales* (2002) 211 CLR 317 (5 September 2002) (1 adult female, plaintiff lost) (Mental harm)
- 61 *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 (5 September 2002) (1 adult female, 1 adult male, plaintiffs won) (Mental harm)
- 62 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 (7 March 2002) (1 adult male, plaintiff lost) (Recreational activity)
- 63 *Frost v Warner* (2002) 209 CLR 509 (7 February 2002) (1 female child, 1 adult female, 1 adult male, plaintiffs lost) (Recreational activity)

2001

- 64 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 (15 November 2001) (Excluded: Pure economic loss)
- 65 *Sullivan v Moody; Thompson v Connan* (2001) 207 CLR 562 (11 October 2001) (2 adult males, plaintiffs lost) (Mental harm)
- 66 *Derrick v Cheung* (2001) 181 ALR 301 (9 August 2001) (1 female child, plaintiff lost) (Transport)
- 67 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (9 August 2001) (1 adult male, plaintiff won) (Transport)
- 68 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (31 May 2001) (2 adult males, plaintiffs won) (Public authority)
- 69 *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 (31 May 2001) (1 adult female, plaintiff lost) (Public authority)

- 70 *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321 (3 May 2001) (1 adult male, plaintiff lost) (Employment)
- 71 *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 (5 April 2001) (Excluded: Pure economic loss)
- 72 *Rosenberg v Percival* (2001) 205 CLR 434 (5 April 2001) (1 adult female, plaintiff lost) (Medical)

2000

- 73 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 (23 November 2000) (1 adult male, 1 adult female, plaintiff lost) (Occupier)
- 74 *Jones v Bartlett* (2000) 205 CLR 166 (16 November 2000) (1 adult male, plaintiff lost) (Occupier)
- 75 *Scott v Davis* (2000) 204 CLR 333 (5 October 2000) (1 male child, 1 adult male, 1 adult female, plaintiffs lost) (Recreational activity)
- 76 *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552 (3 August 2000) (2 adult males, plaintiff lost) (Recreational activity)
- 77 *Grincelis v House* (2000) 201 CLR 321 (3 August 2000) (1 adult male, plaintiff won) (Transport)
- 78 *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 (13 April 2000) (1 adult male, plaintiff lost) (Employment)