

High Court Negligence Cases 2000–10

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Abstract

This article reports and analyses the results of a study of High Court negligence decisions from 2000 to 2010. The research establishes that the common law of negligence has been evolving toward the imposition of greater personal responsibility on plaintiffs in most circumstances, but especially in recreational activity cases. Further, the study reveals a substantial level of protection for public authority defendants at common law, challenging the assumptions that underpinned the significant statutory protections that were enacted in Australian jurisdictions from 2002 onwards. The data analysis therefore corroborates previous work of Australian tort law scholars and contradicts the claims made by policymakers at the start of the 21st century about the urgent need for tort law reform. Given that there has not been an empirical study of 21st century High Court negligence decisions to date, the study provides a foundation for future assessment of the effect of Australian tort law reform legislation.

I Introduction

This article analyses High Court negligence decisions from 2000 to 2010. The data suggests that, in the first 11 years of the 21st century, the negligence ideology of the High Court imposes a burden of responsibility on individuals to take care of themselves.¹ Such ideology limits liability and quantum of damages arising from personal injury, which was the main task of the Ipp Panel in its review of the law of negligence.² The data in this study evidences that the application of the common law had already moved towards low rates of plaintiff success in High Court litigation prior to any impact from tort law reform legislation. This finding both confirms and extends earlier empirical findings of legal scholars and anecdotal evidence from the judiciary supporting the conclusion that the tort law reforms were not required or empirically supported.³

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¹ See also David Ipp et al, *Review of the Law of Negligence: Final Report* (Commonwealth of Australia, 2002) 29 [1.24] ('Ipp Report').

² *Ibid* 26 [1.7].

³ See Harold Luntz, 'Reform of the Law of Negligence Wrong Questions — Wrong Answers' (2002) 8(2) *University of New South Wales Law Journal Forum* 18; Harold Luntz 'Turning Points in the Law of Torts in the Last 30 Years' (2003) 15 *Insurance Law Journal* 1; Chief Justice J J Spigelman, 'Tort Law Reform: An Overview' (2006) 14(1) *Tort Law Review* 5, 8; Justice G L Davies, 'Negligence: Where Lies the Future?' (Speech delivered at the Supreme and Federal Court Judges; Conference on the Ipp Report, Adelaide, 23 January 2003. See also comments by Tobias JA in *Wyong Shire Council v Vairy* [2004] NSWCA 247 (27 July 2004) [152], [157].

The methodology used is outlined in Part II of the article. Analysis of the following aspects of the High Court case law is then provided: the numbers of negligence cases on a year-by-year basis (Part III); plaintiff success rates (Part IV); the main substantive legal issues (Part V); categories of duty of care (Part VI); recreational activity cases (Part VII); and cases with public authority defendants (Part VIII). The findings of the dataset are stated at the beginning of each Part, followed by discussion. Where relevant, there is analysis of the impact of the legislative tort law reforms that occurred across Australian jurisdictions from 2002 onwards.

This form of study, which examines a large number of cases systematically, remains relatively rare in Australian legal research.⁴ However, its novelty should not obscure its limitations. While inference and implications are drawn from the data throughout this article, the overall aim is for the data presented to stimulate discussion. As such, the statistical information presented in this article is not intended as an end in itself, but rather is provided as a foundation for more detailed consideration.⁵

II Methodology

While rare, there is a growing number of Australian empirical studies into the methodological approach, function and performance of the High Court.⁶ Such studies range from work examining the textual content of High Court negligence judgments,⁷ to work that studies citation patterns, judicial ideology and dissent.⁸

Although the data in these previous studies diverge both in focus and breadth from the data presented here, aspects of the existing research make important contributions to informing analysis of the treatment of tortious litigation by the High Court. Specifically, the exploration of litigant success in the Australian High Court⁹ and the questions of ‘repeat player advantage’ in litigation¹⁰ provide informative reference points for analysis, as does the more expansive empirical literature on United States judicial decision-making. Such Australian and

⁴ ‘[T]here traditionally has been limited academic interest and activity in empirical research into the justice system in Australia’: Australian Law Reform Commission, *Managing Justice: Continuity and Change in the Federal Justice System*, 31 December 1999, ALRC Report No 89 (1999) 72 [1.43] < <http://www.austlii.edu.au/au/other/lawreform/ALRC/1999/89.html> >.

⁵ For similar cautionary wording, see Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2003 Statistics’ (2004) 27(1) *University of New South Wales Law Journal* 88, 89, quoting ‘The Supreme Court, 1948 Term’ (1949) 63 *Harvard Law Review* 119, 119.

⁶ Empiricism is used broadly here to extend beyond statistical analysis to ‘include any attempt to collect and analyze a set of data for more than anecdotal purposes’: Russell Korobkin, ‘Empirical Scholarship in Contract Law: Possibilities and Pitfalls’ [2002] 4 *University of Illinois Law Review* 1033, 1035.

⁷ See, eg, Kylie Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’ (2012) 40 *Federal Law Review* 317.

⁸ *Ibid* n 44 for a list of such works.

⁹ Reginald G Sheehan and Kirk A Randazzo, ‘Explaining Litigant Success in the High Court of Australia’ (2012) 47 *Australian Journal of Political Science* 239.

¹⁰ Russell Smyth, ‘The “Haves” and “Have-Nots”: An Empirical Study of the Rational Actor and Party Capability Hypotheses in the High Court 1948–99’ (2000) 35 *Australian Journal of Political Science* 255.

international research is discussed in this article where relevant (although much research from the United States is limited in its comparative value¹¹ and focus).¹²

The approach used in this study, which codes judicial decisions to allow systematic analysis of the development of the law of negligence over a specific time period, is well recognised across divergent areas of legal research.¹³ The study utilises a mixed methodology involving both quantitative and qualitative aspects. The High Court cases selected for the research were for the period from 1 January 2000 to 31 December 2010.¹⁴ The cases chosen by the research team involved an exercise of some discretion. The judgments selected are all decisions where the substantive issues decided by the High Court related to liability in the tort of negligence.¹⁵ In all, 78 negligence cases were examined and coded for the purposes of the research. A list of the cases included appears in Appendix 1. Cases were excluded where substantive legal issues pertaining to the law of negligence were not the subject of the appeal. For example, decisions were excluded where, although the case was based in a claim in negligence, the High Court judgment was solely concerned with matters such as a statute of limitations,¹⁶ or choice of law

¹¹ Similar work on tort law reform was undertaken more than 20 years ago in the United States: see Thomas B Marvell, 'Tort Caseload Trends and the Impact of Tort Reforms' (1994) *Justice System Journal* 193.

¹² See Joel Waldfogel, 'Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation' (1998) 41 *Journal of Law and Economics* 451; Peter Siegelman and John J Donohue III, 'The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis' (1995) 24 *Journal of Legal Studies* 427. For criticism of the Priest-Klein hypothesis, see Daniel Kessler, Thomas Meites and Geoffrey Miller, 'Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation' (1996) 25 *Journal of Legal Studies* 233; Donald Wittman, 'Is the Selection of Cases for Trial Biased?' (1985) 14 *Journal of Legal Studies* 185; Peter Siegelman and Joel Waldfogel, 'Toward a Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model' (1999) 28 *Journal of Legal Studies* 101; Sara Manning and Kirk A Randazzo, 'Leveling the Playing Field? Litigant Success Rates in Health-Care Policy Cases in the U.S. Courts of Appeals' (2009) 30(3) *Justice System Journal* 245.

¹³ See, eg, Richard Chisholm, 'Children's Participation in Family Court Litigation' in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices, Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law* (Hart Publishing, 2003) 37; Robert A Hillman, 'Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study' (1998) 98 *Columbia Law Review* 580; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2011) 34(3) *University of New South Wales Law Journal* 1030.

¹⁴ This excludes the following negligence cases decided after the cut-off date of 31 December 2010: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 ('*Hunt & Hunt Lawyers*'); *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 ('*Insight Vacations*'); 276 ALR 497; and *Wallace v Kam* (2013) 250 CLR 375 ('*Wallace*'); it also excludes: *Amaca Pty Ltd v Booth* (2011) 246 CLR 36; *Barclay v Penberthy* (2012) 246 CLR 258; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; *Lithgow City Council v Jackson* (2011) 244 CLR 352; *Miller v Miller* (2011) 242 CLR 446; *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555; *Strong v Woolworths Ltd* (2012) 246 CLR 182 ('*Strong*'); *Brookfield Multiplex Ltd v Owners — Strata Plan 61288* (2014) 88 ALJR 911.

¹⁵ The cases were identified from the Australian Legal Information Institute (AustLII) database: see <<http://www.austlii.edu.au/cases/cth/HCA/>>.

¹⁶ *Queensland v Stephenson* (2006) 226 CLR 197; *Davison v Queensland* (2006) 226 CLR 234; *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.

issues,¹⁷ or construction of legislation¹⁸ (other than tort reform legislation), or the effect of workers compensation legislation on a common law claim,¹⁹ or liability under the trade practices legislation.²⁰ The research includes negligence cases where the damage was purely economic, because those cases dealt with basic negligence principles, though there were only five such cases.²¹

The research team developed a coding template containing 29 categories. This enabled a combination of quantitative and qualitative data to be extracted from each judgment. Quantitative data concerned case administration and demographics including date of judgment, jurisdiction of origin, date of hearing, judges, decision, appellants and respondents.²² Qualitative data included text summaries, case category, brief details of the case background and inferences drawn from the judgment. This approach to the coding of the decisions has two outcomes for the material analysed in this article. The first is that the discussion in Parts I–VI of the article applies the dataset as a whole — where the cases have been treated as per the list contained in Appendix 1. Here, if a case was concerned with multiple issues it was categorised as per the dominant legal principle involved. The second outcome is that the discussion in Parts VII and VIII concerns specific categories of case and involves coding cases by reference to the type of activity in which the plaintiff was engaged and the type of defendant. Occasionally some discretionary categorisation was required here. This was necessary to apply retrospectively some of the clear changes made in the tort law reform legislation, such as the creation of recreational activity defences after 2002. The coding in Parts VII and VIII was designed to evaluate further whether the tort law reforms were justified empirically. The absence of any pressing need for the reforms is reinforced in this discussion, which focuses on the areas where the tort law reform legislation sought to restrict recovery or to modify the common law in relation to recreational activities (Part VII) and statutory authorities (Part VIII). Assumptions by the authors are made transparent throughout.

¹⁷ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *BHP Billiton Ltd v Shultz* (2004) 221 CLR 400; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331.

¹⁸ *Hickson v Goodman Fielder Ltd* (2009) 237 CLR 130; *Nominal Defendant v GLG Aust Pty Ltd* (2006) 228 CLR 529; *Insurance Commission of Western Australia v Container Handlers Pty Ltd* (2004) 218 CLR 89; *Golden Eagle International Trading Pty Ltd v Zhang* (2007) 229 CLR 498; *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568. Many of these cases concerned motor accidents legislation and fewer are concerned with the construction of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) or the *Damage by Aircraft Act 1999* (Cth); *Povey v Qantas Airways Ltd* (2005) 223 CLR 189; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283; *ACQ Pty Ltd v Cook* (2009) 237 CLR 656.

¹⁹ *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364; *Brighton Und Redfern Plaster Pty Ltd v Boardman* (2006) 225 CLR 402; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1; *Hickson v Goodman Fielder Ltd* (2009) 237 CLR 130.

²⁰ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.

²¹ *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.

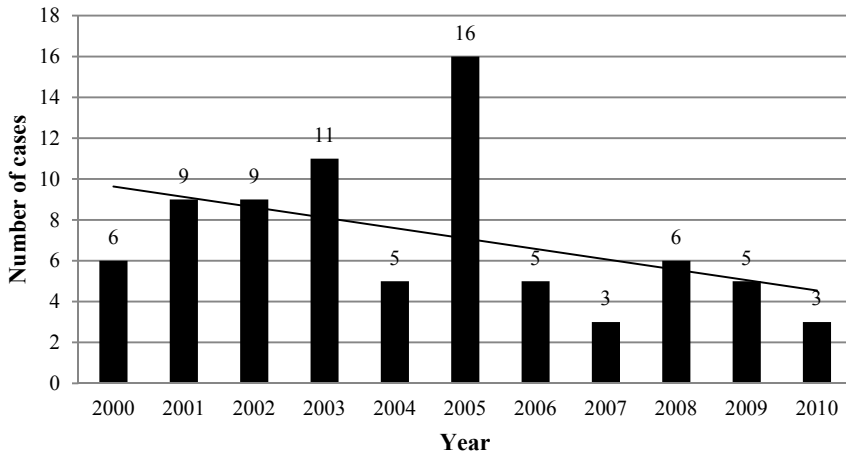
²² Separately coded material on the gender and age of litigants is discussed in Pamela Stewart and Anita Stuhmcke, 'Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond' (2014) 38 *Melbourne University Law Review* 151.

III The Number of Negligence Cases before the High Court: 1 January 2000–31 December 2010

A *Statistics: High Court Negligence Cases Reported 2000–10*

Graph 1 shows a total of 78 negligence cases decided by the High Court during the 11-year period: an average of just over seven per year.

Graph 1: Number of High Court negligence cases (by year), 2000–10



The data evidences a general, though not radical, decline in the numbers of negligence cases before the High Court in the period from 1 January 2000 until 31 December 2010. The numbers of negligence cases before the High Court in 2006 and the years following have reduced compared with the numbers in the years from 2000 until the end of 2005 when there were 56 cases in a six-year period. There were 22 cases in the five-year period from 2006 until the end of 2010.

B *Discussion: The Declining Number of Negligence Cases in the 21st Century and Special Leave to Appeal to the High Court*

A significant impact on the number and types of cases before the High Court is the requirement for special leave to appeal. The requirement for litigants to apply for special leave to appeal provides the High Court with full discretionary jurisdiction to refuse or grant such applications. The Court itself selects the cases it hears having regard to the criteria set out in s 35A of the *Judiciary Act 1903* (Cth). The criteria include: whether the case involves a question of law that is of public importance because of its general application or otherwise; whether there is a need to resolve differences of opinion between courts or within a single court; or whether the interests of the administration of justice require consideration of a matter by the High Court.

Importantly, this study has not attempted a comparison between special leave cases refused and actual cases heard in negligence before the High Court. Doubtless, such further research would be instructive. It would have widespread implications across High Court decisions generally. For example, Luntz examined the special leave criteria applied by the High Court in 18 tort law cases in 2003. He summarised the result as follows:

one sees few of the criteria for the grant of special leave to have been satisfied. Instead, one comes away with the impression that a court dominated by justices from New South Wales is concerned to put decisions of the New South Wales Court of Appeal right, often on points of interest to that jurisdiction only.²³

This area thus offers fertile ground for future analysis. This is especially so given the lack of uniformity of legislative tort law reforms in all Australian states and territories.²⁴ Importantly, Justice Kirby (as he then was) has observed that the High Court may be less likely to grant leave where a case concerns interpretation of a particular statutory provision applicable in only one state or territory.²⁵ That said, leave has now been granted to a small number of cases concerning interpretation of individual state tort law reform statutes.²⁶ It is also notable that many statutory provisions are quite similar across states and territories.²⁷ Of course, the anticipated gradual appearance of cases governed by the various tort law reform statutes was not especially evident by the close of the period studied — even allowing for the hurdle of the special leave requirement. The three special leave cases comprise only 2% of the dataset. In light of the quoted observation from Luntz above, it is interesting to note that each of these cases again originated from New South Wales (NSW).

²³ Harold Luntz, 'Round-up of Cases in the High Court of Australia in 2003' (2004) 12 *Torts Law Journal* 1, 10.

²⁴ *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act* (NT).

²⁵ Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30 *University of New South Wales Law Journal* 731, 743.

²⁶ The cases granted leave to date are *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 ('*Adeels Palace*'); *Wicks v State Rail Authority of NSW* (2010) 241 CLR 60 ('*Wicks*'); *Insight Vacations* (2011) 243 CLR 149; *Strong* (2012) 246 CLR 182; *Hunt & Hunt Lawyers* (2013) 247 CLR 613; *Wallace* (2013) 250 CLR 375. The decisions after the 31 December 2010 cut-off date that do not form part of the data analysis are: *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, which concerned the waiver provision in s 5N of *Civil Liability Act 2002* (NSW); *Strong* (2012) 246 CLR 182, in which the High Court considered the causation provisions of the same NSW tort reform legislation; *Hunt & Hunt Lawyers* (2013) 247 CLR 613, which concerned the proportionate liability provisions of that legislation; *Wallace* (2013) 250 CLR 375, which concerned a medical 'failure to warn' case.

²⁷ Provisions providing a statutory definition of negligence are in some cases identical: *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 1936* (SA) s 32; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B; *Civil Law (Wrongs) Act 2002* (ACT) s 43.

C *Discussion: Declining Numbers of Negligence Cases and the Tort Law Reform Legislation*

Only three negligence cases (just over 2% of the dataset) are governed by substantive tort reform legislation. These are *Adeels Palace Pty Ltd v Moubarak*,²⁸ *Wicks v State Rail Authority of NSW*²⁹ and *Sydney Water Corporation v Turano*.³⁰

This extremely small number of cases in the dataset leads to the conclusion that the gradual trending decline in High Court negligence cases is not directly attributable to the tort reform legislation. Of course, the legislation was intended to have a profoundly restrictive, or even stultifying, effect on the development of major aspects of the common law of negligence.³¹ The parliamentary aim to make it more difficult for plaintiffs to recover arose particularly because of a perceived insurance crisis making public liability insurance difficult to obtain or prohibitively expensive.³² The reforms were said to restore personal responsibility to accident victims.³³ The result is non-uniform legislation across Australia, which, broadly speaking:

- (a) limits the availability of negligence claims in many instances by providing defences unknown to the common law, by modifying common law defences and by providing immunity for some defendants;
- (b) raises the ‘bar’ for plaintiffs to establish the elements of the tort of negligence by altering common law rules relating to risk, negligence and causation; and
- (c) reduces the cost of injury claims by limiting the damages recoverable.

Planned data analysis on High Court negligence cases in 2011–2020 will determine what impact the legislation has had. For now, it can be said that from the 1990s onwards, work of torts scholars, both evidentiary and discursive,³⁴ has

²⁸ *Adeels Palace* (2009) 239 CLR 420. The claim was governed by the *Civil Liability Act 2002* (NSW).

²⁹ *Wicks* (2010) 241 CLR 60. The claim was governed by the *Civil Liability Act 2002* (NSW).

³⁰ *Sydney Water Corporation v Turano* (2009) 239 CLR 51 (*‘Turano’*). Here the claim was subject to the *Civil Liability Act 2002* (NSW), but the case was decided on the duty of care question, rather than any provision of the legislation. The High Court referred to s 43A of the Act, but made the point that it was not relied on.

³¹ The reform legislation has in some instances gone much further in terms of reducing negligence claims and capping damages than the Ipp Report recommended. See, eg, *Civil Liability Act 2002* (NSW) pt 5 (liability of public authorities), pt 3 (mental harm), s 50 (intoxication); pts 2, 2A (damages).

³² New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2002, 2085 (Bob Carr, Premier).

It could be argued that this was even more pronounced in NSW than elsewhere, for example, South Australia.

³³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764 (Bob Carr, Premier).

³⁴ Kylie Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective’ (2007) 15 *Torts Law Journal* 195; 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; David Partlett, ‘Of Law Reform Lions and the Limits of Tort Reform’ (2005) 27(3) *Sydney Law Review* 417; Spigelman, ‘Tort Law Reform: An Overview’ above n 3; Prue Vines, ‘Fault, Responsibility and Negligence in the High Court of Australia’ (2000) 8 *Tort Law Review* 130; Andrew Field, ‘“There Must be a Better Way”: Personal Injuries Compensation since the “Crisis in Insurance”’ (2008) 13(1) *Deakin Law Review* 67; Peter

observed the shift in the Australian common law of negligence towards individuals being responsible for themselves. This shift is evidenced by this study, supporting the view that the tort law reform legislation was unnecessary.

D Discussion: The 2005 'Spike'

The 2005 'spike' in the number of common law negligence cases before the High Court is intriguing, though not readily explicable. The spike cannot be attributed to the rush of cases that commenced in the lower courts in anticipation of tort reform legislation in 2002–03.³⁵ This is because all of the 2005 High Court decisions were cases in which the first instance trial decisions had been between 2001 and 2003. None of the 2005 cases was a case to which any tort reform legislation applied. The proceedings had been commenced in one instance as early as 1993.³⁶ Eleven cases commenced between 1998 and 2001.³⁷ Only four cases commenced as late as 2002, but before the Ipp Review reports³⁸ and before the tort reform legislation.

The first tort law reforms commenced in NSW and Queensland toward the end of 2002, with the bulk of the reforms in other states and territories commencing in 2003, and some as late as 2004. The NSW reforms comprised two tranches: the first relating to assessment of damages that commenced on 20 March 2002 (retrospectively),³⁹ and the second relating to substantive negligence law reform under the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), which generally commenced on 6 December 2002.⁴⁰ In Queensland, provisions of the *Civil Liability Act 2003* (Qld) commenced variously on 2 December 2002, 9 April 2003 and 10 April 2005.⁴¹ In South Australia, the

Cashman, 'How Australia's Tort Reform is Playing Out in the System: The Good, the Bad and the Ugly' (2005) 28(1) *Australian and New Zealand Institute of Insurance and Finance Journal* 23.

³⁵ E W Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (2006) 14 *Torts Law Journal* 233.

³⁶ *Vairy v Wyong Shire Council* [2002] NSWSC 881 (20 December 2002) was suit/file no. 13576/93.

³⁷ The case commencement years are taken from the first instance suit or case numbers, or references to filing dates of statements of claim.

³⁸ Ipp Report, above n 1. The Review's two Reports were released on 2 September 2002 and 2 October 2002.

³⁹ *Civil Liability Act 2002* (NSW) s 2.

⁴⁰ Excepting the provisions concerning waivers for recreational activities and structured settlements, which commenced on 10 January 2003, and the provisions relating to proportionate liability, which commenced on 1 December 2004. The provisions relating to recovery by 'criminals', self-defence and nervous shock claims commenced retrospectively on 3 September 2002 (the date the Bill was publicly released). Most of the substantive provisions of this Act applied retrospectively to civil liability arising before the date of commencement unless court proceedings had already been commenced prior to that date, see: *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) s 2 and New South Wales, *Government Gazette of the State of New South Wales: Special Supplement*, No 249, 6 December 2002, 10529. Subsequent amendments such as the *Civil Liability Legislation Amendment Act 2008* (NSW) may also operate with respect to liability that had arisen earlier where there had been no final determination of legal proceedings before the introduction of that amendment: see *Civil Liability Act 2002* (NSW), sch 1, pt 11, cls 34, 36. For comment on the issue of retrospectivity of the legislation see, David Gwynn Morgan, 'The Retrospective Dimension of the 2002–03 Australian Personal Injuries Reforms' (2008) 29(1) *Statute Law Review* 53.

⁴¹ *Civil Liability Act 2003* (Qld) s 2.

amendments to the *Civil Liability Act 1936* (SA) commenced on 1 May 2004.⁴² In Tasmania, the *Civil Liability Act 2002* (Tas) commenced on 1 January 2003.⁴³ In Victoria, the relevant amendments to the *Wrongs Act 1958* (Vic) commenced on 3 December 2003.⁴⁴ In Western Australia (WA), the *Civil Liability Act 2002* (WA) commenced on 1 January 2003.⁴⁵ The *Civil Law (Wrongs) Act 2002* (ACT) in the Australian Capital Territory (ACT) commenced on 31 October 2002⁴⁶ and the *Personal Injuries (Liabilities and Damages) Act* (NT) in the Northern Territory commenced on 1 May 2003.⁴⁷

These dates are significant. In NSW, for example, the coming of the *Civil Liability Act 2002* (NSW) was announced well before the legislation was enacted⁴⁸ and solicitors were careful to commence common law proceedings before the legislation commenced, so that their clients would not be disadvantaged. Indeed, the District Court of NSW made special arrangements to ‘cope with the thousands of extra filings that resulted from the restrictions to common law damages’⁴⁹ introduced by the first raft of NSW legislative reforms.⁵⁰ The District Court developed a new Practice Note to enable cases to be commenced before the legislation took effect, but to be placed in a ‘not ready list’ where they were not able to conform to the case management practices then in place.⁵¹ The Law Society of NSW made announcements to solicitors concerning these matters.⁵² So there was in NSW, a very significant ‘spike’ of common law proceedings commenced in late 2001 and early 2002.⁵³ In other Australian jurisdictions there were similar trends⁵⁴ followed by a national decline of about 60% in claiming rates in 2004 and 2005, after the introduction of tort law reforms.⁵⁵

Relevantly, cases can take many years to be heard from their initial filing to an ultimate High Court appeal. Cases in the dataset evidence civil justice delay.

⁴² Governor (SA), ‘*Law Reform (Ipp Recommendations) Act* (Commencement) Proclamation 2004’ in South Australia, *South Australian Government Gazette*, No 36, 29 April 2004, 1113, 1172.

⁴³ *Civil Liability Act 2002* (Tas) s 2.

⁴⁴ *Wrongs Act 1958* (Vic) s 1; Governor (Vic), ‘*Wrongs and Other Acts (Law of Negligence) Act 2003* — Proclamation of Commencement’ in Victoria, *Victoria Government Gazette*, No G 51, 18 December 2003, 3185, 3208.

⁴⁵ *Civil Liability Act 2002* (WA) s 2; Governor (WA), ‘*Civil Liability Act 2002* — Proclamation’ in Western Australia, *Western Australian Government Gazette*, No 221, 17 Dec 2002, 5903, 5905.

⁴⁶ *Civil Law (Wrongs) Act 2002* (ACT) s 2(2); *Civil Law (Wrongs) Commencement 2002* (No 1) (Commencement Notice CN2002-13).

⁴⁷ *Personal Injuries (Liabilities and Damages) Act* (NT) s 2; Administrator of the NT, ‘*Personal Injuries (Liabilities and Damages) Act 2003* — Notice of Commencement’ in Northern Territory, *Northern Territory of Australia Government Gazette*, No G17, 30 April 2003, 1, 3.

⁴⁸ The Premier, Mr Bob Carr, announced on 7 September 2001 that the reforms were under way and that the yet-to-be-introduced Bill would apply to proceedings commenced after 20 March 2002: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2002, 2085 (Bob Carr, Premier).

⁴⁹ Law Society of NSW, *Caveat*, vol 227, March 2002.

⁵⁰ *Civil Liability Act 2002* (NSW), assented to 18 June 2002, commenced (retrospectively) on 20 March 2002. For commentary, see Morgan, above n 40.

⁵¹ District Court of New South Wales, *Practice Note No 61 — Medical Negligence Cases and Workplace Accident Cases*, 1 March 2002.

⁵² Law Society of NSW, above n 49.

⁵³ Wright, above, n 35, 15.

⁵⁴ *Ibid* 13.

⁵⁵ *Ibid*.

For example, in *Roads and Traffic Authority v Dederer*,⁵⁶ Mr Dederer was aged 14 years when he dived from a bridge, hitting the bottom of the river channel and was rendered a partial paraplegic. The case was resolved in the High Court in August 2007,⁵⁷ some nine years later when Mr Dederer was almost 24 years old. Such a decade-long time lag between initial accident and High Court determination is not unusual. This indicates that any appeals arising from the spike in negligence cases filed in Australian jurisdictions in late 2001 and early 2002 would only begin to emerge towards the end of the period under study. This is a reflection of just how slowly the wheels of justice turn and raises the possibility of fertile future research using the methodology adopted in this study.

Taking the notion of the slow wheels of justice further, it is interesting to note that the composition of the High Court changed in 1995 and 1996, following the retirement of Chief Justice Mason and Justice Deane. So, when the ‘new’ Court was required to consider whether a duty of care was owed in a novel fact situation (such as in the decision of *Hill v Van Erp*),⁵⁸ there was less enthusiasm for the concept of proximity that had been advocated by Justice Deane since the 1984 decision of *Jaensch v Coffey*.⁵⁹ Given the state of flux surrounding the duty question, it may be possible that a larger number of cases were filed around this time period — culminating in a spike in 2005. Most importantly, the spike in cases may indicate the willingness of the High Court to resolve the duty issue after rejecting the influence of proximity, through deliberately granting leave to appeal to more cases than usual in order to avoid uncertainty in the law of negligence. Indeed, the categories of duty of care in the 2005 cases were quite varied: recreational activity (4 cases); employment accident (4 cases); car accident (2 cases); occupier’s liability — other than recreational (2 cases); prison authority and prisoner (1 case); school and pupil (1 case); pure economic loss (1 case); advocate’s liability (1 case). Of course, this explanation is highly speculative and many of the 2005 cases concerned issues of breach of duty, unaffected by proximity reasoning.

IV Plaintiff/Defendant Success Rates

A *Statistics: Plaintiff Success Rates 2000–10*

Over the 11-year period studied, the plaintiff — that is, the party who suffered loss or damage — was successful in 25 High Court negligence cases (32.05%) and the defendant was successful in 53 such cases (67.95%). Success or failure was coded in the dataset 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

⁵⁶ *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 (‘RTA v Dederer’).

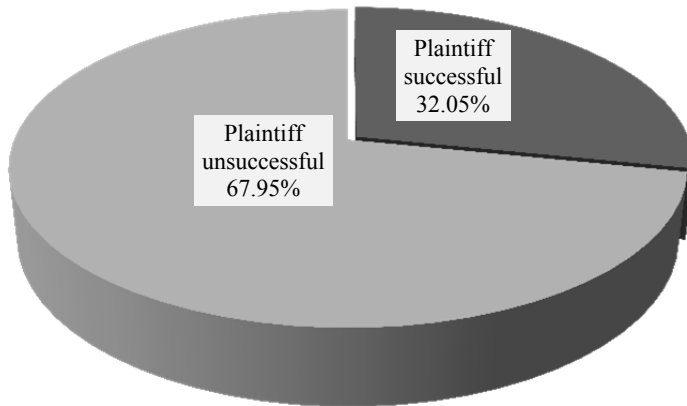
⁵⁷ For a full discussion of this decision, see Pam Stewart and Geoff Monahan, ‘*Roads and Traffic Authority of New South Wales v Dederer*: Negligence and the Exuberance of Youth’ (2008) 32(2) *Melbourne University Law Review* 739.

⁵⁸ *Hill v Van Erp* (1997) 188 CLR 159.

⁵⁹ *Jaensch v Coffey* (1984) 155 CLR 549.

defendant party to the original proceedings (whether appellant or respondent in the High Court).

Graph 2: Plaintiff success rates.



B *Discussion: Low Levels of Plaintiff Success*

The above figures evidence a striking lack of plaintiff success in High Court negligence actions. This finding supports the perception that the 21st century High Court of Australia is retreating from the somewhat expansive approach to negligence liability adopted by earlier High Courts.⁶⁰ The expansive approach to the application of the law of negligence is particularly exemplified by the ‘proximity’ years of the Sir Anthony Mason High Court (1987–95) including decisions such as *Nagle v Rottnest Island Authority*⁶¹ and *Bryan v Maloney*,⁶² and later by decisions such as *Pyrenees Shire Council v Day*⁶³ in the Sir Gerard Brennan High Court (1995–98).⁶⁴

The shift in outcomes in High Court appeals as early as 2000 was described by Luntz as a ‘remarkable turnaround’.⁶⁵ Luntz provided statistics for High Court torts cases (broadly defined) from 1987 (the year of the appointment of Sir Anthony Mason as Chief Justice) until the end of 1999. In this period,

⁶⁰ The Hon JJ Spigelman AC, ‘Negligence: The Last Outpost of the Welfare State’ (2002) 76 *Australian Law Journal* 432; Loane Skene and Harold Luntz, ‘Effects of Tort Law Reform on Medical Liability’ (2005) 79 *Australian Law Journal* 345, 363. See also above n 3.

⁶¹ *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

⁶² *Bryan v Maloney* (1995) 182 CLR 609.

⁶³ *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

⁶⁴ Sir Anthony Mason’s appointment as Chief Justice commenced on 6 February 1987. He was succeeded by Sir Gerard Brennan on 21 April 1995, who was Chief Justice until 22 May 1998.

⁶⁵ Harold Luntz, ‘Torts Turnaround Downunder’ (2001) 1 *Oxford University Commonwealth Law Journal* 95, 96.

Luntz identified 56 appeals by plaintiffs with a 71% success rate (as opposed to 34 appeals by defendants with a 44% success rate). Luntz observed that this high pro-plaintiff decision rate abruptly reversed in 2000, when three out of four plaintiffs' appeals in that year were dismissed and all three defendant's appeals were successful.⁶⁶

Writing in 2007, Luntz noted that:

a surprisingly large number of negligence cases have proceeded all the way to the HCA in 2000–07. Seventy-nine decisions during this period have involved personal injuries. In 44 of them, the Court has decided the legal issue in favour of the defendant; in 29 the relevant issue was decided in favour of the plaintiff; the remaining six might be seen as neutral.⁶⁷

Luntz concluded that this 'outcome merely emphasises the lottery nature of the negligence action'.⁶⁸

In 2002, the Honourable JJ Spigelman AC, then Chief Justice of NSW, observed a prior trend of judicial expansion of the circumstances in which negligence would be found had ceased and that there was a growing body of (then recent) High Court decisions in favour of defendants.⁶⁹ He noted further that there was 'real doubt as to whether the parliaments have enough patience to allow this development to work itself out'.⁷⁰ Indeed, that comment proved to be prescient when the *Civil Liability Act 2002* (NSW) was enacted by the NSW Parliament later that year.

The above figures for 2000–10 plaintiff and defendant success rates in negligence cases in the High Court of Australia, demonstrate that the common law of negligence was, at that time, making an apparent correction: a shift away from any pro-plaintiff stance and toward imposing personal responsibility on plaintiffs quite independently of the Ipp Review or of any tort reform legislation.

In 2005, Kirby J noted in *Neindorf v Junkovic*:

Changing attitudes in this court to the content of the common law of negligence have resulted in a discernible shift in the outcomes of negligence cases. According to Professors Skene and Luntz, 'the common law as emanating from the High Court of Australia, was already moving to a much more restrictive attitude towards the tort of negligence'. Now the shift has been accelerated by statute.⁷¹

⁶⁶ Ibid 97–8.

⁶⁷ Harold Luntz, 'A View from Abroad' [2007] *University of Melbourne Law School Research Series* 2, 99. Luntz's total figures differ from those in this study because the cases he included were 'personal injury cases' and included cases where the cause of action was in the tort of negligence, but where the High Court judgment was solely concerned with matters such as a statute of limitations or choice of law issues or construction of legislation (other than tort reform legislation) or the effect of workers compensation legislation on a common law claim or liability under trade practices legislation.

⁶⁸ Ibid.

⁶⁹ Spigelman, 'Negligence: The Last Outpost of the Welfare State', above n 60, 433.

⁷⁰ Ibid 434.

⁷¹ *Neindorf v Junkovic* (2005) 222 ALR 631, 636 [19] (citations omitted).

If the High Court's retreat from its late 20th century expansive attitude to common law negligence liability has been sustained, a continued decline in the number of cases where plaintiffs were ultimately successful would be expected to the end of the first decade of the 21st century and beyond. The statistics revealed by this research certainly depict such a position.

V Main Substantive Legal Issues

A *Statistics: Main Substantive Legal Issues*

Table 1 shows a breakdown of the main substantive legal issues decided by the High Court in negligence cases during the period of the research.

Table 1: Main substantive legal issues decided, High Court negligence cases 2000–10⁷²

Issue	Number of cases	Percentage of total negligence cases
Breach of duty	22	29%
Duty of care	20	26%
Evidence/appellate procedure	10	13%
Causation	8	11%
Non-delegable duty or vicarious liability	6	8%
Damages	5	7%
Apportionment or contribution	3	4%
Contributory negligence	2	3%

A broad categorisation of the main bases for decision was adopted having regard to:

- the elements of the cause of action in negligence (duty of care, breach, causation and damage);
- the commonly encountered issues of vicarious liability, contributory negligence, apportionment of liability and contribution between parties;
- matters of procedure (particularly appellate power and procedure) and evidence.

Perhaps unsurprisingly, the eight broad categories accounted for all the cases studied, underlining the major challenges commonly presented by the law of negligence. The purpose of using these categories was to isolate the chief concerns of the common law of negligence during the period of the research and to discern whether there might be any correlation between those concerns and the areas of tort law that were subject to reform.

⁷² The percentages shown total 101% owing to rounding to whole numbers.

As noted above, three cases were subject to tort reform legislation: *Turano*,⁷³ *Adeels Palace*⁷⁴ and *Wicks*.⁷⁵— all governed by the *Civil Liability Act 2002* (NSW). The *Turano* case was decided on common law duty of care principles, while *Adeels Palace* was ultimately a decision on the causation provisions of the NSW legislation, and the *Wicks* decisions went to the interpretation of the mental harm duty of care provisions of the same legislation. *Turano* is included in the figures for cases decided on the duty of care question. However, *Adeels Palace* and *Wicks* are omitted from the figures on substantive legal issues due to the focus of this article on the common law.

B Discussion: Main Substantive Legal Issues

As any tort lawyer might anticipate, the questions that most often occupied the High Court were when a duty of care might arise (in 26% of cases, the main issue was duty) and in what circumstances it might be breached (in 29% of cases, the main issue was breach), followed closely by difficult causation issues (11% of cases).

The number of High Court appeals where duty was the decisive issue (26%) provides confirmation that duty of care in novel or difficult cases remains a multifaceted and complex question. It is the duty of care that controls the scope of the tort, so if a change in ideology is underway, it is likely to be seen in the development of duty of care principles. It is, of course, notable that nowhere in Australia has tort law reform sought to intrude on the general common law rules concerning when a duty of care will arise — except in some specific and discrete categories of the duty of care (especially mental harm cases⁷⁶ or cases against public authority defendants⁷⁷), or where it was thought specific types of defendants were deserving of protection.⁷⁸

The number of decisions where breach of duty was the decisive issue (29%) underlines the ongoing concern of the common law with the legal and factual assessment of breach of duty in negligence claims. That such cases outnumbered all others, is a telling statistic: one that may be interpreted as leading to a conclusion that some reform or at least, clarification of the law on breach of duty might be desirable. Conversely, it is possible to conclude that because the issue of breach of a duty of care is so fundamental to liability in negligence and because it is a matter of the application of a standard of reasonableness, there will inevitably be a majority of cases before the courts on that very question. This would be true of trial courts

⁷³ *Turano* (2009) 239 CLR 51.

⁷⁴ *Adeels Palace* (2009) 239 CLR 420.

⁷⁵ *Wicks* (2010) 241 CLR 60.

⁷⁶ *Civil Liability Act 2002* (NSW) pt 3; *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) pt 8; *Wrongs Act 1958* (Vic) pt XI; *Civil Liability Act 2002* (WA) s 5S; *Civil Law (Wrongs) Act 2002* (ACT) pt 3.2.

⁷⁷ *Civil Liability Act 2002* (NSW) pt 5; *Civil Liability Act 2003* (Qld), pt 3; *Civil Liability Act 1936* (SA) s 42 (road authorities only); *Civil Liability Act 2002* (Tas) pt 9; *Wrongs Act 1958* (Vic) pt XII; *Civil Liability Act 2002* (WA) pt 1C; *Civil Law (Wrongs) Act 2002* (ACT) ch 8.

⁷⁸ These include professionals' duties to warn; duties in respect of obvious or inherent risks, or recreational activities; and duties owed by road authorities, Good Samaritans, food donors, volunteers, or not-for-profit organisations. For commentary, see Joachim Dietrich, 'Duty of Care under the "Civil Liability Acts"' (2005) 13 *Torts Law Journal* 17.

certainly. Yet, the High Court is not concerned with reviewing ‘factual matters on which reasonable minds might differ’.⁷⁹ Rather, it is concerned with ‘the misapplication of basic and settled matters of legal principle’,⁸⁰ which on the breach of duty question at common law is the legal principle set forth by Mason J in *Wyong Shire Council v Shirt*.⁸¹ So the number of cases decided in the High Court on the breach issue may well tell of the misapplication of legal principles by lower courts. This misapplication of the ‘*Shirt* calculus’ of negligence by trial and appellate courts is a matter that has been highlighted by the High Court itself on various occasions⁸² and by commentators.⁸³ Yet, there are cases such as *Swain v Waverley Municipal Council* where the High Court was concerned not with any misapplication of *Shirt* principles, but with the Court of Appeal’s interference with a jury’s finding of fact on the breach question.⁸⁴ Nevertheless the misapplication of the ‘*Shirt* calculus’ was a matter recognised by the Ipp Panel and influential in its recommendation for reform by way of a statutory provision setting out the principles to be applied in a determination of negligence.⁸⁵ Following the Ipp Panel recommendations, all Australian states and territories have enacted very similar, though not identical, statutory tests for breach of the duty of care, which modify and restrict the common law *Shirt* test for breach.⁸⁶

Causation is the third most common element of the tort of negligence identified as the substantive legal issue before the High Court (11%), though it emerges in fewer than half as many cases as duty of care or breach during the period studied. Yet the the Ipp Panel had identified the common law of causation as being in need of reform. The Panel referred to ‘several issues that ... are currently the cause of considerable controversy’,⁸⁷ referring to the English cases on the problem of ‘evidentiary gaps’ and material contribution,⁸⁸ though the Panel did not identify High Court doctrine that gave particular cause for concern. In addition, the Panel stated:

It is the Panel’s considered opinion that at least some of the confusion and uncertainty in this area of the law is a result of failure to distinguish clearly between the factual question, of whether the negligence was a necessary

⁷⁹ *RTA v Dederer* (2007) 234 CLR 330, 337 [18] (Gummow J).

⁸⁰ *Ibid.*

⁸¹ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8.

⁸² *Swain v Waverley Municipal Council* (2005) 220 CLR 517, 577 [191] (Kirby J) (‘*Swain*’); *New South Wales v Fahy* (2007) 232 CLR 486, 524–5 [122]–[123] (Kirby J); *Tame v New South Wales* (2002) 211 CLR 317, 351–7 [96]–[108] (McHugh J) (‘*Tame*’); *RTA v Dederer* (2007) 234 CLR 330, 337 [18] (Gummow J).

⁸³ Christian Witting, ‘The Hand and *Shirt* Tests of Breach and the Civil Liability Acts’ (2009) 17 *Torts Law Journal* 242.

⁸⁴ *Swain* (2005) 220 CLR 517, 525–6 [19]–[20] (Gleeson CJ); 560–61 [129]–[132] (Gummow J); 567 [160] (Kirby J).

⁸⁵ Ipp Report, above n 1, 102–7 [7.5]–[7.19], Recommendation 28. The recommendation includes modification and restriction of the common law *Shirt* test in order to restrict negligence liability to ‘not insignificant’ risks.

⁸⁶ *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 1936* (SA) s 32; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B; *Civil Law (Wrongs) Act 2002* (ACT) s 43.

⁸⁷ Ipp Report, above n 1, 109 [7.27].

⁸⁸ *Ibid* 109–11 [7.28]–[7.33].

condition of the harm, and the normative question about which consequences of the negligence the defendant should be held liable for.⁸⁹

Accordingly, the Panel recommended the enactment of a provision that would ‘suggest to courts a suitable framework in which to resolve individual cases’.⁹⁰ This framework comprised the division of the causation enquiry into its two elements: factual causation (the common law ‘but for’ test) and scope of liability (the normative question). The Panel also recommended statutory provisions concerning onus of proof (restating the common law), material contribution and plaintiffs’ evidence on what they would have done if the defendant had not been negligent.⁹¹ These recommendations were taken up by all Australian legislatures (other than the Northern Territory),⁹² though the response has not been uniform.

There are relatively few decisions in the dataset where causation is the main substantive issue. Interestingly, of the six cases before the High Court to date (including cases outside the research period) that have considered the tort law reform legislation, half deal with causation. The causation cases are: *Adeels Palace*⁹³; *Strong*⁹⁴ and *Wallace v Kam*.⁹⁵ The other three cases interpret specific aspects of the legislation that do not centre on the establishment of the tort of negligence: *Wicks*,⁹⁶ *Insight Vacations Pty Ltd v Young*,⁹⁷ and *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*.⁹⁸

VI Categories of Duty of Care

A *Statistics: Categories of Duty*

Table 2 below details the general categories of duty of care into which the negligence cases during the period of study fell.

⁸⁹ Ibid 115 [7.42].

⁹⁰ Ibid 117–19 [7.48], Recommendation 29.

⁹¹ Ibid 117–19 Recommendation 29.

⁹² *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C; *Civil Law (Wrongs) Act 2002* (ACT) s 45.

⁹³ *Adeels Palace* (2009) 239 CLR 420.

⁹⁴ *Strong* (2012) 246 CLR 182.

⁹⁵ *Wallace* (2013) 250 CLR 375.

⁹⁶ *Wicks* (2010) 241 CLR 60.

⁹⁷ *Insight Vacations* (2011) 243 CLR 149.

⁹⁸ *Hunt & Hunt Lawyers* (2013) 247 CLR 613.

Table 2: Categories of duty of care, High Court negligence cases 2000–10

Category	Number of cases
Motor vehicle accident ('MVA')	17
Employment	13
Occupiers	9
Recreational activity (other than occupier)	9
Public authority (including road authority)	8
Pure economic loss	5
Pure mental harm (not MVA or employment)	5
Medical/health	5
School/prison authorities	4
Manufacturer/repairer/producer	2
Non-medical (professional service & advice)	1

B *Discussion: Categories of Duty of Care*

Motor vehicle accident and workplace accident cases were the most numerous, representing 22% and 17% respectively of the total number of cases in the study. These figures are unsurprising given the road and workplace accident statistics in Australia,⁹⁹ together with existence of compulsory universal insurance coverage in respect of tortious injury suffered on the roads or in the workplace.

There is a relatively high number of cases where a duty of care was sought to be imposed on a public authority (including schools and prison authorities). These cases accounted for 15% of all cases. Again, given the often self-insured and 'deep-pocket' status of these defendants, such a statistic could have been anticipated. In Part VIII below, the figures for plaintiff success rates against public authority defendants are examined with particular reference to protections apparently offered by the common law to public authority defendants, and with consideration of the tort law reforms in this area.

⁹⁹ In 2009, approximately 53 people per 1000 workers experienced a work related injury or illness: Australian Bureau of Statistics, *Work Related Injuries Australia, 2009–10*, cat. no. 6324.0 (13 December 2010). During 2008–09 there were 53,406 persons seriously injured and hospitalised due to land transport injury in Australia (9.8% of all hospitalisations due to injury): Australian Institute of Health and Welfare, *Serious Injury due to Land Transport Accidents, Australia 2008–09*, Injury Research and Statistics Series No 67, cat. no. INJCAT 143 (2012) <<http://www.aihw.gov.au/publication-detail/?id=10737421997>>.

VII Recreational Activities

A *Statistics: Recreational Activity Cases*

Ten per cent of cases were coded as recreational activity cases. There were 12 cases during the research period where the plaintiff was injured while engaging in a recreational activity.

In these 12 cases, only one plaintiff was successful (in *Swain*).¹⁰⁰ In that case, the plaintiff's appeal was allowed on the basis that the NSW Court of Appeal had erred in reviewing a jury's factual findings on the question of breach of duty of care.¹⁰¹ This decision is arguably in a special category of case because the High Court was primarily concerned with the circumstances in which a jury verdict should be reviewed by an appellate court.

Of the cases identified as 'recreational activity' cases, there were five decisions (including *Swain*)¹⁰² in which the obvious risk of injury associated with the plaintiff's recreational activity was a fact that was influential in the Court's reasoning.¹⁰³ In four of the cases that fact was central to the ratio decidendi.¹⁰⁴ In each of those cases, the plaintiff was unsuccessful.

B *Discussion: Recreational Activity Cases and the Common Law*

The number of recreational activity cases in this study (10%) is a pattern that will be of ongoing interest in light of the tort law reforms that impose 'personal responsibility'¹⁰⁵ on those injured while engaging in recreational activities, and the provision of new defences¹⁰⁶ unknown to the common law.

In addition to the nine cases identified in Table 2 above in the recreational activity category, three more cases are included for the analysis in this Part. These three cases were categorised elsewhere for duty of care purposes, but had a

¹⁰⁰ *Swain* (2005) 220 CLR 517.

¹⁰¹ *Ibid* 525 [19] (Gleeson CJ); 567 [156] (Gummow J); 647–8 [234] (Kirby J).

¹⁰² *Ibid*.

¹⁰³ *RTA v Dederer* (2007) 234 CLR 330; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Swain* (2005) 220 CLR 517 — though in *Swain* the ratio decidendi related to the powers and functions of the appellate court, rather than to the obviousness of risk issue, which was discussed in obiter dicta.

¹⁰⁴ *RTA v Dederer* (2007) 234 CLR 330; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

¹⁰⁵ The Ipp Panel saw 'its task as being to recommend changes that impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves': Ipp Report, above n 1, 29 [1.24]. See also Ipp Report, above n 1, 63–4 [4.13]–[4.17], 64–8 Recommendations 11–14; New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764 (Bob Carr, Premier).

¹⁰⁶ *Civil Liability Act 2002* (NSW), pt 1A Div. 5; *Civil Liability Act 2003* (Qld) ch 2, divs 3–4; *Civil Liability Act 2002* (Tas) pt 6, divs 4–5; *Wrongs Act 1958* (Vic) pt X, div 4; *Civil Liability Act 2002* (WA) pt 1A, div 6; *Civil Liability Act 1936* (SA) pt 6, div 3.

recreational activity dimension. Of the total of 12, only one case, *Adeels Palace*,¹⁰⁷ concerned the tort law reform legislation.

Adeels Palace is included in this set of data as a recreational activity case due to qualitative coding decisions. For this Part, in order to characterise a case as involving a recreational activity, the broad definition in the *Civil Liability Act 2002* (NSW) s 5K was used, which defines a recreational activity as including:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

The application of the *Civil Liability Act 2002* (NSW) definition is useful as there were cases where it was difficult to characterise the plaintiff's activity as 'recreational' or otherwise. Cases were not included as recreational activity cases where the plaintiff was injured on the roadway while riding a bicycle¹⁰⁸ or where the plaintiff was a pedestrian on a public footpath.¹⁰⁹ These pursuits were not necessarily activities engaged in for enjoyment, relaxation or leisure, but rather as a means of transportation. However, *Adeels Palace* — where the plaintiffs were shot while dancing and dining in a restaurant on New Year's Eve¹¹⁰ — was included, in Table 2 (above) as an occupiers' liability case (as that was the basis on which the duty of care was imposed). Also included is the case where a child was injured in a school playground while playing on a flying fox,¹¹¹ though in Table 2 that case is categorised as a school authority case. The case where a plaintiff was injured in a road collision while riding her horse was also included as a recreational activity case,¹¹² though in Table 2 that is classified as a motor accident case.

Notwithstanding the small sample of cases here, it is notable in *all* the cases where plaintiffs were injured by the materialisation of obvious risks associated with recreational activities, the common law responded in favour of defendants, particularly where the defendant's negligence was framed as a failure to warn of such risks.¹¹³ Accordingly, it appears that the common law competently recognises and adapts to subtle societal expectations and values concerning personal responsibility in respect of recreational activities.

¹⁰⁷ *Adeels Palace* (2009) 239 CLR 420.

¹⁰⁸ *Grincelis v House* (2000) 201 CLR 321; *Suvaal v Cessnock City Council* (2003) 200 ALR 1.

¹⁰⁹ *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512.

¹¹⁰ *Adeels Palace* (2009) 239 CLR 420.

¹¹¹ *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161.

¹¹² *Fox v Percy* (2003) 214 CLR 118.

¹¹³ *RTA v Dederer* (2007) 234 CLR 330; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Mulligan v Coff's Harbour City Council* (2005) 223 CLR 486; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

Of course, most of these common law cases have been decided after 2002¹¹⁴ and therefore against the backdrop of the Ipp Report and the tort law reforms (there being only the one case that directly concerned the tort law reform legislation). The tort law reforms therefore existed in the background of the decision-making of the High Court and this may or may not have afforded increased judicial recognition at common law of an apparent shift in community expectations about the personal responsibility of those injured during recreational activities.¹¹⁵ The common law decisions of the High Court concerning recreational activities and obvious risks, after the tort law reforms of 2002/03, may be a reflection of the same societal expectations and concerns that were recognised by the Ipp Panel. After all, the common law is supposed to be influenced by, and to reflect, society's concerns, so that it responds to 'changing social conditions'¹¹⁶ and 'the exigencies of changing times'.¹¹⁷ Notably, however, there is a paucity of evidence as to what really are the social conditions or social concerns referred to in the Ipp Report.¹¹⁸ It is a point of contest and uncertainty as to whether such concerns are really the desires of the insurance industry or viable public policy considerations.

VIII Public Authority Defendants

A *Statistics: Cases with Public Authority Defendants*

As Table 3 below shows, of the 78 negligence cases for the period studied, there were 33 with at least one public authority defendant (there may have been other types of defendants in addition). There were 25 cases with other types of corporate defendants (which may also have had additional natural person defendants) and 20 cases with natural persons only as defendants.

Table 3: Defendants by type, High Court negligence cases 2000–10

Category	Cases with public authority defendants	All defendants
Public authority defendant (may include other types of defendant)	33	n/a
Other corporate defendant (may include natural person defendant)	25	n/a
Natural person only defendant	20	n/a
Total public authority defendants		42
Total corporate defendants		36
Total natural person defendants		37

¹¹⁴ *RTA v Dederer* (2007) 234 CLR 330; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

¹¹⁵ See, eg, *Wyong Shire Council v Vairy* [2004] NSWCA 247 (27 July 2004) [152] (Tobias JA) quoting *University of Wollongong v Mitchell* [2003] NSWCA 94 (30 May 2003) [33] (Giles JA); *Waverley Municipal Council v Swain* [2003] NSWCA 61 (3 April 2003) [114] (Spigelman CJ).

¹¹⁶ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 585 (McHugh J).

¹¹⁷ *Harriton v Stephens* (2006) 226 CLR 52, 99 [151] (Kirby J).

¹¹⁸ Ipp Report, above n 1.

Having regard to the significant reforms of the common law of negligence as it affected public authorities, the research examined all cases during the period studied where there was a statutory or public authority defendant as defined by the tort reform legislation.¹¹⁹ In particular, when identifying a defendant as a public or statutory authority, the definition in the *Civil Liability Act 2002* (NSW) s 41 was used. That definition specifies that each of the following are ‘public or other authorities’:

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*), or
- (b) a Government department, or
- (c) a public health organisation within the meaning of the *Health Services Act 1997*, or
- (d) a local council, or
- (e) any public or local authority constituted by or under an Act, or
- (e1) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person’s public official functions, or
- (f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions), or
- (g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.¹²⁰

While there were 33 cases in which there were public authority defendants, the overall number of public authority defendants is greater, because some cases had multiple defendants. Table 3 also shows that the total number of public authority defendants was 42, as compared to 36 other corporate defendants and 37 natural person defendants.

The plaintiff success rate for *all* cases over the 11-year period studied, as shown in Graph 2 above, was 32.05% and the defendant success rate was 67.95%. The plaintiff success rate in cases with a public authority defendant was 27.27% — not significantly lower than overall success rates, the difference being in the order of 4.5%.

Plaintiffs were successful in only nine of 33 cases (27.27%) with public authority defendants. The success rate for plaintiffs against *all* public authority defendants was also calculated (28.57%), because in some cases there were multiple parties including more than one public authority defendant.

¹¹⁹ *Civil Liability Act 2002* (NSW) s 41. Other jurisdictions’ definitions vary considerably: *Civil Liability Act 2003* (Qld) s 34; *Civil Liability Act 2002* (Tas) s 37; *Wrongs Act 1958* (Vic) s 82; *Civil Liability Act 2002* (WA) s 5V; *Civil Law (Wrongs) Act 2002* (ACT) s 109.

¹²⁰ Note that the *Civil Liability Regulation 2014* (NSW) reg 4 prescribes that a non-government school registered (or exempted from registration) under the *Education Act 1900* (NSW) is prescribed as an authority to which pt 5 of the Act applies.

B *Discussion: Cases with Public Authority Defendants*

As shown in Table 3 above, 33 cases (42.31%) of the total dataset had at least one public authority defendant. This is a significant proportion of cases, no doubt (in part at least) owing to their deep pockets and usually well-insured status, often as self-insurers. This is clearly evidenced again in the fact that when all defendants are taken into account, 36.52% of the total defendants are statutory authorities.

The plaintiff success rate in cases with a public authority defendant (27.27%) and the plaintiff success rate against all public authority defendants (28.57%) evidence poor success rates for plaintiffs. While High Court cases represent a very small proportion of cases involving public authorities these success rates demonstrate, within the parameters of this study, practical protection afforded to public authority defendants at common law, though the success rates for plaintiffs against public authority defendants overall are not significantly different from the general success rates as shown in Graph 2 (32.05%).

The above figures for plaintiff success rates against public authority defendants are inconclusive as to whether plaintiffs are at a disadvantage when dealing with well-resourced and litigation-seasoned opponents. In 1974, Galanter formulated the hypothesis that ‘repeat players’ in court — those parties with greater litigation experience and resources — fare better than parties that have fewer resources and less experience in litigation.¹²¹ This research was supported by studies of United States trial courts that demonstrated that government litigants tended to succeed more often — being statistically more successful than private businesses or other organisations or individuals. Since then, studies of appellate courts have shown less conclusive support for Galanter’s hypothesis — indicating that party strength does not necessarily affect litigant success rates and that other factors such as area of law and the nature of counsel may impact as well.¹²² The Australian High Court has been examined using Galanter’s theory, initially by Smyth¹²³ and more recently by Sheehan and Randazzo.¹²⁴ Both studies have found only limited support for the Galanter hypothesis — determining that while the Australian Federal Government has a distinct advantage over other litigants, individuals (contrary to Galanter’s hypothesis) possess higher net advantages over state and local government and private business.¹²⁵

¹²¹ Marc Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law and Society Review* 95. See also Stanton Wheeler et al, ‘Do the “Haves” Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970’ (1987) 21 *Law and Society Review* 403. Canadian research has supported Galanter’s theory: see Peter McCormick, ‘Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992’ (1993) 26 *Canadian Journal of Political Science* 523. For English research, see Burton M Atkins, ‘Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeal’ (1991) 35 *American Journal of Political Science* 881.

¹²² Donald J Farole Jr, ‘Re-examining Litigant Success in State Supreme Courts’ (1999) 33(4) *Law & Society Review* 1043.

¹²³ Smyth, above n 10.

¹²⁴ Sheehan and Randazzo, above n 9.

¹²⁵ *Ibid* 254.

However, the figures above certainly test any supposition that plaintiffs in the High Court of Australia enjoy significant advantage over well-funded public authority defendants.

C *Discussion: Tort Law Reform Protections and Public Authorities*

The Ipp Panel recommended the enactment of a ‘policy defence’¹²⁶ for public authorities, which would be available except where the authority’s policy decision was manifestly unreasonable by reference to what has become known as ‘*Wednesbury* unreasonableness’.¹²⁷ The Panel recommended that the defence would apply to any ‘public functionary’ defined in the report to include a body corporate or a natural person.¹²⁸ In effect, the policy defence enables a public authority to rely on a decision made on the basis of financial, economic, political or social considerations, in answer to a negligence claim in respect of the authority’s failure to exercise one of its functions.

In addition, the Panel recommended the enactment of the ‘compatibility principle’:

[T]hat an action for breach of a common law duty of care committed in the performance or non-performance of a statutory function will be available only if allowing such an action would be compatible with the provisions and policy of the statute.¹²⁹

The Ipp Panel stated that:

The combined effect of Recommendations 39 and 41 is that courts will have two ways of affording a degree of protection from liability to defendants exercising statutory public functions. Depending on the facts of the case and the provisions of the relevant statute, the court may be able either to afford the defendant complete immunity from liability under the incompatibility principle, or uphold the policy defence.¹³⁰

The recommendation concerning the ‘policy defence’ has been enacted in NSW, Queensland, Tasmania, Victoria, WA and the ACT, though in much broader terms than was recommended by the Ipp Panel. These jurisdictions have each included a provision that lists the principles to be taken into account by the courts in considering whether a public authority owes a duty of care or has breached a duty of care.¹³¹ In each instance, one of the principles listed is to the effect that the functions required to be exercised by the authority are limited by financial and other resources. Further, in each of these jurisdictions there is a provision that the

¹²⁶ Ipp Report, above n 1, 158 Recommendation 39.

¹²⁷ Ibid 157–8 [10.27], referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹²⁸ Ipp Report, above n 1, 158 Recommendation 40.

¹²⁹ Ibid 160 [10.36]. See also ibid 160 Recommendation 41. The ‘compatibility principle’ has been enacted in WA: *Civil Liability Act 2002* (WA) s 5Y.

¹³⁰ Ipp Report, above n 1, 161 [10.39].

¹³¹ *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2003* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83; *Civil Liability Act 2002* (WA) s 5W; *Civil Law (Wrongs) Act 2002* (ACT) s 110.

general allocation of resources by an authority is not open to challenge.¹³² The *Wednesbury* unreasonableness test for liability has been adopted in NSW in respect of both negligence claims related to the exercise of special statutory powers and claims for breach of statutory duty.¹³³ It has been adopted in the ACT,¹³⁴ Queensland,¹³⁵ Tasmania¹³⁶ and Victoria¹³⁷ in claims for breach of statutory duty, and in WA in respect of ‘policy’ decisions only.¹³⁸

Ten of the 33 cases in the research that had public authority defendants considered policymaking functions or the general allocation of resources (though these issues were not necessarily decisive, by themselves, on duty of care or breach of duty issues), namely:

- *Brodie v Singleton Shire Council*;¹³⁹
- *Sullivan v Moody*;¹⁴⁰
- *Tame v New South Wales*;¹⁴¹
- *Ryan v Great Lakes Council*; *New South Wales v Ryan*;¹⁴²
- *Vairy v Wyong*;¹⁴³ *Mulligan v Coffs Harbour*;¹⁴⁴
- *RTA v Dederer*;¹⁴⁵
- *Leichhardt Council v Montgomery*;¹⁴⁶ and
- *New South Wales v Fahy*.¹⁴⁷

¹³² *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2003* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83; *Civil liability Act 2002* (WA) s 5W; *Civil Law (Wrongs) Act 2002* (ACT) s 110.

¹³³ *Civil Liability Act 2002* (NSW) ss 43–43A.

¹³⁴ *Civil Law (Wrongs) Act 2002* (ACT) s 111.

¹³⁵ *Civil Liability Act 2003* (Qld) s 36.

¹³⁶ *Civil Liability Act 2002* (Tas) ss 40–41.

¹³⁷ *Wrongs Act 1958* (Vic) s 84.

¹³⁸ *Civil Liability Act 2002* (WA) s 5X.

¹³⁹ *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (*‘Brodie’*) — formulation of the duty of care included consideration of the resources available: 580–81 [162] (Gaudron, McHugh and Gummow JJ).

¹⁴⁰ *Sullivan v Moody* (2001) 207 CLR 562 (*‘Sullivan’*) — ‘deployment of resources’ and decisions on ‘matters of policy and discretion’ were relevant considerations on the duty of care issue: 581 [57] (quoting *Hill v Chief Constable of West Yorkshire* [1989] AC 53).

¹⁴¹ *Tame* (2002) 211 CLR 317 — the conduct of police investigation, and decisions on matters of policy and resources are not subject to duty of care (quoting *Sullivan v Moody* (2001) 207 CLR 562, 581 [57] (Gleeson CJ, Gaudron, McHugh, Hayne Callinan JJ) and referring to *Hill v Chief Constable of West Yorkshire* [1989] AC 53): 430 [335] (Callinan J).

¹⁴² *Ryan v Great Lakes Council* (2002) 211 CLR 540 — resources and policy were relevant to the duty of care question: 554–5 [7]–[8] (Gleeson CJ); 624–5 [236] (Kirby J); 664 [321], 664–5 [323] (Callinan J).

¹⁴³ *Vairy v Wyong* (2005) 223 CLR 422 — the geographic reach of a council’s responsibilities was relevant to the breach of duty question: 442–3 [59]–[60], 452 [88] (Gummow J).

¹⁴⁴ *Mulligan v Coffs Harbour* (2005) 223 CLR 486, 501 [49] (Hayne J).

¹⁴⁵ *RTA v Dederer* (2007) 234 CLR 330 — the limited resources of a public authority was relevant on the issue of breach of duty of care at 356 [80] (Gummow J), but see Kirby J’s comments: 374 [146]–[147].

¹⁴⁶ *Leichhardt Council v Montgomery* (2007) 230 CLR 22 — the resources of a local authority was relevant to the scope of the duty of care: 35–6 [26] (Gleeson CJ).

¹⁴⁷ *New South Wales v Fahy* (2007) 232 CLR 486 — police resources at a crime scene were relevant on the breach of duty issue: 549–50 [210] (Callinan and Heydon JJ); 559 [255] (Crennan J).

In all these cases, the plaintiff's claim was unsuccessful, with the single exception of *Brodie*, the highway authority case in which the High Court abolished the old common law rule that a highway authority was not liable for damage caused by a 'non-feasance' in the performance of its functions.¹⁴⁸ This immunity has been restored in several jurisdictions by tort reform legislation, at least where the road authority has no actual knowledge of the non-feasance.¹⁴⁹

The 'compatibility' principle was a consideration in *Stuart v Kirkland-Veenstra*, where it was held that the defendant had 'no relevant statutory power to which a common law duty could attach'.¹⁵⁰ The principle was also influential in High Court reasoning in *Sullivan*¹⁵¹ and *Tame*.¹⁵²

While the cases in the research do not reveal a constant or compelling consideration of a formal 'policy defence' at common law, the High Court is clearly concerned with the question in cases dealing with public authority functions. Certainly, the common law was alert to the issue and, in appropriate instances, the High Court was addressing the very real limitations of the resources available to public authority defendants and the constraints imposed by policy decisions of such authorities. At common law, it was not clear whether consideration of policy and allocation of resources should be at the duty or breach stage of the negligence enquiry. There are cases where the consideration has been relevant on the duty of care question,¹⁵³ but equally there are authorities where the matter has been considered at the breach of duty enquiry.¹⁵⁴ Given the proven ability of the common law to adapt and respond to changing societal attitudes and values, it may well be that these cases mark the commencement of a trend in recognising public funding realities.

The data indicates that the common law, as applied by the High Court, is in step with the expectations of law reformers and legislatures, as the figures demonstrate a restrictive approach to the negligence liability of government or public authorities.

Only two of the cases in the period of the research where there was a public authority defendant were subject to the tort reform legislation. The first of these was *Turano*,¹⁵⁵ a case in which the defendant public authority was successful. There the

¹⁴⁸ *Brodie* (2001) 206 CLR 512.

¹⁴⁹ *Civil Liability Act 2002* (NSW) s 45; *Civil Liability Act 2003* (Qld) s 37; *Civil Liability Act 2002* (Tas) s42; *Road Management Act 2004* (Vic) s 102; *Civil Liability Act 2002* (WA) s 5Z; *Civil Law (Wrongs) Act 2002* (ACT) s 113.

¹⁵⁰ *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 266 [150] (Crennan and Kiefel JJ); also 242 [63] (French CJ).

¹⁵¹ *Sullivan* (2001) 207 CLR 562,582 [62] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

¹⁵² *Tame* (2002) 211 CLR 317, 430–1[336] (Callinan J).

¹⁵³ See, eg, *Brodie* (2001) 206 CLR 512 — formulation of the duty of care included consideration of resources available: 580–81 [162] (Gaudron, McHugh and Gummow JJ); *Ryan v Great Lakes Council* (2002) 211 CLR 540 — resources and policy were relevant to the duty of care question: 554–5 [7]–[8] (Gleeson CJ); 624–5 [236] (Kirby J); 664 [321], 664–5 [323] (Callinan J).

¹⁵⁴ *Vairy v Wyong* (2005) 223 CLR 422 — the geographic reach of a council's responsibilities was relevant to the breach of duty question: 442–3 [59]–[60], 452 [88] (Gummow J); *RTA v Dederer* (2007) 234 CLR 330 — the limited resources of a public authority was relevant on the issue of breach of duty of care: 356 [80] (Gleeson CJ), but see Kirby J's comments: 374 [146]–[147].

¹⁵⁵ *Turano* (2009) 239 CLR 51.

claim was subject to the *Civil Liability Act 2002* (NSW). The case was decided however, on the common law duty of care question rather than by reference to any provision of the legislation. The High Court referred to s 43A of the *Civil Liability Act 2002* (NSW), but made the point that it was not relied on by the defendant.¹⁵⁶ Further, the defendant had not called any evidence at trial as to its financial or other resources, so as to raise the operation of s 42 of the *Civil Liability Act 2002* (NSW), which sets out principles — respecting the resources and responsibilities of public authorities — that apply in determining the existence or breach of a duty of care.¹⁵⁷ The High Court concluded on common law principles that injury to the class of persons to which the plaintiff belonged was not a *reasonably* foreseeable consequence of the defendant's actions and, hence, there was no duty of care.

The second public authority case to which the tort reform legislation applied was *Wicks*.¹⁵⁸ In *Wicks*, two cases were heard together — the plaintiffs being persons who each suffered psychiatric injury as a result of the same train crash. In both cases, the defendant public authority admitted negligence.¹⁵⁹ The determinative issue in each appeal was the construction and application of pt 3 of the *Civil Liability Act 2002* (NSW) dealing with the duty of care in cases of pure mental harm.¹⁶⁰ So the cases were not determined by reference to the public authority protections offered by the tort reform legislation.

The claims against public authority defendants during the period of research that were decided on common law principles¹⁶¹ were in various categories of duty of care as shown in Table 4 below.¹⁶²

Table 4: Categories of duty of care, High Court public authority negligence cases 2000–10

Category	Number of cases
Road authority	10
Failure to exercise statutory power	6
Authority as employer	6
Authority as occupier	5
Authority as school authority	4
Authority as hospital	2
Other case of physical harm	2
Other case of mental harm	2
Negligent misstatement by authority	1
Authority as legal advocate	1
Authority as prison authority	1

¹⁵⁶ Ibid 61 [12]–65 [27] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁵⁷ Ibid 65 [27].

¹⁵⁸ *Wicks* (2010) 241 CLR 60.

¹⁵⁹ Ibid 67 [5] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁶⁰ Ibid 67 [7].

¹⁶¹ The total number of public authority defendants in cases decided on common law principles was 40. The decision in *Wicks* (2010) 241 CLR 60 has not been included in this list because it was decided under the *Civil Liability Act 2002* (NSW).

¹⁶² The cases in each category are listed in Appendix 2 to this article.

It is notable that in *all* six instances where liability was sought to be imposed on the basis of an authority's failure to exercise a statutory power,¹⁶³ the plaintiff was unsuccessful on common law principles. In the 10 claims against road authority defendants, only two plaintiffs were ultimately successful.¹⁶⁴ In future cases, the tort reform legislation in some states will provide further bases for protection from liability and, in some instances, will preclude the plaintiffs' claims altogether.¹⁶⁵

It is interesting to note that the public authority status of the defendants in the above cases was not always invoked or, in some instances, was not relevant to the determination of the issues between the parties in the High Court appeal. For example, in *Turano* it was held that:

The proposition that at common law a public authority may be subject to a general duty of care arising out of its conduct of works pursuant to a statutory power is not in issue.¹⁶⁶

Table 5 below lists the categories of case where the public authority status of the defendant was invoked and had some relevance in the consideration of the appeal by the Court. Of the total of 40 public authority defendants shown in Table 4, only 15 were in cases where the public authority status of the defendant was invoked.

Table 5: Categories of duty of care where public authority status of defendant was invoked, 2000–10

Category	Number of cases
Highway authority	4
Failure to exercise statutory power	3
Authority as occupier	2
Mental harm caused by authority employees	2
Public authority as employer	1
Authority as hospital	1
Negligent misstatement by authority	1
Physical injury caused by authority employee	1

¹⁶³ *Turano* (2009) 239 CLR 51 (decided on common law duty of care principles, despite the *Civil Liability Act 2002* (NSW)); *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; *Waterways Authority v Fitzgibbon*; *Mosman Municipal Council v Fitzgibbon* (2005) 221 ALR 402; *Ryan v Great Lakes Council*; *NSW v Ryan* (2002) 211 CLR 540.

¹⁶⁴ *Pledge v RTA* (2004) 205 ALR 56 (the RTA and Blue Mountains City Council were both defendants); *Brodie* (2001) 206 CLR 512. Special protection for road authorities was enacted in NSW following the High Court decision in *Brodie*. The practical effect of the *Civil Liability Act 2002* (NSW) s 45 is to reinstate the common law immunity for non-feasance by road authorities where the authorities are not aware of the problem.

¹⁶⁵ See, eg, *Civil Liability Act 2002* (NSW) ss 43A, 44; *Civil Liability Act 2002* (Tas) s 41; *Civil Law (Wrongs) Act 2002* (ACT) s 112. See also highway authority protections in: *Civil Liability Act 2002* (NSW) s 45; *Civil Liability Act 2003* (Qld) s 37; *Civil Liability Act 1936* (SA) s 42; *Civil Liability Act 2002* (Tas) s 42; *Road Management Act 2004* (Vic) s 102; *Civil Liability Act 2002* (WA) s 5Z; *Civil Law (Wrongs) Act 2002* (ACT) s 113.

¹⁶⁶ *Turano* (2009) 239 CLR 51, 69 [44] (citations omitted) (French CJ, Gummow, Hayne Crennan and Bell JJ).

In only two of these cases was the plaintiff successful — one in a road authority case¹⁶⁷ and one where the plaintiff was physically injured as a result of the negligence of the authority.¹⁶⁸ Again, the inference that may be drawn is that the common law offers public authorities a level of protection that the tort reform legislation sought to provide. The figures certainly do challenge any assumption that it is easy for plaintiffs to succeed in negligence claims against public authorities or that tort law manifestly favours plaintiffs over deep-pocket public defendants. Yet, such assumptions were clearly part of the impetus for the enactment of the tort reform legislation in Australian parliaments.¹⁶⁹

IX Conclusion

This research confirms the work of previous tort law scholars that the common law of negligence has been developing toward the imposition of greater personal responsibility on plaintiffs generally and particularly in recreational activity cases. Further, the data for cases against public authority defendants reveals a significant level of protection for such defendants at common law, calling into question the need for the broad statutory protections that were enacted following the Ipp Report. The data analysis thus adds to existing scholarship and further undermines the assertions made by Australian governments in the early years of the 21st century about the pressing need for tort law reform. The research supports the idea that the reform of the law of negligence was, as succinctly framed by Luntz, focused on the ‘wrong questions — wrong answers’.¹⁷⁰

Future research will be critical. Moving into the second decade of the 21st century, data analysis of High Court negligence decisions will become increasingly valuable in light of the tort law reform legislation introduced from 2002 onwards in every Australian jurisdiction. There will inevitably be more tort law reform cases for future study. Indeed, since the completion of the dataset there have been more such cases. Again, all of these cases originate from NSW. In 2011, the High Court’s decision in *Insight Vacations*¹⁷¹ concerned the waiver provision in s 5N of *Civil Liability Act 2002* (NSW). In *Strong*,¹⁷² the High Court considered the causation provisions of the same NSW tort reform legislation. In *Hunt & Hunt Lawyers*,¹⁷³ the Court was concerned with the proportionate liability provisions of that legislation. Most recently, the High Court examined causation in *Wallace*,¹⁷⁴ a medical ‘failure to warn’ case. Those four decisions and the *Insight Vacations* case do not form part of the statistical analysis reported in this article, all being after the 31 December 2010 cut-off date.

¹⁶⁷ *Brodie* (2001) 206 CLR 512.

¹⁶⁸ *Coote v Forestry Tasmania* (2006) 227 ALR 481.

¹⁶⁹ See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2002, 2085 (Bob Carr, Premier).

¹⁷⁰ Luntz, ‘Reform of the Law of Negligence Wrong Questions — Wrong Answers’, above n 3.

¹⁷¹ *Insight Vacations* (2011) 243 CLR 149.

¹⁷² *Strong* (2012) 246 CLR 182.

¹⁷³ *Hunt & Hunt Lawyers* (2013) 247 CLR 613.

¹⁷⁴ *Wallace* (2013) 250 CLR 375.

The tort law reforms alter fundamental aspects of the common law tort of negligence.¹⁷⁵ Since their introduction, the tort law reforms have brought about significant change to the sustainability of many negligence claims, dramatically reducing the number of personal injury claims filed in the courts of Australian jurisdictions.¹⁷⁶ Historically, statute law has operated as an adjunct to the common law. It has acted to expand avenues of recovery where the common law of negligence has failed to provide a remedy in particular circumstances.¹⁷⁷ It has also acted to abrogate common law rights and remedies¹⁷⁸ in the tort of negligence where legislators have perceived that negligence law had become too plaintiff-oriented.¹⁷⁹ This analysis of High Court negligence decisions from 2000–10 will provide a platform for future evaluation of the operation of the tort law reform legislation given both the role of the High Court in lawmaking and the fact that there has not been an empirical study of 21st century High Court decisions to date.

¹⁷⁵ The relevant legislation in each jurisdiction is *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act* (NT).

¹⁷⁶ Wright, above, n 35.

¹⁷⁷ Barbara McDonald, 'Legislative Intervention in the Law of Negligence: the Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27(3) *Sydney Law Review* 443.

¹⁷⁸ See, eg, *Motor Accidents Act 1988* (NSW); *Motor Accidents Compensation Act 1999* (NSW); *Workers Compensation Act 1987* (NSW); *Accident Compensation Act 1985* (Vic); *Transport Act 1986* (Vic); and the counterparts in other jurisdictions. See also the *Health Care Liability Act 2001* (NSW), which limited damages available in health care claims and provided protection from civil liability for emergency health care providers. The relevant sections of the Act were repealed by the *Civil Liability Act 2002* (NSW).

¹⁷⁹ See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764 (Bob Carr, Premier).

Appendices

Appendix 1: 2000–10 Cases Reviewed for this Study

2010

1. *Wicks v State Rail Authority of NSW; Sheehan v State Rail Authority of NSW* [2010] HCA 22 (16 June 2010); (2010) 241 CLR 60
2. *Tabet v Gett* [2010] HCA 12 (21 April 2010); (2010) 240 CLR 537
3. *Amaca Pty Ltd v Ellis; South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis* [2010] HCA 5 (3 March 2010); (2010) 240 CLR 111

2009

4. *CAL No 14 Pty Ltd v Motor Accidents Insurance Board; CAL No 14 Pty Ltd v Scott* [2009] HCA 47 (10 November 2009); (2009) 239 CLR 390
5. *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48 (10 November 2009); (2009) 239 CLR 420
6. *Sydney Water Corporation v Turano* [2009] HCA 42 (13 October 2009); (2009) 239 CLR 51
7. *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Ltd v Fox* [2009] HCA 35 (2 September 2009); (2009) 240 CLR 1
8. *Zheng v Cai* [2009] HCA 52 (9 December 2009); (2009) 239 CLR 446
9. *Stuart v Kirkland-Veenstra* [2009] HCA 15 (22 April 2009); (2009) 237 CLR 215

2008

10. *Lujans v Yarrabee Coal Co Pty Ltd* [2008] HCA 51 (16 October 2008); (2008) 249 ALR 663
11. *Imbree v McNeilly* [2008] HCA 40 (28 August 2008); (2008) 236 CLR 510
12. *Fergusson v Latham* [2008] HCA 24 (20 May 2008); (2008) 246 ALR 463
13. *Roads and Traffic Authority v Royal* [2008] HCA 19 (14 May 2008); (2008) 245 ALR 653
14. *Collins v Tabart* [2008] HCA 23 (16 April 2008); (2008) 246 ALR 460

2007

15. *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42 (30 August 2007); (2007) 234 CLR 330
16. *New South Wales v Fahy* [2007] HCA 20 (22 May 2007); (2007) 232 CLR 486
17. *Leichhardt Municipal Council v Montgomery* [2007] HCA 6 (27 February 2007); (2007) 230 CLR 22

2006

18. *Coote v Forestry Tasmania* [2006] HCA 26 (13 June 2006); (2006) 227 ALR 481
19. *CSR Ltd v Della Maddalena* [2006] HCA 1 (2 February 2006); (2006) 224 ALR 1
20. *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19 (16 May 2006); (2006) 226 CLR 161
21. *Harriton v Stephens* [2006] HCA 15 (9 May 2006); (2006) 226 CLR 52
22. *Waller v James; Waller v Hoolahan* [2006] HCA 16 (9 May 2006); (2006) 226 CLR 136

2005

23. *Swain v Waverley Municipal Council* [2005] HCA 4 (9 February 2005); 220 CLR 517

24. *Czatyрко v Edith Cowan University* [2005] HCA 14 (6 April 2005); (2005) 214 ALR 349
25. *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15 (6 April 2005); (2005) 222 CLR 44
26. *Manley v Alexander* (2005) [2005] HCA 79 (14 December 2005); (2005) 223 ALR 228
27. *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19 (21 April 2005); (2005) 221 CLR 234
28. *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* [2005] HCA 31 (15 June 2005); (2005) 221 CLR 161
29. *Neindorf v Junkovic* [2005] HCA 75 (8 December 2005); (2005) 222 ALR 631
30. *New South Wales v Bujdosó* [2005] HCA 76 (8 December 2005); (2005) 227 CLR 1
31. *Travel Compensation Fund v Tambree* [2005] HCA 69 (16 November 2005); (2005) 224 CLR 627
32. *Vairy v Wyong Shire Council* [2005] HCA 62 (21 October 2005); (2005) 223 CLR 422
33. *Mulligan v Coffs Harbour City Council* [2005] HCA 63 (21 October 2005); (2005) 223 CLR 486
34. *CSR Ltd v Eddy* [2005] HCA 64 (21 October 2005); (2005) 226 CLR 1
35. *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 (10 March 2005); (2005) 223 CLR 1
36. *Commissioner of Main Roads v Jones* [2005] HCA 27 (20 May 2005); (2005) 215 ALR 418
37. *Laybutt v Glover Gibbs Pty Ltd* [2005] HCA 56 (29 September 2005); (2005) 221 ALR 310
38. *Waterways Authority v Fitzgibbon* [2005] HCA 57 (5 October 2005); (2005) 221 ALR 402

2004

39. *Anikin v Sierra* [2004] HCA 64 (9 December 2004); (2004) 211 ALR 621
40. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 (1 April 2004); (2004) 216 CLR 515
41. *Pledge v Roads and Traffic Authority* [2004] HCA 13 (11 March 2004); (2004) 205 ALR 56
42. *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29 (15 June 2004); (2004) 217 CLR 469
43. *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28 (15 June 2004); (2004) 217 CLR 424

2003

44. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003); (2003) 212 CLR 511
45. *Samin v Queensland; Rich v Queensland* [2003] HCA 4 (6 February 2003); (2003) 212 CLR 511
46. *Shorey v PT Ltd* [2003] HCA 27 (28 May 2003); (2003) 197 ALR 410
47. *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33 (18 June 2003); (2003) 214 CLR 269
48. *Joslyn v Berryman* [2003] HCA 34 (18 June 2003); (2003) 214 CLR 552
49. *Cattanach v Melchior* [2003] HCA 38 (16 July 2003); (2003) 215 CLR 1
50. *Suvaal v Cessnock City Council* [2003] HCA 41 (6 August 2003); (2003) 200 ALR 1

51. *Whisprun Pty Ltd v Dixon* [2003] HCA 48 (3 September 2003); (2003) 200 ALR 447
52. *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003); (2003) 215 CLR 317
53. *Hoyts Pty Ltd v Burns* [2003] HCA 61 (9 October 2003); (2003) 201 ALR 470
54. *Fox v Percy* [2003] HCA 22 (30 April 2003); (2003) 214 CLR 118

2002

55. *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (5 December 2002); (2002) 211 CLR 540
56. *Ryan v Great Lakes Council* [2002] HCA 54 (5 December 2002); (2002) 211 CLR 540
57. *New South Wales v Ryan* [2002] HCA 54 (5 December 2002); (2002) 211 CLR 540
58. *Tame v New South Wales* [2002] HCA 35 (5 September 2002); (2002) 211 CLR 317
59. *Annetts v Australian Stations Pty Ltd* [2002] HCA 35 (5 September 2002); (2002) 211 CLR 317
60. *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9 (7 March 2002); 208 CLR 460
61. *Frost v Warner* [2002] HCA 1 (7 February 2002); (2002) 209 CLR 509
62. *Goldsmith v Sandilands* [2002] HCA 31 (8 August 2002); (2002) 190 ALR 370
63. *De Sales v Ingrilli* [2002] HCA 52 (14 November 2002); (2002) 212 CLR 338

2001

64. *Sullivan v Moody; Thompson v Cannon* [2001] HCA 59 (11 October 2001); 207 CLR 562
65. *Derrick v Cheung* [2001] HCA 48 (9 August 2001); (2001) 181 ALR 301
66. *Hollis v Vabu Pty Ltd* [2001] HCA 44 (9 August 2001); (2001) 207 CLR 21
67. *Brodie v Singleton Shire Council* [2001] HCA 29 (31 May 2001); (2001) 206 CLR 512
68. *Ghantous v Hawkesbury City Council* [2001] HCA 29 (31 May 2001); (2001) 206 CLR 512
69. *Liftronic Pty Ltd v Unver* [2001] HCA 24 (3 May 2001); (2001) 179 ALR 321
70. *Tepko Pty Ltd v Water Board* [2001] HCA 19 (5 April 2001); (2001) 206 CLR 1
71. *Rosenberg v Percival* [2001] HCA 18 (5 April 2001); (2001) 205 CLR 434
72. *Baxter v Obacelo Pty Ltd* [2001] HCA 66 (15 November 2001); (2001) 205 CLR 635

2000

73. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61 (23 November 2000); (2000) 205 CLR 254
74. *Jones v Bartlett* [2000] HCA 56 (16 November 2000); (2000) 205 CLR 166
75. *Scott v Davis* [2000] HCA 52 (5 October 2000); (2000) 204 CLR 333
76. *Grincelis v House* [2000] HCA 42 (3 August 2000); (2000) 201 CLR 321
77. *Agar v Hyde; Agar v Worsley* [2000] HCA 41 (3 August 2000); (2000) 201 CLR 552
78. *Schellenberg v Tunnel Holdings Pty Ltd* [2000] HCA 18 (13 April 2000); (2000) 200 CLR 121

Appendix 2: Categories of Duty of Care in Common Law Decisions against Public Authority Defendants

Failure to exercise statutory power

Sydney Water Corporation v Turano (2009) 239 CLR 51 (decided on common law duty of care principles, despite the *Civil Liability Act 2002* (NSW))

Stuart v Kirkland-Veenstra (2009) 237 CLR 215

Waterways Authority v Fitzgibbon (2005) 221 ALR 402

Ryan v Great Lakes Council; New South Wales v Ryan (2002) 211 CLR 540

Highway authorities

Roads and Traffic Authority v Royal (2008) 245 ALR 653

Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330

Leichhardt Municipal Council v Montgomery (2007) 230 CLR 22

Commissioner of Main Roads v Jones (2005) 215 ALR 418

Pledge v Roads and Traffic Authority (2004) 205 ALR 56 (RTA and Blue Mountains City Council were both defendants)

Suvaal v Cessnock City Council (2003) 200 ALR 1

Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council (2001) 206 CLR 512

Joslyn v Berryman (2003) 214 CLR 552 (Wentworth Shire Council, as the relevant road authority, was a defendant)

Public authority as employer

South Australia v Ellis (2010) 240 CLR 111

New South Wales v Fahy (2007) 232 CLR 486

Czatyрко v Edith Cowan University (2005) 214 ALR 349

Goldsmith v Sandilands (2002) 190 ALR 370 (the State of Western Australia; the Commissioner of Police of Western Australia and the State Government Insurance Commission all defendants in case where police officer injured in high speed chase)

School authority

Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba (2005) 221 CLR 161

New South Wales v Lepore; Samin v Queensland; Rich v Queensland (2003) 212 CLR 511

Prison authority

New South Wales v Bujdoso (2005) 227 CLR 1

Authority as occupier — Recreational activity claim

Vairy v Wyong Shire Council (2005) 223 CLR 422

Mulligan v Coffs Harbour City Council (2005) 223 CLR 486 (Coffs Harbour City Council; the State of NSW and the Coffs Harbour Jetty Foreshore Reserve Trust were all defendants)

Swain v Waverley Municipal Council (2005) 220 CLR 517

Authority as legal advocate

D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1

Authority as hospital

Sullivan v Moody (2001) 207 CLR 562 (Queen Elizabeth Hospital, Sexual Assault Referral Centre was the third defendant)

Cattanach v Melchior (2003) 215 CLR 1 (the State of Queensland, as the successor to the Brisbane South Regional Area Health Authority, was a defendant)

Negligent misstatement by an authority

Tepko Pty Ltd v Water Board (2001) 206 CLR 1

Other cases of physical harm caused by an authority

Cootte v Forestry Tasmania (2006) 227 ALR 481

Anikin v Sierra (2004) (2004) 211 ALR 621 (the State Transit Authority of New South Wales was vicariously liable for the negligence of a bus driver who caused physical injury)

Other cases of mental harm caused by an authority

Tame v New South Wales (2002) 211 CLR 317

Sullivan v Moody (2001) 207 CLR 562 (the State of South Australia, as operator of the Department of Community Welfare, was a defendant)

Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of New South Wales (2010) 241 CLR 60 (not included in the figures on substantive legal issues because they were decided under the *Civil Liability Act 2002* (NSW), rather than at common law)