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**TOPICAL MATTERS PERTAINING TO THE TORT OF  
NEGLIGENCE - THE ATTRIBUTION OF BLAME**

**The Hon Justice Kenneth Martin**  
**Supreme Court of Western Australia**

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**Introduction**

I am honoured to be asked to deliver this address. When I received Julian's email in late April it led me to start pondering at idle moments over the following weekend about many tort cases I had been either involved in as counsel or associated with over my professional life to date. That mental walk down memory lane soon dredged back many past good and bad memories. I also began to wonder how the cases would be decided now, if they were argued on today's law of torts. I came to appreciate, as I should have long before, that tort cases have rather consumed my professional life as a lawyer, barrister and now as a Judge.

**In the beginning**

Thinking back, I vaguely recall my first 'on feet' performance as a trial advocate happened in 1979, at the Local Court (Magistrates Court now) at Armadale. Somehow, I came to be acting for a defendant insurance company, resisting a smallish tort claim for damages. The details are misty now. But I seem to remember there had been an incident involving a collision between a motor vehicle and a horse. The horse had escaped (repeatedly, it was said) from an owner's property somewhere bordering the road. There was a problem with a

defective fence of the defendant and the horse kept getting out. The consequence was a collision between the plaintiff's motor vehicle and the horse, with the most damage being to the motor vehicle. The horse was fine. This should have been just a straightforward negligence case in tort - but there was a twist courtesy of a quaint piece of English law transplanted to Australia at European settlement.

I remember trudging out to Armadale to defend - upon the basis of the immunity delivered under an old UK decision, *Searle v Wallbank* (1947) AC 341, a much criticised decision of the House of Lords. That case had decided that an owner of land in England abutting a highway was under no prima facie legal obligation to users of the highway to keep and maintain fences or gates - in order to prevent animals straying on to a highway (other than for animals exceptionally known to be dangerous).

In fact, our High Court of Australia in September 1979 had reaffirmed the applicability of this rule for Australia in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. That, I think, was about a week after I had lost in Armadale. I haven't been back.

*Trigwell* was delivered notwithstanding a stirring dissent from Murphy J. He, in effect, said it was ridiculous this rule of the common law from England (but which was not even part of the common law of Scotland, see page 644) had been imported to Australia. Quaint English notions of hedges and isolated countryside lanes were hardly applicable for Australia.

Somehow or other, I managed to lose this case - on the basis that the horse in question had displayed the propensity on numerous occasions to get out. Therefore, it was said against me the immunity of the *Seale v Wallbank* principle (at least according to the old Magistrate) was not open. That was probably a wrong application of the rule: see *Ellis v Johnstone* [1963] 2 QB 8. But, in the end, it did not matter. I had a minor forensic win, calling a panel

beater witness, who coincidentally had worked on the plaintiff's somewhat decrepit old motor vehicle. From a valuation and damages perspective, my surprise witness painted a picture that the plaintiff's vehicle was an 'old bomb' that was practically worthless. The client had paid a small amount of money into court, just in case we lost - that was more than what the plaintiff ended up getting from the Magistrate as damages at the end.

That was my first working association with tort law imported to Australia as the common law of England.

Nowadays, the position in Western Australia would be governed by a statute which has removed the old immunity for straying animals: see the *Highways (Liability for Straying Animals) Act 1983* (WA), s 3. The legislation has counterparts in all of the other Australian States and Territories save for Queensland the Northern Territory: see *Brown v Toohey* (1994) 35 NSWLR 417, 424 (Meagher JA).

### **Five years of professional life (1983 - 1988) - loss of the Key Biscayne off Lancelin on 1 September 1983**

The Key Biscayne was a jack-up drilling rig owned by the Texas based Key International Drilling Company. It had been operating in the early 1980s in the Timor Sea, off Darwin, exploring subsea for oil and gas.

'Jack-up' oil drilling platforms are essentially huge floating barges with huge legs that are capable of being raised and lowered to the sea bed. When lowered into the seabed, the triangular barge component of the rig is positioned significantly above sea level. From there the drilling is done. However, when the legs are 'jacked', to be raised like vertical towers above the deck of the barge, the triangular platform then lowers to water level where it floats and becomes, in effect, a large barge. But the 'jack-up' rig is not self-propelled and needs to be towed by tug boats to get from location to location.

Jack-up platforms are designed to very high engineering standards. They necessarily have high measures of seaworthiness. They are expected to withstand heavy sea conditions encountered all around the world, including when being towed across oceans.

Storm conditions encountered off the coast of Western Australia in late August 1983 were very severe. They were storm conditions measured at one in 100-year levels. Some parts of the Key Biscayne, in terms of their overall seaworthiness, were only designed to withstand one in 50-year storm events. This was a problem.

The capsizing and sinking of the Key Biscayne off the coast of Western Australia, off Lancelin on 1 September 1983 is well remembered to me. It is explained at length in a Department of Transport inquiry report which can still be found on the internet<sup>1</sup> – see preliminary investigation into 'Loss of tow and subsequent foundering off the coast of Western Australia of (the Key Biscayne jack-up drilling rig)'.

A complicated tort damages case soon followed. My firm was acting for the owners of the lost jack-up drilling rig (which company had become a subsidiary of Chevron Oil Corporation).

On the day of the loss, there had been 52 crew aboard the sinking rig who, at the last minute, had to be evacuated by helicopters. Fortunately, there was no injury or loss of life. That came about courtesy of great acts of heroism by the helicopter pilots who, at great danger to themselves, landed on a pitching and heaving rig platform in horrendous weather conditions. These efforts successfully saw the repatriation to safety and dry land of all crew, before the adrift rig just disappeared off radar screens in the dark and stormy gloom after 1845 hours on that fateful Friday, 1 September 1983.

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<sup>1</sup> [https://www.atsb.gov.au/publications/investigation\\_reports/1984/mair/mair3/](https://www.atsb.gov.au/publications/investigation_reports/1984/mair/mair3/)

Next day, the sunken and totally wrecked rig was eventually located in 41 metres of water, lying 31 degrees 10 minutes south, 110 degrees 11.7 minutes east off Lancelin. It is still there - as a significant dive wreck and well visited tourist attraction off the Lancelin coast - to prove the point that over time every cloud has at least one silver lining.

The massive tort case that followed unfolded this way, although I am greatly oversimplifying things. There could be no action in contract by the owners of the rig against the tug boat operators. This was because relevant towing contracts were just between the exploration company charterer, Esso Australia Ltd. Two tug boat companies had been contractually engaged by Esso to essentially tow the Key Biscayne from the north to the south - around the coast of Western Australia from Torres Strait past the Monte Bello Islands, the Northwest Cape then past the Abrolhos Islands down to a Cockburn Sound destination. The rig was to be stacked there for a period before its next assignment. It never arrived!

In the course of that long 'coastal tow' in August/September 1983 the towing lines or cables connecting the two tug boats pulling the barge snapped altogether on six occasions. That was not a problem on four occasions, when the breaks happened in calm, benign, flat sea conditions - and where reattachment was straightforward. But that was not so for the fifth and sixth breaks.

On 1 September 1983, when a one in 100-year storm was at its height, the rig was only attached (after a fifth breakage at 0644 hours) by one tow line to one of the two tug boats. The fifth breakage left one tug, the Atlas van Diemen, attempting to hold and position the rig into the weather, and against a gale pushing both towards a perilous coast - towards which it was slowly drifting, courtesy of horrendous storm conditions, wind, waves and swell.

The conditions that day amounted to what old salts described as the 'mariner's nightmare', a 'leeshore' in a really bad storm.

There was no contract between the operators or owners of the tug boats and the owners of the rig. Hence, the owner's law suit against them claiming for the loss of their rig (variously valued at between about US\$5 million and US\$30 million), had to be brought in tort, for damages for alleged negligence in the conduct of the tow.

The core argument of the owners was that the operators of the tug boats (the two defendants) had owed a duty of reasonable care to the owners of the drilling rig to carry out the tow in a way that reflected proper skill and competence and as a part of the process of towing to use appropriate towing connections.

In essence, the rig owner's argument was that the towing equipment used by the tugs had been the wrong equipment, particularly the ends of the tow lines connecting to the rig. The argument was that soft 'eye' loop (rope to metal) connections had been used, rather than hard 'eye' connections (metal to metal) - hence six line breakages, it was argued (but always disputed by the defendants).

There followed some robust international debates between expert towing mariners over the pros and cons of hard eye/soft eye towing connections, plus a myriad of difficult associated technical maritime issues.

However, the real tort law difficulty that kept myself and my leaders in that case awake for too many nights was over the issue of proving causation under the law of tort. Could it be proved - what looked simple at first blush turned out to be far from so.

If the rig had simply drifted onto shore and broken apart there, a causation in tort case would have been easier - at least in terms of proving that allegedly defective towing equipment led to breakages in the tow lines, hence to an uncontrolled drift of the rig, hence to beaching and destruction. However,

our case was a sinking scenario at sea. It was different and harder to prove from a causation in tort perspective.

The rig had sunk in deep water in a bad storm. But this was in circumstances where the rig had been constructed, annually inspected and certified as being fully seaworthy as a seagoing barge. Hence, this rig was built to float safely at sea - even in difficult storm conditions.

The plaintiff owners needed to prove in tort that an act of negligence in respect of defective towing equipment had been causatively responsible for the ultimate sinking and so loss of the rig. There were too many explanation gaps in that chain of reasoning process - which needed to be better explained in order to prove legal causation and, hence, responsibility in the defendants. In other words, to prove that the loss of the rig would not have happened, 'but for' the negligent acts or omissions complained about.

The case was finally ready for trial, in August 1988. It had been listed to run for four months before Justice Seaman. Had it run, it would have then been the longest running West Australian Supreme Court civil litigation to that point. But it settled at the last minute.

The causation case theory matured over five years. It had reached a point, following various (expensive) tank testing and modelling scenarios, that the plaintiffs thought they could show causation using experts to illustrate how an inability of tugs to keep the rig in motion at sea under a connected tow line scenario, had seen the rig wallowing aimlessly in the heavy seas too long, at multiple angles whilst being swamped at the rear (ie, stern) by waves ('pooped' as it is terms by mariners).

The argued consequence was that the rig had wallowed too long stern into the weather - rather than kept bow into the weather under tow. The further consequence was that the rig's stern region, the most structurally vulnerable part of the vessel from a seaworthiness perspective, became unduly exposed to the

force of massive seas in the storm. Had the rig been towed and kept in motion by connected tow lines, the theory was that the vulnerable stern (particularly the rig's pre-load tanks) would not have been exposed to the same high levels of forces. The rig would not then have taken in destabilising levels of water and not capsized offshore at Lancelin as it did.

The negligence/causation of loss theory was never tested. The case settled three weeks before the trial was to begin - under confidential settlement terms. I was privy to the extent of knowing that money had changed hands as between a chain of insurers and underwriters following a back room meeting between 'heavies' somewhere in Europe.

But five years spent working on this case as a relatively young lawyer, dwelling over tort causation of loss arguments, at least had the benefit of attuning me forever to the intricacies and pitfalls looming around the proving of causation in a civil law tort case. It is usually harder than it looks at first blush, in my view.

Let me divert from the reminiscing to offer a few words on the topic of legal causation under Australian tort law.

### **Causation in tort law in Australia**

Between 1983 and 1988 (when I was worrying about causation on a daily basis due to the Key Biscayne case) the common law tort causation test was generally accepted as the 'but for' test of causation. In other words, a plaintiff needed to prove on the balance of probabilities that absent the alleged wrong (tortious) conduct (the act or omission) of a defendant, that the injury (either a physical loss to someone's person or to their property, or a money/economic loss) would not have happened. This is also referred to as the *sine qua non* test, for latin devotees ('the essential combination or ingredient' for the event).

As explained in a leading torts text, the 10th edition of *Fleming's Law of Torts* (2011) 9.40 (page 228), the 'but for' (*sine qua non*) test of causation postulates a defendant's conduct is a cause of the plaintiff's harm, if the harm would not have occurred without it, or 'but for' it. According to Fleming:

The 'but for' test thus operates as a negative criterion of causation but eliminates factors which made no difference to the outcome ... it is not all negligent conduct that results in legal liability. The defendant's conduct is not a legal cause if the harm would have happened in any event, fault or no fault: for example, a doctor's delay in attending a patient is causally irrelevant if the patient would have suffered the same damage in any event.

Scholars, philosophers and scientists have argued for ages over the merits or demerits of a singular 'but for' test to establish causation. There is a large measure of agreement even from devotees that it does not work well for scenarios of multiple potential causes of a loss scenarios, eg, such as for smoking and asbestos fibres as causes of lung cancer: see *AMACA Pty Ltd v Ellis* (2010) CLR 111.

For Australia the law on causation in tort altered significantly, under a leading decision of the High Court in 1991, *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506. This was a nasty (car - v -truck) motor vehicle collision scenario arising out of South Australia.

The High Court moved Australia towards a 'common sense test of causation'. The 'but for'/*sine qua non* test is still to be used as a (negative) criterion in showing legal causation - but more than just a meeting of the but for' threshold, was said to be needed. This was to cater for an evaluation of further questions of policy and principle. This was controversial.

The change to a commonsense rule of causation was not without critics, particularly McHugh J, who took a different line in the case (pages 533 - 534), albeit all judges agreed that the drunken/speeding injured driver should bear a 70% (not 100%) share of the responsibility for his injuries. They were sustained following his car's collision with the rear tray of a truck that had been parked

across the centre line of a highway and into half of his lane of the six-lane highway.

Explaining the 'common sense' test of legal causation at chapter 9 of the Fleming text on tort law (that chapter being authored by the Hon Margaret Beazley, the current President of the New South Wales Court of Appeal), it is said at page 230:

This approach recognises that a person should not be liable for every wrongful act which is a necessary condition of the harm suffered. The 'but for' test was not replaced. Rather, the common sense this approach recognised was that the 'but for' test was neither a comprehensive nor an exclusive test of causation in tort. Its proper role necessarily limited as a negative criterion of causation, was retained.

I confess that, like McHugh J, I have never really been a great fan of a 'common sense' test of causation, albeit Sir Anthony Mason carefully explained (page 515) in *March v Stramare*, that such an approach was supported by a line of previous cases. The key problem for me is that such a test can look close to being a 'gut' intuitive reaction - rather than the outcome of coherently expressed and logical reasoning process. Too often these days I perceive 'One person's common sense is another person's heresy'.

The common sense causation test in tort also makes it difficult to give reliable advice to clients upon a tort outcome in a civil trial. An essential part of dispute resolution is a reasonable level of outcome predictability, before a trial is reached.

Subsequently, however, there has been wholesale statutory reform reinstating the primacy of the 'but for' test. This happened under *Civil Liability Acts* across all States and Territories of Australia, which commenced operation around Australia governing tortious causes of action which vest after 1 December 2003: see *Civil Liability Act 2002* (WA) and interstate counterparts. Western Australia closely followed the New South Wales

legislation. For causation, the relevant provision is s 5C in Div 3, in pt 1A of the *Civil Liability Act 2002* (WA). It reads:

5C General Principles

(1) A determination that the fault of a person (the *tortfeasor*) caused particular harm comprises the following elements -

(a) that the fault was a necessary condition of the occurrence of the harm (*factual causation*); and

(b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused (*scope of liability*).

...

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the *injured person*) would have done if the tortfeasor had not been at fault -

(a) subject to paragraph (b), the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault; and

(b) evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor.

Section 5D in this division says:

**5D. Onus of proof**

In determining liability for damages for harm caused by the fault of a person, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

**Key Biscayne: Redux**

Thinking back to that fading experience for the (1983-1988) Key Biscayne scenario, the factual need to show that fault was a necessary condition to the occurrence of the resultant loss (ie, use of towing equipment allegedly prone to breaking, was a necessary condition leading to the sinking of the jack-

up rig would still apply - albeit this is spelt out even more clearly now, under s 5C(1)(a), as the first step in the process.

Under s 5C(1)(a), the 'but for' test has effectively been re-elevated to its paramount status, as regards need for a plaintiff to prove the links between showing cause and effect. That is a necessary, but by no means the sole, criteria.

Had the state of the evidence in the Key Biscayne litigation been left simply as that the towing connections had broken six times on a coastal voyage and that the vessel had sunk in a storm, there would, I think, under the post 2003 tort regime of *Civil Liability Act* legislation, have been failure to sufficiently show factual causation. It is necessary, in my view, for a plaintiff to link up the cause to the effect - and to prove the other factual steps in a path between tow line breakages at sea, unseaworthiness, taking on of destabilising amounts of water, unseaworthy instability, sinking and loss.

The need for that level of precise proof of causation is now clearer than ever, in my view, under s 5C(1)(a) as to showing factual causation. But then, there is also s 5C(1)(b) to meet as well.

As I said, the Key Biscayne litigation was settled and did not reach a trial. The only trace (apart from a diving wreck off Lancelin) is found as regards a minor interlocutory controversy over documents: see *Key International Drilling Co Ltd v TNT Bulk Ships Operations Pty Ltd* [1989] WAR 280, a decision of Kennedy J.

#### **Four tort cases (2001 - 2008) as counsel**

Four negligence cases I was involved in arising in the period after I joined the independent Bar are now briefly discussed. At the outset I plead guilty to unshakable levels of personal bias that are inescapable for the participant advocate. Tort scenarios of attempted blame attribution are seen in each case.

### **(a) The Agnew-Leinster Road**

The first case I will mention is *Stevens v Flannery* (1999) 23 SR (WA) 165; [1999] WADC 164, but reversed on appeal, reported as *Flannery v Shire of Leonora* [2001] WASC 47 (per Wallwork J with Malcolm CJ and Ipp J agreeing). The underlying facts bear something of a similarity to the facts of *March v Stramere* - at least I thought so.

*Stevens* was a road accident negligence case concerning a car rollover at speed in the outback - on the Agnew-Leinster road. The circumstances were tragic, as they always are in such cases.

There were three people travelling together in the car that rolled over on this road. The driver and front seat passenger were not wearing seatbelts. The other passenger, in the rear, was wearing a seatbelt. In the ensuing rollover he was not injured.

The driver (Mr Flannery) and the front seat passenger (Mr Stevens) were both thrown from the vehicle. Both were very seriously injured.

Mr Stevens, the front seat passenger, sued the driver, Mr Flannery, for negligence. The driver was indemnified under compulsory State Government motor vehicle insurance legislation. But he (his insurers) then cross-sued the Shire of Leonora, seeking a contribution towards what was a massive injury payout to which the driver's insurer was exposed and attacking the Shire for fault (also insured, but by different insurers).

Underlying this tort personal injury litigation was essentially a fight between two insurance companies - in terms of their overall contributions to Mr Stevens' severe injuries in the wake of this tragedy.

The rollover had occurred after employees of the Shire of Leonora had been grading what had become a washed out Leinster-Agnew dirt road.

Part of the dirt road suffered heavy wear and tear from rain. A deep, so-called 'bog hole' had developed in the middle of the road after the heavy rains.

There was visible water in this bog hole, along with mud and gravel. The 'bog hole' was visible on the straight road in daylight from some way off as it was approached.

To facilitate the Shire repairing the road and grading back to standard three loads of gravel had been dumped at a point just prior to the 'bog hole' by the Shire's workers. The intention was that mounds of gravel would be pushed by a grader to fill up and fix the hole.

However, the three mounds of gravel had been left by the workers protruding about two to three metres on to the road. In the afternoon the Shire's three road workers employees took a break to travel into the closest town to obtain some provisions. They were away for an hour. It was enough. In that time a worst possible outcome unfolded.

The vehicle driven at some high but unspecified speed by Mr Flannery moved to the middle of the road, obviously to manoeuvre round the three visible piles of gravel on the left. From there, it moved directly into the path of the bog hole - which it otherwise would have skirted to the left.

The road was straight and the 'bog hole' and water in it visible to an approaching driver. But Mr Flannery lost control of the vehicle whilst coming out of the hole. The car rolled, with himself and the front seat passenger, Mr Stevens, thrown out and seriously injured.

The trial judge found that there was a lack of legal causation, between the positioning of loads of gravel and the ensuing car rollover. This was a straight, flat, dirt road in the country with good visibility of the mounds and the hole. Another vehicle on the same road beforehand had passed around the loads of gravel to the hole without incident - albeit that driver was critical of the situation.

The incident vehicle was admittedly travelling at excessive speed. More particularly, its course looks to have deviated twice - first, passing to the right to

move around the gravel mounds, then second, deviating again, in attempting to move back to the left-hand side of the road, whilst still in the hole. The last time it was changing direction, the vehicle was coming out of the 'bog hole' and through water, still at speed. There had been no braking before the hole. [No-one in the rollover vehicle was a witness at the trial - no-one could remember the incident to give evidence.]

Speed and a lack of seatbelts aside, country drivers usually learn young to: (a) not drive into visible water on a road ahead at speed, and (b) in muddy or boggy road terrain, not to significantly change direction until the wheels of the vehicle reach a firmer surface. Both those injunctions for prudent driving were violated here.

On the appeal the Full Court of Western Australia thought legal causation in tort was sufficiently established to attribute most of the fault to the Shire - effectively by the Shire's employees putting the oncoming driver 'in harm's way' of the 'hole'. This was negligence, found by the positioning and leaving of the loads of gravel, in effect, forcing a driver, albeit speeding, further to the right on the dirt road, to encounter the risk - in the form of the water filled 'bog hole'. As expressed by Wallwork J at [66]:

It is a fair conclusion that the chain of causation of the accident was that there was the deviation to the right, the car hitting the water going into the hole, a swerve to the left, with the speed of the vehicle causing the vehicle to roll when it hit the rough gravel on the other side, due to the sideways motion of the vehicle.

In the end, liability at the appeal came to be apportioned one-third against the driver and two-thirds against the Shire. That was on the basis of a lesser contributory responsibility assessed towards the driver (Flannery) and the greater upon the Shire - or, more pragmatically, as between their insurers.

That result was almost the obverse of the apportionment in *March v Stramere* (30% parked truck owner, 70% against the intoxicated speeding driver).

The appeal result, I suspect, would probably be similar today, even applying s 5C(1)(a) of the *Civil Liability Act* - although it is possible the policy considerations now arising explicitly under s 5C(1)(b) could make it tougher for a plaintiff to achieve a 70% outcome in his favour in close circumstances.

**(b) Cowaramup Bay: 1996**

The second tort case I discuss is the Gracetown cliff collapse litigation. This case arose out of another set of tragic events at Huzzas Beach, Cowaramup Bay, on 27 September 1996. This litigation went to trial for two months - the longest civil case I was in as counsel.

The trial reasons outcome can be found as *McFarlane v The State of Western Australia* [2004] WADC 235. Chillingly, the trial judge, Nisbett DCJ, set the scene at [1] of his reasons:

On 27 September 1996 a number of adults and children were standing beneath a cliff at Huzzahs Beach in Cowaramup Bay watching the progress of an interschool surfing competition. It was mid-afternoon. It was raining and windy and the people there were taking shelter when, without warning, the cliff above them collapsed. Nine people died. Men, women and children. Their survivors bring this action alleging that the defendants could have averted this disaster if they had taken the care they ought to have taken. Among those survivors are some who were present on the day of the tragedy and who either miraculously escaped harm or, in one case even more miraculously, was rescued from it.

Litigation in tort had been brought on behalf of the surviving relatives and dependant family members against the State and the Shire of Augusta-Margaret River. There was a lot of publicity. If I recall correctly, there was a documentary aired on the ABC.

Negligence arguments were run on a basis of contentions that the State or the Shire of Augusta Margaret River ought to have been able to foresee the September 1996 cliff collapse before it happened. That was always going to be hard to show.

An overhang rocky ledge visible on the cliff that collapsed had been in position at Huzzas Beach for as long as anyone locally could remember. One day everyone knew, if they ever thought about it, that by the force of gravity it was going to fall down. But when? No-one could say

The September 1996 cliff collapse was a horrible local and State tragedy. It was fully recognised as such at the time by the whole West Australian community. There was the usual Lord Mayor's Relief Appeal conducted in the aftermath.

But all proper empathy aside, a negligence case is something else. That is an argument about fault. The action took eight years to get a trial, in August and September 2004, eight years later. By then, as we have seen, the *Civil Liability Act 2002* was in force. But it did not apply to the September 1996 collapse events, which had happened prior to that legislation's commencement in 2003.

In the end, the plaintiffs failed to show negligence against anyone at trial: see *McFarlane* supra. Their essential difficulty was that there was no tangible evidence given at trial of any visible or other physical warning feature (such as a visible crack or close by previous fall to indicate an unstable rock formation) to put anybody within the south-west local community on reasonable notice of a possibility, likelihood or imminence of this cliff's ledge imminently collapsing, when it did.

Multiple expert geologists were called as trial witnesses. They all accepted that one day this huge granite overhang, through the force of gravity and atmosphere, must fall. Uniformly, however, none could say or even reliably guess at when that might be. This overhang, safely used for years before by the local community as a convenient shelter against the weather, looked to have been in its same position since the first European settlement of Western

Australia. Predicting the time of its fall was impossible. That it turned out to be September 1996 was an unforeseeable risk.

The question at trial then was not as to whether there had unfolded a shockingly tragic event. It was the proving of fault in the defendants, by an absence of reasonable care on the part of someone responsible. The answer to that legal question was 'No', by the trial judge. There was no appeal run against that decision.

Litigation is sometimes referred to, rather simplistically, as a 'quest for answers', or even sometimes, as a necessary part of the 'grieving process'. Generally, these types of remarks emanate from people with no first-hand experience of the process. Whatever might be said, I doubt the expense of a two-month trial is a burden taxpayers should ever have to bear as an exercise in providing therapy. A civil trial is not a roving Royal Commission of Inquiry. The contested adversarial courtroom trial environment will often be a cold and unpleasant place, even for the strongest of personalities - let alone for the vulnerable. Nor, in my 37-year experience, is a civil trial seeking damages likely to be a reliable place for finding 'answers'.

The problem for this tort case was the lack of evidence to prove fault by a lack of reasonable care in a particular State or local authority, however else one will, as a fellow citizen, greatly empathise with surviving families after a natural disaster.

### **(c) Bushfires at Brookton**

The next case I mention was another saga. On this occasion, I came to be acting as counsel for multiple plaintiffs following an incident arising out of a bushfire, which began in a rubbish tip on the outskirts of the town of Brookton, on 15 December 1997.

A fire emanating from that waste disposal site jumped on the wind to adjacent farmland about half a kilometre away in a nearby paddock, sown with

dried off clover. This was the perfect environment for a bushfire on a brutally hot mid-December day, with a strong wind blowing from the north, to the rapidly spread of fire across fields and paddocks brimming with crops for harvest.

Tragically, the whole of the Brookton farming district and well beyond was heavily affected by a huge fire front that developed that day, in extremely adverse weather and fire fighting conditions.

The tort case at first instance was heard in the Supreme Court before Master Sanderson, who had been appointed as trial judge. His decision, *Brechin v Shire of Brookton* [2002] WASC 228, was delivered on 25 September 2002.

The decision saw success follow for the many plaintiffs who had sustained multi-million dollar property damage, on the basis of them proving negligence against the Shire of Brookton (pragmatically, their insurers). The case was soon taken on appeal, where it became a close run thing: see *Shire of Brookton v Water Corp* [2003] WASCA 240.

In the result, the decision at first instance was upheld as regards the liability found in the Shire.

The first decision was upheld on the basis that no proper fire extinguishment instructions had been issued from the Shire to its employees. Had there been, it was found causatively under tort law principles, that such an instruction about the need for a swift and priority extinguishment of any fire would have materially reduced the risk here of the bush fire harm to fire ravaged properties of the local respondents. Failure to give that instruction to the Shire's employees, who had seen smouldering grain at the local tip for months beforehand and not intervened, was found to have materially increased the risk of harm to the property owning local respondents.

This was another case raising legal causation problems under tort law. The absence of an adequate fire extinguishment instruction to Shire employees was assessed as causatively linked to the instant escape of the fire from the local tip and the ensuing district farmland destruction. McLure J, in the Court of Appeal, applied observations from the decision of Gaudron J in *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, at 420 - 421:

Generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect, or that the injury would have occurred even if the duty had been performed, it will be taken that the breach of the common law duty caused or materially contributed to the injury.

Whether the same result would be arrived at today, applying the *Civil Liability Act* s 5C as regards causation, is an open question. There might be need to have recourse to the exceptional provisions (albeit the word used by the West Australian legislation is 'appropriate', rather than 'exceptional' as is the word used in the New South Wales equivalent law): s 5C(2). This remains a still undeveloped area of law, albeit see a decision of the High Court of Australia in *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48; (2009) 239 CLR 420 at [44] and [55], dealing with the similar New South Wales legislation and a somewhat bizarre shooting incident. There the plaintiffs argued there was a failure to provide security guards at a function centre and that this would have likely stopped a crazed gunman's rampage against innocent people at the function.

The High Court of Australia refused an application for special leave to appeal in the Brookton bushfire litigation: *Shire of Brookton v Brechin* [2004] HCA Trans 415 of 27 October 2004.

#### **(d) Medical negligence: Breech births**

The last case in my quartet is yet another tragic scenario, this time a negligence action brought against a specialist obstetrician, in the wake of a

birthing delivery at a regional West Australian hospital, that saw in the plaintiff infant born with severe cerebral palsy: see *McLennan v McCallum* [2007] WADC 67, decision affirmed by the Court of Appeal of Western Australia as *McLennan v McCallum* [2010] WASCA 45. The core reasons were delivered by Buss JA, with McLure P and Newnes JA agreeing. I had appeared at the trial as counsel on behalf of the insurers for the defendant obstetrician. All the negligence claims were dismissed at trial by Wisbey DCJ.

One of the factors leading to dismissal of the action was a rejection of the plaintiff's arguments contending the obstetrician ought not to have allowed a natural birth to proceed. There had been a 'breech' presentation scenario. There was a factual argument at trial over whether or not this infant's presentation had been a feet first presentation (a footling breech), or whether the true presentation was a different and less problematic type of breech presentation. In the latter case, by the standards of the day, allowing a natural birth was then acceptable with heart rate monitoring and could not be assessed as negligent. The trial judge rendered factual findings upon the nature of the breech presentation, concluding in the end it had not been a footling breech presentation.

Tragic facts aside, the case was legally important, if not only for the evidence that ongoing international research (trials) undertaken over many years had effectively moved the medical profession to a position of knowledge where all breech presentations came necessarily to be addressed by a caesarean intervention. The Hannah trials over some years had generated that change in medical practice. But that was after this birth. Hindsight is not open to be used in rendering the duty of care assessments upon the medical practices of the day, when they come to be assessed as reasonable, or not.

The fundamental factual difficulty for the plaintiff in that case, sickeningly tragic as it was for all concerned, was that the infant was born with a whole range of other medical problems, which were capable of being attributed

to distinct other causes - other than a relatively swift natural birth at a regional hospital. Even if a caesarean intervention had been performed it still could not, in a causative sense, be proven that an earlier birth by a caesarean intervention would have avoided all these problems. There was a fundamental tort causation obstacle.

There was an attempt before the Court of Appeal to argue different aspects of alleged negligence, not run at the trial. That was not allowed. The appeal failed.

### **Conclusions**

This review, I trust, shows a diverse daily range of fault and fact situations that arise in everyday experiences, all catered for under the law of tort, in particular, by common law negligence principles and with modifications now delivered under the *Civil Liability Act 2002*. A theme of proving legal causation is seen to run through many of the cases.

Of course, there have been some hugely interesting tort/negligence cases that I have been involved in as a judge since I joined the Supreme Court in 2009. But time, space and confidentiality considerations presently inhibit a candid discussion about them tonight. That will have to await the memoirs and, hopefully, a future return visit. Thank you again for affording me the opportunity to speak this evening.

KJM

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