respondent; or the charge may have been lost, thus ultimately benefiting X.

No answer is suggested as to which of these possibilities is correct, yet common sense would lead to a conclusion that, on the decision reached by the court, Porter must be held to have come under an obligation to assign the charge to the respondent.[43]

From the foregoing it appears that the following conclusions may be drawn. The medium of a case stated may be dangerous in its use because statements may be made in it which describe an action by the use of 'words which assume that it has legal efficacy corresponding to its appearance, notwithstanding that the very question whether it has that legal efficacy is in dispute',[44] or because it prevents the consideration of all the relevant facts.[45] Secondly, it would appear that there is an area of fact in cases of this type where a fraudulent person is present purporting to make a bargain with another and that circumstances may justify a finding that, notwithstanding some fraud and deceit, the correct view may be that a bargain was struck with the person present, or on the other hand they may equally justify a finding the other way.[46] Finally, it may seem that the best approach in such cases is to identify each transaction separately and then to determine the relationship of the mistake to the transaction, so testing whether the mistake is fundamental to the transaction.[47]

J. P. M. DE KONING

## McHALE v. WATSON[1]

*Trespass to the Person—Intent or Negligence—Onus of Proof; Original Jurisdiction of the High Court.*

This was an action commenced in the original jurisdiction of the High Court[2] by Susan McHale, a resident of South Australia, and an infant, who, through her father as next friend, sued Barry Watson, also an infant, his father and his mother, all residents of New South Wales. The action was to recover damages for personal injuries suffered by the plaintiff arising out of events which occurred in January, 1957. The defendant Barry Watson, aged twelve years, threw a sharpened piece of metal, described as a dart, which struck Susan McHale, who was almost ten years of age, in the right eye and resulted in serious consequences to her. The question of limitations of actions did not arise, the delay being no bar to an action by an infant.

43 Windeyer J. is the only judge who refers to this point. He comes to the conclusion that Porter should receive the certificate of title from the respondent who must must also disclaim in favour of Porter any rights which he (the respondent) might have acquired. As the majority decided the suit in favour of the appellant, it seems logical that Porter ought to be ordered to assign his equitable charge to the respondent.

44 38 A.L.J.R. 187 *per* Kitto J.

45 *Ibid.* 191 *per* Taylor J.

46 *Ingram v. Little* [1961] 1 Q.B. 31, 50 *per* Sellers L.J.

47 38 A.L.J.R. 187 *per* Barwick C.J.

1 (1964) 38 A.L.J.R. 267 High Court of Australia; Windeyer J.

2 By section 75(iv) Constitution of Australia:

Before considering the important issue, that is, the action against the son, Windeyer J. proceeded firstly to dispose of the action against the parents of Barry Watson. He stated the common law rule that a parent was not vicariously liable for his child's wrongdoings. But if he had ratified the act, or directed or encouraged the child, the parent was liable—as an independent tortfeasor. A parent who employed a child could also be liable for his child's torts, but on a master and servant basis. Liability may also be imposed on a parent for his own negligence in failing to exercise reasonable control of his child. However, a parent was not liable in such cases merely because he was a parent. His Honour also touched on the novel point which as yet has not been fully discussed in earlier cases, the question of which parent you join as the defendant —the mother or the father. Simply because one parent has failed in his exercise of parental responsibilities does not make the other parent also responsible.[3] His Honour said:

> although the proper upbringing and control of a child is commonly regarded as the responsibility of both parents when they share his custody, I do not think that one becomes implicated in the acts or omissions amounting to negligence of the other unless he or she in some way participated or concurred in them. They do not, because they are parents, become joint tortfeasors.[4]

The allegation of negligence failing, the action against the parents was dismissed.[5] His Honour then turned to the substantial issue of the liability of the son, Barry Watson, both in trespass and negligence. His Honour held that to succeed in trespass, there had to be evidence either that the dart was thrown with intent, or negligently, and that the onus of proving this was on the defendant. His conclusion was 'that Barry Watson did not throw the so-called dart with the intent that it hit Susan McHale'.[6] With respect to the negligence aspect it was held that the defendant did exercise care, having regard to his age at the time.[7] The action was dismissed.

In the course of his judgment, His Honour discussed what became the two main points of controversy concerning the tort of trespass to the person (indeed, also to goods and land). The first concerned doubts as to whether an action lay in negligence or for an intentional wrong. This doubt arose out of the obscure origins of trespass to the person and the early common law doctrine of strict liability, that made even a faultless trespassory contact actionable unless the defendant could establish that the accident was inevitable.[8] His Honour expressed his agreement with the proposition established since *Stanley v. Powell*,[9] despite academic

3 *e.g.* see *Newton v. Edgerley* [1959] 1 W.L.R. 1031.
4 (1964) 38 A.L.J.R. 267, 268.
5 *Ibid.* His Honour referred to *Smith v. Leurs* (1945) 70 C.L.R. 256; *Salmond on Torts* 13th ed., (1961) 80; *Halsbury's Laws of England,* 3rd ed., xxi. p. 150; and an article by Mr P. L. Waller in (1963) 4 M.U.L.R. 17, concerning general principles governing liabilities in tort of a child and his parents.
6 (1964) 38 A.L.J.R. 267, 268. 7 *Ibid.* 269.
8 *Weaver v. Ward* [1616] Hob. 134; Fleming, *The Law of Torts,* 3rd ed., 19.
9 [1891] 1 Q.B. 86.

criticism[10] of that case, that a non-intentional trespass to the person was not actionable without negligence."

The second and more important controversy regarding a direct trespass is whether the burden lies upon the plaintiff to prove the intention or establish the negligence, or whether it is on the defendant to disprove the intention or negligence. In the present case His Honour took the view that the defendant carries the onus of proving absence of intent and negligence. In doing so he was aware of the academic nature of this problem and that it had 'little practical consequence for adjudication upon the facts of this case'.[12] It only really arises where there is a question of law in conflict with the statement of claim and there is no evidence, or in the case of a dispute over the Statute of Limitations.

In deciding that the burden of proof is on the defendant, His Honour reached a result contrary to that arrived at in England[13] and in Canada,[14] and followed in New Zealand.[15] In all these cases the authorities were extensively considered. To support his view, however, Windeyer J. relied on *Blacker v. Waters,*[16] *Williams v. Milotin,*[17] and *National Coal Board v. Evans.*[18] His Honour considered that the law was 'as stated in the old and constantly quoted words in *Weaver v. Ward,*[19] . . . that "No man shall be excused of a trespass except it be adjudged utterly without his fault".'[20] But this case really does nothing to support His Honour's conclusion, because the point was not considered there. *Weaver v. Ward* has been often quoted in support of the present day view that an unintentional trespass without negligence gives rise to no liability. All that that case is authority for is that 'where the defendant was entirely without fault, he could have a good defence to an action in trespass'.[21] The question of burden of proof did not arise at all in *Weaver v. Ward,* and the same can be said of *National Coal Board v. Evans.* In *Blacker v. Waters* it was really stated as obiter,[22] since the trial judge found as a fact that there was no intention to injure, and there was evidence of negligence. *Williams v. Milotin* turned on a different question—the statutory interpretation of negligence in relation to the Statute of Limitations.

It seems regrettable that His Honour reached the conclusion that he did, for it rests only on the distinction between direct and indirect injuries to the person which was only relevant to the forms of action. Where the injury suffered was a direct result of the defendants' force, trespass *vi et armis* applied, but if the harm was merely consequential, trespass on the case was used. When the forms of action were abolished this distinction

10 Particularly *Pollock on Torts,* 15th ed., 128.
11 (1964) 38 A.L.J.R. 267, 268. 12 *Ibid.*
13 *Fowler v. Lanning* [1959] 1 Q.B. 426.
14 *Walmsley v. Humenick* [1954] 2 D.L.R. 232.
15 *Beals v. Hayward* [1960] N.Z.L.R. 131. 16 [1928] S.R. (N.S.W.) 406.
17 (1957) 97 C.L.R. 465, 474. 18 [1951] 2 K.B. 861.
19 [1616] Hob. 134. 20 (1964) 38 A.L.J.R. 267, 268.
21 *National Coal Board v. Evans* [1951] 2 K.B. 861, 871 *per* Cohen L.J. Singleton L.J. (at 879) and Morris L.J. (at 880-1) both used *Weaver v. Ward* for this proposition only. 22 (1928) S.R. (N.S.W.) 406, 410.

should also have disappeared. The question is no longer which of the forms of action apply, but now relates to the cause of action—given certain facts, can there be recovery? Were it otherwise, there would be a distinction between negligence and trespass as regards the burden of proof. As Diplock L.J. pointed out in *Letang v. Cooper*:[23]

> If A., by failing to exercise reasonable care, inflicts direct personal injuries upon B., it is permissible today to describe this factual situation indifferently, either as a cause of action in negligence or as a cause of action in trespass, and the action brought to obtain a remedy for this factual situation as an action for negligence or an action for trespass to the person . . . But no procedural consequences flow from the choice of description by the pleader: see *Fowler v. Lanning*.[24]

It seems all the more unfortunate that Windeyer J. did not take the opportunity to bring Australian law up to date and in line with present law in England. Just a few months before the present case, the Court of Appeal in *Letang v. Cooper*[25] not only approved of *Fowler v. Lanning*, but even went beyond this and said that trespass lies only if intention is shown and that where we have an unintentional trespass, negligence is the only action available. The result achieved—that we can no longer have a negligent trespass—follows the view held in the United States of America for many years.

It would thus appear that in Australia, after obiter in *Williams v. Milotin*,[26] and now *McHale v. Watson*, the question of where the onus of proof for trespass to the person lies, is far from settled. In England it would now appear as well established[27] that it lies on the plaintiff, and it would seem desirable that when the High Court has the opportunity to again consider this question, it will bring our law into line with the English decisions.

The final point is merely to raise the question of whether actions of such a nature as came before the court in this case are appropriate cases to be heard as part of the High Court's original jurisdiction. Since the High Court was also designed as a general court of appeal, it is questionable, as Professor Z. Cowen points out,[28] whether actions of this type, where there is no restriction on the minimum amount in issue, should be settled at first instance in the High Court on a simple showing of diversity. It seems to place a 'potentially great burden of original jurisdiction on the (High) Court'.[29]

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[23] [1964] 3 W.L.R. 573; [1965] 1 Q.B. 232. [24] *Ibid.* 580. [25] *Ibid.*
[26] *Supra.*
[27] *Fowler v. Lanning* has also been academically approved by Fleming, *op. cit.* 23; contra *Salmond on Tort*, 13th ed. 320.
[28] *Federal Jurisdiction in Australia*, 92. [29] *Ibid.*