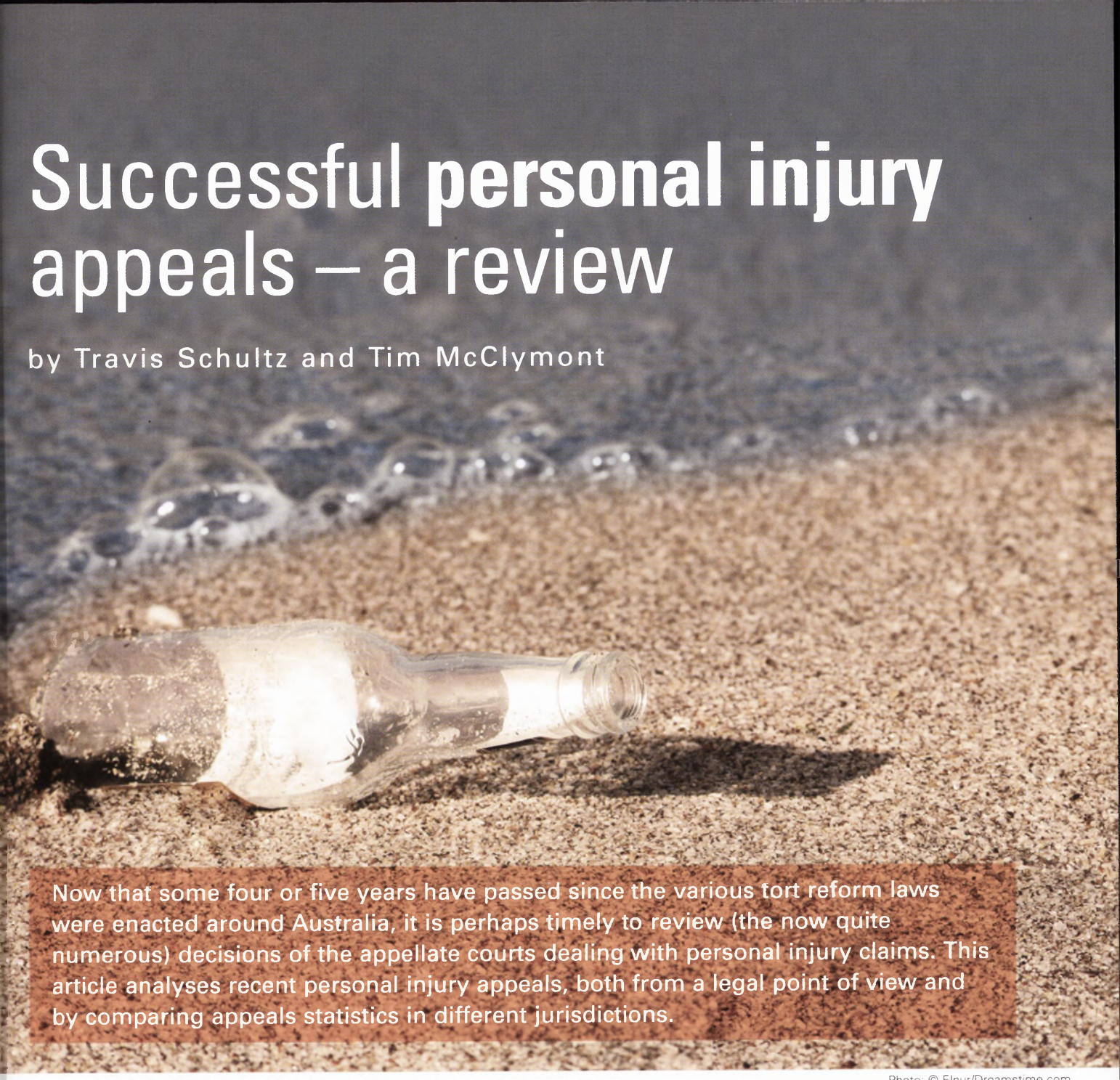
Successful **personal injury** appeals – a review

by Travis Schultz and Tim McClymont



Now that some four or five years have passed since the various tort reform laws were enacted around Australia, it is perhaps timely to review (the now quite numerous) decisions of the appellate courts dealing with personal injury claims. This article analyses recent personal injury appeals, both from a legal point of view and by comparing appeals statistics in different jurisdictions.

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Appeal courts provide guidance to lower courts and a consistency in approach to legal issues. Such consistency enables lawyers not only to predict outcomes and provide advice, but also to promote community confidence in our legal system.

In the personal injury context, the legislature and the appellate courts have been engaged in a 'tug of war' of Herculean proportions over the past decade. No sooner had the various parliaments enacted the civil liability Acts, and bolstered protection for highway authorities and councils, than appellate courts began making decisions that ameliorated to some extent the otherwise harsh effects of the legislation. In several cases, for example, the term 'obvious risk', introduced by the civil liability Acts, was construed in a way that allowed plaintiffs who had fallen and suffered injuries due to a so-called 'hidden trap' to recover compensation.[1] Both the legislature and the appeals courts justifiably believe that their legislation and decisions reflect community values and standards, yet there is a tension between the two often reminiscent of Newton's third law of physics: 'for every action there is an equal and opposite reaction'.

A topical example is the fate of the 'highway rule' which, after more than 100 years of serendipitous existence, was dismantled by the High Court in *Ghantous v Hawkesbury City Council*.[2] In response to the decision, state parliaments legislated to partially >>

reinstate the immunity for highway authorities.[3]

PERSONAL INJURY LAW AND THE APPELLATE COURTS

Appellate courts – in particular, the High Court – have recently handed down decisions that have had a significant impact on the law as it applies to personal injury claims. Some notable decisions include:

- *Berowra Holdings Pty Ltd v Gordon*,[4] where the High Court held that non-compliance by the plaintiff with the pre-court procedures in the *Workers' Compensation Act*,[5] did not deny legal effect to the proceedings commenced by the plaintiff. The High Court held that the pre-court procedure prescribed by the Act did not affect the plaintiff's common law right to bring a claim for damages; it merely delayed it. The purpose of the section was held to be to facilitate non-litigated settlements, not to be an indiscriminate bar to the common-law right to bring a claim.
- *Leichhardt Municipal Council v Montgomery*,[6] where the High Court held that the council, which had engaged a contractor to undertake road repairs, was not liable for the negligent acts of that contractor. The plaintiff was injured when she fell into a telecommunications pit that the contractor had covered with a piece of carpet. The High Court held that the council was under a duty to take reasonable care to prevent injury, and that duty may well involve some monitoring of the contractor's work activity. However, that did not extend to 'a duty to ensure that no employee of the independent contractor act carelessly'.[7]
- *State of New South Wales v Fahy*,[8] where the plaintiff, a police officer, sustained psychiatric injuries as a result of providing assistance to a stabbing victim. She alleged negligence on the part of her employer for not ensuring that working police partners stayed together, and a lack of support by her work colleague. The Court of Appeal found that there had been a breach of duty by the Police Service, because it had not implemented a safe system of work. Special leave was granted by the High Court, which considered not just whether there had been a breach, but also whether the decision in *Wyong Shire Council v Shirt*[9] should be reconsidered. The High Court was divided 4:3 in finding that the Police Service had not breached its duty of care, after applying *Shirt*. The Police Service was not required to have a system of work that required partnered officers to stay together on all occasions. In dissent, Callinan and Heydon JJ thought that there was a need to reconsider the principles enunciated in *Shirt*.
- *Roads and Traffic Authority of New South Wales v Dederer*,[10] where the majority of the High Court (Gummow, Callinan and Heydon JJ) held that the RTA had not breached its duty of care to the plaintiff, who was seriously injured when he dived off a bridge into the channel below. The allegations of breach included a failure to put in place more elaborate warning signs and physical barriers to stop people climbing the existing hand railing. In applying Mason J's test in *Shirt*,[11] Gummow and Heydon JJ held that the lack of previous incidents meant that the risk of injury was low. There was thus no requirement for the council to implement the measures suggested by the plaintiff. In arriving at this decision, the Court considered the doubtful utility of the measures and the significant expense of implementing them.

Creating a uniform approach to civil liability legislation around the country is a major undertaking for the High Court. To date, tort reform laws have been inconsistently interpreted by appellate courts around Australia. An example of the lack of a uniform approach is the different interpretations of similar provisions in *Geahan v Daubert*[12] and *Grice v State of Queensland*,[13] by the NSW and Queensland Courts of Appeal. These almost identical state provisions[14] were intended to impose thresholds on the entitlement to recover care and assistance.

Another area arguably in need of the High Court's attention is the issue of duty of care, particularly in the context of an 'obvious risk'. Does the obviousness of the risk need to be considered in identifying whether a duty of care is owed, or is it perhaps relevant only to breach? Although, in late 2005, the High Court provided some guidance on the issue in *Vairy*,[15] *Mulligan*[16] and *Neindorf*,[17] there remains inconsistency in the approach to the issue, particularly in NSW. For example, the decision in *Richmond Valley Council v Standing*,[18] where the Court (notably Heydon JA) held that if a hazard is so obvious that a pedestrian taking reasonable care for their own safety will be able to see and avoid it, it poses a foreseeable, but not reasonably foreseeable, risk of injury. As a consequence, the Court found that the Council did not owe a duty of care to the plaintiff in respect of the trip hazard in the footpath. On the other hand, in *Sutherland Shire Council v Henshaw*, Bryson JA held that what 'is foreseeable about a hypothetical able-bodied fully-sighted sober pedestrian at a walking pace in day lit serene weather is inadequate as a test of the duty of care of a highway authority'.[19] A similar view was taken in *Roads and Traffic Authority v McGregor*.[20]

APPEALS STATISTICS 2006 – 2007

There have been a large number of appeals in personal injury cases across Australia in recent years. The appellate courts considering the most personal injury matters were the NSW and Queensland Courts of Appeal.

The following tables set out statistics relating to appeals in personal injury matters on the issues of liability or quantum (or both) between 2006 and 2007.[21]

The statistics indicate that, for 2006 – 2007, an appeal is far more likely to succeed in a NSW appellate court than in most other Australian states or territories. Over this period, 70 per cent of appeals to the High Court have succeeded, which is not surprising given that appellants must first obtain leave before their appeal is even considered. This leave application process normally ensures that less meritorious applicants are filtered out.

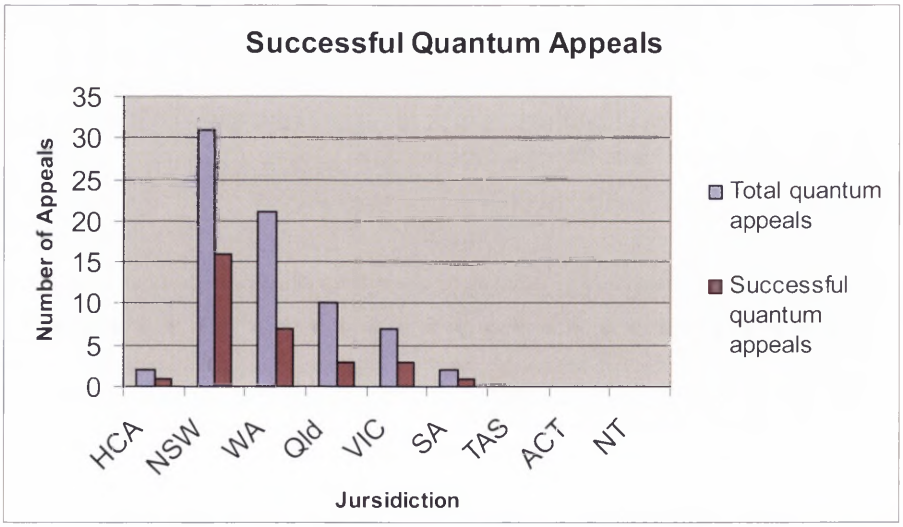
Table 1: successful appeals in personal injury matters (on issues of liability and/or quantum)

	Succesful appeals 2006	Successful appeals 2007	Total appeals 2006 – 2007
High Court	3	4	10
NSW	40	21	118
Queensland	3	4	22
Western Australia	9	6	43
Victoria	7	1	16
South Australia	0	1	8
Tasmania	1	0	2
ACT	0	0	3
Northern Territory[22]	0	0	0
Total	63	37	222

Table 2: successful appeals by plaintiffs and defendants

	2006		2007	
	Plaintiff appeals	Defendant appeals	Plaintiff appeals	Defendant appeals
High Court	3	0	0	4
NSW	15	25	9	12
Queensland	1	2	0	4
Western Australia	5	4	2	4
Victoria	3	4	0	1
South Australia	0	0	1	0
Tasmania	0	1	0	0
ACT	0	0	0	0
Northern Territory	0	0	0	0
Total	27	36	12	24

The following graphs show the numbers of successful appeals by issue – either quantum or liability. A significant number of the cases reviewed involved both issues, and are represented in both graphs.



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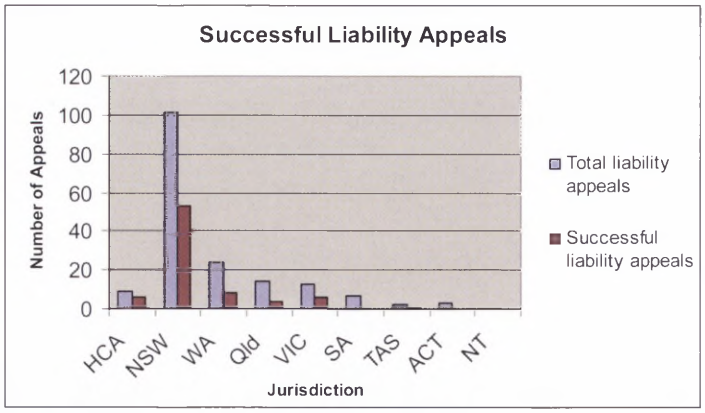

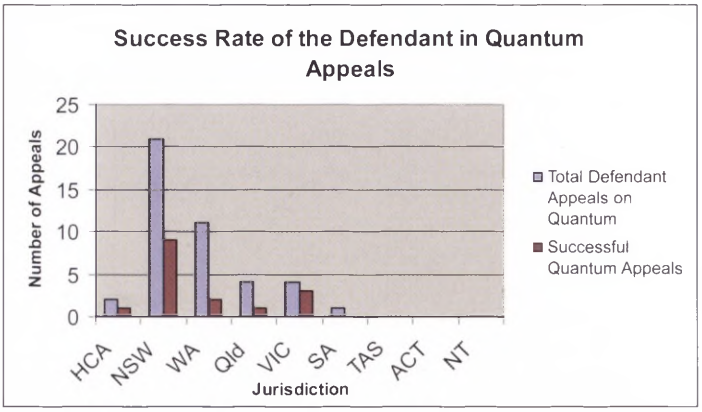

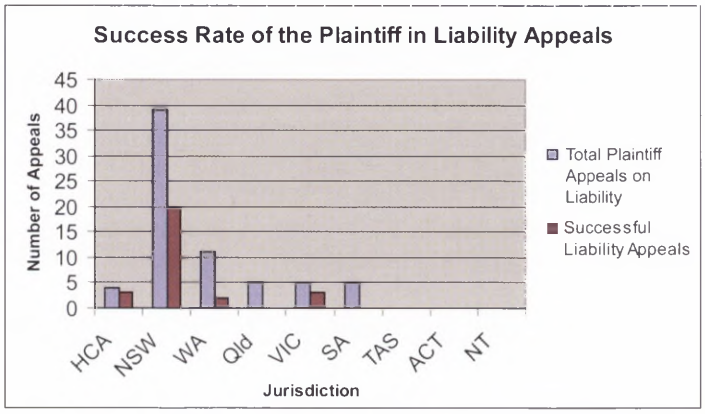

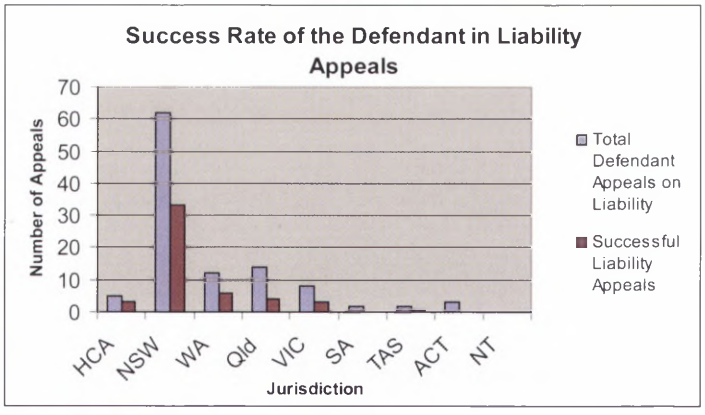

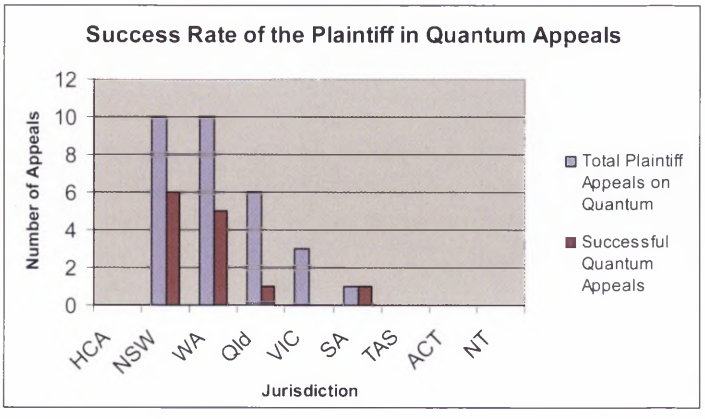

Notes: **1** In *Penrith City Council v Parks* [2004] NSWCA 201, a slab was cut in a footpath, so that each section was unstable and could rise when weight was put on it and become a trip hazard. It was found to be a hidden danger. Similarly, in *Parramatta City Council v Watkins* [2001] NSWCA 364, the NSWCA found for a plaintiff who tripped over part of a manhole cover, which had dropped 50mm below the level of the road surface. Hodgson JA, with whom Powell JA and Rolfe AJA agreed, thought that sudden variations of that magnitude might be expected at the edge of footpaths, but that the same may not be true within the paved surface of an 'apparently well maintained road' (at 106). **2** (2001) 206 CLR 512 (*Ghantous*). **3** See s37(1) *Civil Liability Act* 2003 (Qld); s45(1) *Civil Liability Act* 2002 (NSW); s42(1) *Civil Liability Act* 1936 (SA); s5Z *Civil Liability Act* 2002 (WA); s84 *Wrongs Act* 1958 (Vic); s42(1) *Civil Liability Act* 2002 (Tas); s113 *Civil Law (Wrongs) Act* 2002 (ACT). **4** [2006] HCA 32. **5** Section 151C *Workers' Compensation Act* 1987 (NSW). **6** [2007] HCA 6. **7** Per Gleeson CJ at [22]. **8** [2007] HCA 20. **9** (1980) 146 CLR 40. **10** [2007] HCA 42. **11** (1980) 146 CLR 40. **12** [2002] NSWCA 260. **13** [2005] QCA 272. **14** Section 72 *Motor Accidents Act* 1988 (NSW); s54 *Personal Injuries Proceedings Act* 2003 (Qld). **15** *Vairy v Wyong Shire Council* [2005] HCA 62. **16** *Mulligan v Coffs Harbour City Council* [2005] HCA 63. **17** *Neindorf v Junkovic* [2005] HCA 75. **18** [2002] NSWCA 359. **19** [2004] NSWCA 386 at [88]. **20** [2005] NSWCA 388, the Court of Appeal refused to disturb a trial judge's findings that a damaged section of footpath that caused a plaintiff's fall was not an obvious hazard, despite the plaintiff's concession that the damaged section of the footpath would have been obvious in daylight (the plaintiff's injury occurred at night time in windy conditions, causing leaves to blow along the footpath). **21** The statistics in this section were compiled by the authors after a review of cases in each jurisdiction as at 5 December 2007. **22** There were no personal injury-related appeals in the NT in 2006 or 2007.

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