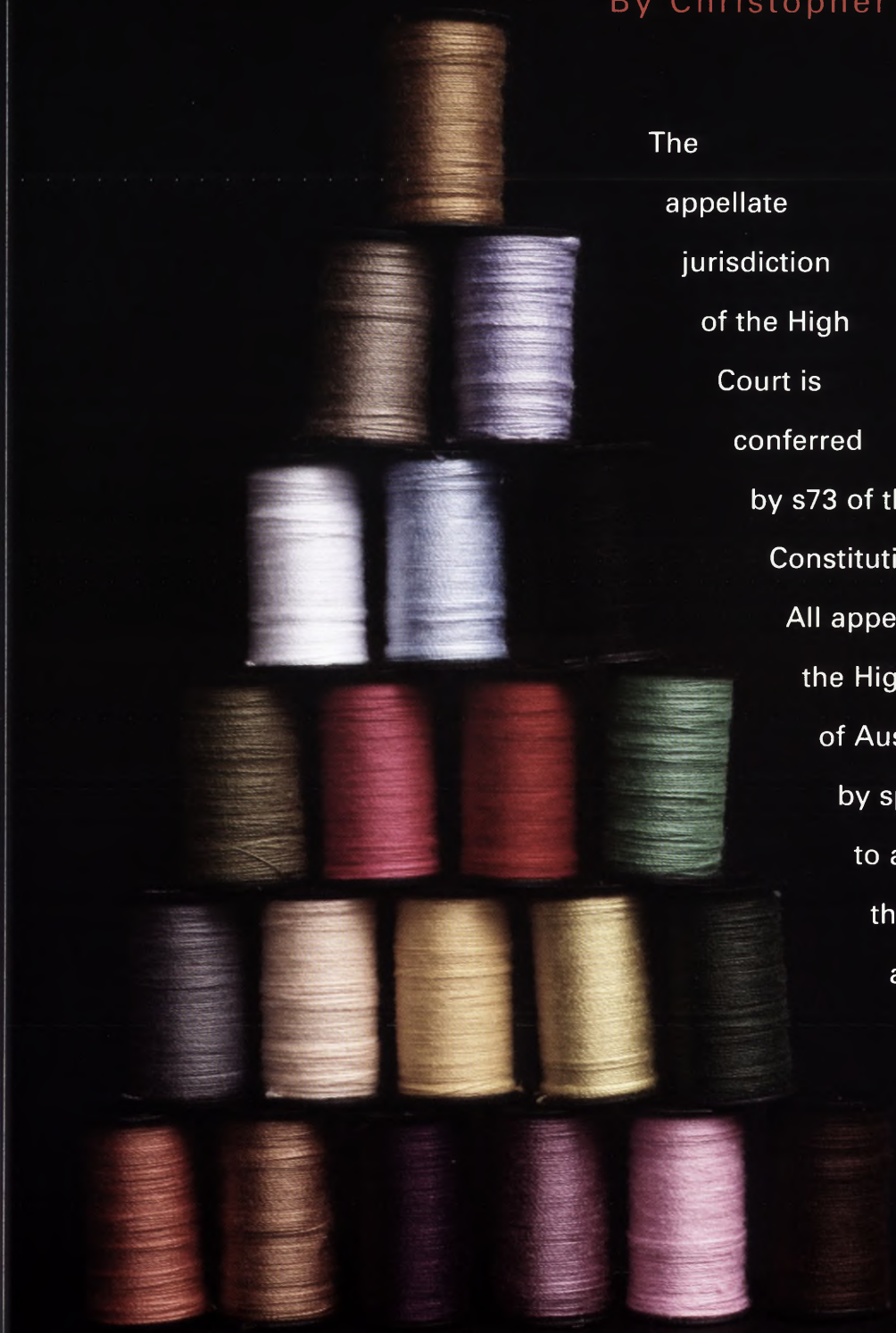
HIGH COURT APPEALS

By Christopher T Barry QC



The appellate jurisdiction of the High Court is conferred by s73 of the Constitution. All appeals to the High Court of Australia are by special leave to appeal, with the exception of appeals brought pursuant to a certificate from the Family Court.

SPECIAL LEAVE TO APPEAL

Obtaining special leave to appeal is the most difficult aspect of a High Court appeal. The criteria for granting special leave are set out in s35A of the *Judiciary Act* 1903 (Cth):

> 'In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:
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> a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
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> (i) that is of public importance, whether because of its general application or otherwise; or
>
> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
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> b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.'

The High Court's function is to correct errors in intermediate courts and to develop the law. These functions control how this section works in practice. The error may concern how the intermediate court has discharged its function, or involve a matter of legal principle that needs to be clarified or corrected to achieve a coherent body of law throughout Australia.

Special leave is sometimes granted on either a limited or conditional basis. Often, the successful applicant agrees not to disturb the costs orders made in the lower court, and to pay the respondent's costs of the appeal. These conditions often occur with 'institutional' appellants; for example, leave to appeal in *Lepore v State of New South Wales*,[1] a case involving a state education department, was granted on this conditional basis.

Sometimes, where a number of grounds are argued on an application for special leave to appeal, leave is granted on only one of the grounds. Sometimes, leave to appeal is granted on grounds that are not mentioned in the application. In these cases, the High Court itself identifies an important point of principle and invites the applicant to include it as a ground of appeal. This happened on the special leave hearing in *Nais v Minister for Immigration and Multicultural and Indigenous Affairs*.[2] An application for special leave must fit within one of the classes of matters where special leave is likely to be granted, and avoids one of the 'pitfall' areas identified below.[3]

There are two broad categories of matters for which special leave is granted. The first is in the Court's 'supervisory jurisdiction',[4] and the second includes areas where development of the law is required.

The supervisory jurisdiction

Many of the cases in the 'supervisory jurisdiction' category follow a familiar pattern. A trial judge has made findings of fact that are overturned by a court of appeal, and leave is granted so that the High Court can 'supervise' the way in which the particular court of appeal discharged its functions. In *Zuvela v Cosmarnan Concrete Pty Ltd*, the High Court said:

> 'When a Court of Appeal is reviewing by way of rehearing the findings of fact made by a trial judge who has had the advantage of hearing and observing the witnesses, the Court of Appeal should not treat the appeal as a hearing *de novo*.'[5]

In the exercise of this 'supervisory jurisdiction', the High Court requires intermediate courts of appeal to restrain themselves from interfering with decisions made by trial judges based upon findings of fact.[6] Provided that a court of appeal gives appropriate weight to the trial judge's advantageous position of being able to evaluate the evidence firsthand, it may interfere if satisfied that the finding was erroneous. >>

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Whether special leave involving the 'supervisory jurisdiction' will be granted depends upon a careful analysis of what the trial judge did, what the court of appeal did with the trial judge's findings, and whether at first instance or on appeal the lower courts have properly discharged their respective functions.

Successfully obtaining special leave in a 'supervisory jurisdiction' case is enhanced if there is a split decision in the intermediate appellate court, and even further enhanced if the judge in the minority has provided persuasive reasons for his or her dissenting judgment.

The development of the law

Numerous pitfalls bedevil this class of special leave application.

Cases where special leave is refused are often described as being not a 'suitable vehicle', a phrase that means that the legal point raised in the application for special leave cannot be sufficiently clearly identified by the facts so as to allow the outcome of the case to turn on that point of principle. For example, the reasoning in the intermediate court of appeal may seem clearly unsound, but on the facts of the case the right result was achieved. When refusing special leave in these cases, the High Court has noted that such refusal should not be taken to endorse the judgment in the lower court.

It may also be that the case on appeal involves such factual complexity that the High Court would find it difficult to distil the legal point of principle that requires consideration. Such cases will not be granted special leave.

On the positive side, where the legal issues to be resolved fall within the specific criteria of s35A, the prospects of obtaining special leave are considerably enhanced.

The best examples occur where the law has developed in different directions in two states or territories. The High Court's position as the final court of appeal makes it the ideal forum for ensuring consistency throughout the country on matters of legal principle.

Differently constituted courts of appeal within the same state have often resolved similar cases in different ways. Where the facts enable the legal point to be clearly examined and determined by the High Court, such cases have reasonably good prospects of obtaining a grant of special leave to appeal.

An application for special leave would not normally succeed where the subject matter of the dispute is the construction of a statute that has relevance only in a particular state. Such an application may be successful where there are similar statutes in several states, and the courts of appeal in the different states have construed similar provisions in different ways. Even though the appeal would involve only a matter of statutory construction, that kind of conflict can be satisfactorily resolved only by the High Court's consideration. This ensures a uniform approach throughout Australia to a particular provision.

Cases involving questions of fact almost never obtain a grant of special leave to appeal unless they fall within the 'supervisory jurisdiction', as discussed above. The task is almost impossible where there are concurrent findings of fact – that is, where a trial judge has found the facts in a particular way and a court of appeal has found the facts in the same way. Similarly, applications for leave to appeal in relation to interlocutory decisions almost never obtain a grant of special leave, because the case may ultimately be decided upon a different basis when the whole of the evidence comes before the primary court, making the High Court's finding redundant.

THE APPEAL

The success rate for applications for special leave to appeal to the High Court is approximately 7 per cent. Those applicants who obtain special leave to appeal face further hurdles in the substantive appeal.

High Court appeals will always concern an error of principle, either in the way that the intermediate appellate court has carried out its function (the 'supervisory jurisdiction'), or an error of principle in the law as it was applied by the intermediate court, of a kind that requires further consideration by the High Court.

Accordingly, there is a radical difference between appeals in the High Court and appeals in state and territory courts of appeal.[7] A number of consequences follow from the fact that the High Court is the final court of appeal, and from the fact that it is not bound by its previous decisions. The first is that decisions by judges lower in the judicial hierarchy do not have the same precedent value as they would have if the matter were being argued in an intermediate appellate court. In the High Court, everything is open for reconsideration.

Of course, the High Court will not overrule one of its previous decisions lightly, and will also carefully analyse the reasons of any judge from an intermediate court. However, the principal objective of the High Court is to develop a coherent body of law throughout Australia, not only within particular areas of law but, insofar as it can be done, between different areas of law. This point can be demonstrated by the way in which the High Court has dealt with negligence law over the last few decades.

Appeals in negligence matters

Consider, for example, expansion in the law of negligence in the master and servant cases in the 1980s.[8] The liability for medical negligence was extended by *Rogers v Whitaker*,[9] and the old law on occupier's liability was subsumed into the

general law of negligence in *Australian Safeway Stores Pty Ltd v Zaluzna*.[10]

More recently, the scope of negligence law has been wound back, as its development was seen to be undermining established principles in other areas of the law. A good illustration of that winding back is the dicta of McHugh J in *Dovuro Pty Ltd v Wilkins*, where his Honour said:

> 'If negligence law is to serve any useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of ordinary members of the community or, in cases of expertise, of the experts in that particular community. To hold defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute. That is not to say that a defendant will always escape liability by proving that his or her conduct was in accord with common practice. From time to time cases will arise where, despite the common practice in a field of endeavour, a reasonable person in the defendant's position would have foreseen and taken steps to eliminate or reduce the risk that caused harm to the plaintiff. But before holding a defendant negligent even though that person has complied with common practice, the tribunal of fact had better first make certain that it has not used hindsight to find negligence. Compliance with common practice is powerful, but not decisive, evidence that the defendant did not act negligently. And the evidentiary presumption that arises from complying with common practice should be displaced only where there is a persuasive reason for concluding that the common practice of the field of activity fell short of what reasonable care required.'[11]

Such cautionary observations are not seen in the judgments of the 1980s and 1990s, when negligence law was rapidly expanding.

Readers of this publication will be well aware that parliaments throughout Australia have enacted various statutory changes incorrectly described as tort law reform. It is regrettable that these matters were not left to the institution best able to deal with the systematic and rational development of the law.

The way that negligence law has expanded and contracted illustrates how the High Court carries out its law development functions. Any legal proposition advanced in the High Court is always tested by reference to its impact on the development of the law – both within the area of law relating to the dispute, and more broadly. To this extent, policy considerations play a role in High Court appeals not seen in intermediate courts of appeal. In an intermediate court of appeal, the focus is on whether or not error can be established in the judgment of the trial judge. In the High Court, the facts of the case, and the reasoning by the intermediate court of appeal, are merely the springboard for examining, and possibly refining, a particular legal principle.

The result is that going from trial to court of appeal to the High Court can be an interesting experience. By the time a case gets to the High Court, it is sometimes barely recognisable to the original parties, or even to their lawyers. This is inherent in the process, because High Court cases are essentially the mechanism – or 'the vehicle' – by which a matter of principle is examined and decided. ■

Notes: **1** (2001) 212 CLR 511. **2** (2005) 80 ALJR 367. **3** See 'Clarification or development of the law', below. **4** The words 'supervisory jurisdiction' do not appear in the statute law or case law. I use the phrase as a convenient way of encapsulating what is being done. **5** (1996) 71 ALJR 29 at 31. **6** *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *Fox v Percy* (2003) 214 CLR 118. **7** For discussion of the nature of appeals to intermediate courts of appeal, see CT Barry, 'Appellate Review of Procedural and Factual Error' (1991) 65 ALJ 720. **8** See *McLean v Tedman* (1984) 155 CLR 306; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Braistina v Bankstown Foundry Pty Ltd* (1986) 160 CLR 301. **9** (1992) 175 CLR 479. **10** (1987) 167 CLR 479. **11** (2003) 215 CLR 317 at 329.

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