CIVIL LIABILITY LEGISLATION

A NATIONAL OVERVIEW

By Dominic Villa

This paper reviews the various legislative responses to the *Ipp Report* throughout Australia, insofar as they relate to liability. Using the NSW *Civil Liability Act* 2002 as a model, it considers the legislative response in each jurisdiction by reference to that Act.

On 2 July 2002, the federal government, together with the state and territory governments, appointed a 'panel of eminent persons' to review the law of negligence. This review was chaired by Justice David Ipp of the Supreme Court of NSW, and became popularly known as the 'Ipp Committee'. The Committee was required to 'inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death', and to 'develop and evaluate principled options to limit liability and quantum of awards for damages'.

Driven by the demands of politics (rather than good policy), the federal government required the Ipp Committee to report by 30 August 2002 in relation to the standard of care in professional negligence claims, the liability of non-profit organisations, the interaction of the *Trade Practices Act* 1974 with the law of negligence, and limitation periods. The remainder of the terms of reference were to be reported on by 30 September 2002.

The Ipp Committee's *Final Report* contained 61 recommendations on the reform of the law of negligence. The federal, state and territory governments committed themselves to implementing the majority of these reforms.

In NSW, the charge was led by the NSW government. Even before the appointment of the Ipp Committee, the *Civil Liability Act* 2002 (NSW) had been enacted, taking effect from 20 March 2002 and limiting the recovery of damages for personal injury claims. The NSW Government had also released a draft bill for discussion, setting out more substantive reforms to the law of negligence in NSW. While the wording of some of these proposals was amended in the light of the recommendations of the Ipp Committee, the substance was not. Accordingly, on 28 November 2002 the *Civil Liability Amendment (Personal Responsibility) Act* 2002 received royal assent.

Despite the recommendation of the Ipp Report – that its implementation be incorporated into a single statute to be enacted in each jurisdiction – a number of different approaches has been adopted, both as to the recommendations to be implemented and the manner of their enactment.

It should be remembered that the NSW statute does not, in all cases, adopt the recommendations of the Ipp Report. In some places it rejected or disregarded the findings of the Committee, and in others it has implemented provisions that were not considered by the Ipp Committee at all. This paper highlights the similarities and differences between the civil liability regimes enacted in each of the states and the territories.

NEW SOUTH WALES

The NSW *Civil Liability Act* 2002, as amended by the *Civil Liability Amendment (Personal Responsibility) Act* 2002, enacts a wide-ranging series of reforms to the common law of negligence (although the reforms are not limited to the tort of negligence, but apply irrespective of the cause of action sued upon).

The provisions relating to duty of care provide that persons will not be liable unless they knew or ought to have known of the risk; the risk was not insignificant; and, in the circumstances, a reasonable person would have taken precautions. The principles for determining whether a reasonable person would have taken precautions against the risk are also described.

The element of causation is redefined, with causation now consisting of two elements: factual causation and scope of liability. The principles for determining whether or not these two elements have been established are stated. It is also made clear that the onus rests on the plaintiff to prove, on the balance of probabilities, any fact relevant to the issue of causation. The reforms provide that statements made by plaintiffs after they have suffered injury – as to what they would have done had the defendant not been negligent – are inadmissible.

The common law relating to assumption of risk has also been reformed. People are presumed to have been aware of an obvious risk, unless they can prove that they were not aware of it. There is no duty to warn of an obvious risk – unless the injured person requested information about the risk; a risk warning is required by law; or the risk is a risk of injury or death resulting from the provision of a professional service. And there is no liability for the materialisation of an inherent risk (that is, a risk that cannot be avoided even by the exercise of reasonable care).

Recreational activities are subject to their own additional liability regime. There is no liability for harm resulting from an obvious risk of a dangerous recreational activity. There is no liability for harm resulting from a risk of a recreational activity that was the subject of a risk warning. A supplier of recreational services is able to exclude, restrict or modify liability from failure to exercise reasonable care and skill.

A modified version of the *Bolam* test has been introduced. Professionals are not negligent if they act in accordance with a practice that is widely accepted in Australia by peer professional opinion as competent, and which is not irrational (however, this does not apply in relation to a duty to warn of the risk of personal injury or death associated with that service).

The existence and extent of liability for breach of a non-delegable duty is to be determined on the same basis as the principles applicable to vicarious liability.

The principles relating to contributory negligence have been restated and reformed. A court is now entitled to reduce damages by 100% on account of contributory negligence, and the contributory negligence of a deceased person is taken into account in reducing the damages payable in a compensation to relatives claim. There >>

is a presumption of a minimum reduction of 25% on account of contributory negligence where the plaintiff is intoxicated, unless the intoxication did not contribute in any way to the accident.

The law relating to 'nervous shock' is renamed ('mental harm') and restated. There is no liability for either pure mental harm or consequential mental harm, unless the harm consists of a recognised psychiatric illness. There is no duty to avoid causing mental harm unless the defendant ought to have foreseen that a person of normal fortitude might have suffered a recognised psychiatric illness. A person is entitled to recover for pure mental harm arising from the injury, death or peril of another only where s/he either witnessed the victim being injured, killed or imperilled, or is a close member of the family of the victim.

In claims involving economic loss or property damage in non-personal injury claims, proportionate liability replaces the joint and several liability of persons concurrently responsible for the loss or damage. These provisions commenced on 1 December 2004.

Special rules relating to the liability of public authorities are enacted. A court is required to consider the financial and other resources reasonably available to the authority. Resource allocation decisions are immune from challenge, and regard must be had to all of the activities and functions for which the authority is responsible. A public authority is not liable for breach of statutory duty unless it has acted in a way that no reasonable public authority could act. A public authority is not liable for failing to prohibit or regulate an activity unless it could have been compelled to do so.

A road authority is not liable for failing to carry out road works (or for considering whether to carry out road works) unless it had actual knowledge of the particular risk at the time of the alleged failure.

An intoxicated person is not able to recover damages for personal injury or property damage unless the court is satisfied that the accident was likely to have occurred even if the person was

not intoxicated. There is no increased duty of care owed to persons simply because they are or might be intoxicated.

There is no civil liability for injury, death or property damage arising from conduct that is in self-defence in response to unlawful conduct. Where a person believes that s/he is acting in self-defence but his/her actions are not a reasonable response in the circumstances, there is no civil liability unless the court considers the case to be exceptional and damages should be awarded to prevent injustice. No damages are recoverable for injury, death or damage to a person's property sustained in the course of committing a serious criminal offence, unless the defendant's conduct also constituted an offence.

Good samaritans who voluntarily come to the assistance of another without expectation of reward are immune from liability for acts or omissions done in good faith.

Volunteers doing work for community organisations are immune from liability for acts or omissions done in good faith.

An apology does not constitute an admission of liability, and is not relevant to the determination of fault or of liability.

AUSTRALIAN CAPITAL TERRITORY

The ACT enacted its reforms in the *Civil Law (Wrongs) Act* 2002. In its original form, this Act re-enacted various traditional reforms of the common law (such as compensation to relatives, contributory negligence, contribution among tortfeasors, innkeepers and common carriers, and defamation).

In addition to re-enacting those traditional reforms, the Act provides protection for good samaritans and volunteers, who acted honestly and without recklessness. This protection is not available where their liability is covered by compulsory insurance, or where their capacity to exercise appropriate care is impaired by drugs or alcohol.

By amendments made by the *Civil Law (Wrongs) Amendment Act* 2003, the ACT implemented many of the reforms provided for by the Stage 2 reforms in the NSW *Civil Liability Act* 2002. Thus, the general principles relating to duty of care, and the general principles relating to causation, have been enacted in substantially the same form as in NSW. However, the NSW provision that renders inadmissible *post hoc* evidence as to what a plaintiff would have done had the defendant not been negligent has not been enacted in the ACT. Nor have the NSW reforms relating to assumption of risk (dealing with obvious and inherent risks), the provision of recreational services, or the reforms relating to professional negligence. However, there are provisions that define the role of experts in medical negligence cases, which require the expert to have regard as to whether the treatment was in accordance with an opinion widely held by a significant number of respected practitioners in Australia in the relevant field.

There are no provisions in relation to non-delegable duties.

As in NSW, a court may reduce a plaintiff's claim by 100% on account of contributory negligence. However, contributory negligence of a deceased person is not to be taken into account in reducing a claim under the compensation to relatives legislation. There is a presumption of contributory negligence where the plaintiff is intoxicated, but the other reforms in the NSW legislation have not been enacted. However, in addition, the ACT legislation contains a further presumption of contributory negligence where the plaintiff relied upon the skill and judgment of an intoxicated person.

In many respects the provisions in relation to liability for mental harm are similar to the NSW reforms, although there is a substantially different regime in relation to the awarding of damages for pure mental harm arising from shock.

The ACT has enacted the same provisions relating to the liability of public authorities, and of highway authorities, as are contained in the NSW legislation.

As in the NSW legislation, there is a bar on recovery for injury sustained while committing an indictable offence. However, the self-defence provisions of the NSW legislation have not been enacted.

The ACT legislation includes a similar provision relating to apologies as the NSW *Civil Liability Act* 2002.

The Act has been further amended by the *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act* 2004, which enacts a regime of proportionate liability in substantially the same terms as the NSW regime. However, at the time of writing these amendments were not in force.

NORTHERN TERRITORY

The relevant Northern Territory enactment is the *Personal Injuries (Liabilities and Damages) Act* 2003. As its name suggests, this legislation is of limited scope and makes no provision for the implementation of most of the substantive reforms recommended by the Ipp Committee, or otherwise adopted elsewhere in Australia.

There are no provisions dealing with general principles of duty of care, causation or assumption of risk. There are similarly no provisions addressing matters of general principle in relation to liability arising out of recreational activities, although the *Consumer Affairs & Fair Trading Act* has been amended to enable contractual waivers to exclude warranties that would otherwise be implied by that statute into a contract for the supply of recreational services. >>

Despite the Ipp Committee's exhortations, the response of legislatures around Australia has been inconsistent.

The law relating to professional negligence and non-delegable duties remains unchanged. There are no new provisions covering contributory negligence generally, so the common law position that precludes a 100% reduction for contributory negligence remains, and the contributory negligence statute provides for reduction in a compensation to relatives claim on account of the contributory negligence of the deceased. There are, however, specific provisions relating to the effect of intoxication, with a minimum reduction of 25% where the plaintiff is intoxicated or relies upon the care and skill of an intoxicated person.

There are no provisions for implementating the Ipp Committee recommendations in relation to liability for mental harm.

There are no provisions relating to proportionate liability, although the NT government has promised to enact a scheme of proportionate liability.

There are no provisions relating to public authorities or highway authorities.

The NT legislation contains similar provisions to the NSW *Civil Liability Act* 2002 providing protection to occupiers against persons who enter with intent to commit an offence, and precludes recovery for people injured while committing an offence in other than exceptional circumstances.

The legislation also provides protection for good samaritans and volunteers acting in good faith and without recklessness.

The legislation also provides a scheme for 'expressions of regret' (limited to personal injury proceedings), similar to the provisions relating to apologies in the NSW *Civil Liability Act* 2002.

QUEENSLAND

The relevant Queensland enactment is the *Civil Liability Act* 2003. This legislation implements most of the reforms enacted in Stage 2 of the NSW *Civil Liability Act* 2002, and in substantially the same terms.

The Queensland legislation largely enacts the same general principles in relation to duty of care and causation (including the non-admissibility of *post hoc* evidence of what a plaintiff would have done had the defendant not been negligent).

It also enacts predominantly the same provisions in relation to assumption of risk (including obvious risks and inherent risks). It provides the same protection from liability for the materialisation of obvious risks of dangerous recreational activities as the NSW legislation. However, there are no corresponding provisions specifically relating to the provision of risk warnings for recreational activities.

There is no provision in relation to non-delegable duties.

The Queensland legislation allows for a 100% reduction in damages on account of contributory negligence, and compensation to relatives claims are to be reduced on account of the contributory negligence of the deceased. It also contains a presumption of contributory negligence where the plaintiff is intoxicated, as well as where the plaintiff has relied upon the care and skill of an intoxicated person.

There are no provisions in relation to liability for mental harm.

The Queensland legislation implements a scheme of proportionate liability. This scheme differs from the NSW scheme, and at the time of writing had not yet commenced.

There are similar provisions to the NSW *Civil Liability Act* 2002 in relation to the liability of public authorities and highway authorities.

Similarly to the NSW legislation, there is a bar on recovery for injury sustained while committing an indictable offence. However, the self-defence provisions of the NSW legislation have not been enacted.

There are similar provisions providing protection for good samaritans, and for volunteers, to those contained in the NSW *Civil Liability Act* 2002.

The Queensland legislation enacts a scheme of 'expressions of regret' similar to the provisions relating to apologies in the NSW legislation, although it is limited to personal injury proceedings.

SOUTH AUSTRALIA

The relevant South Australian legislation is the *Civil Liability Act* 1936. This Act is, in fact, an amended and re-named version of the *Wrongs Act* 1936, with most of the relevant reforms being inserted in Part 6 of the Act.

The South Australian legislation contains similar provisions to the NSW *Civil Liability Act* 2002 in relation to duty of care and causation. However, there is no provision relating to the non-admissibility of *post hoc* evidence of what a plaintiff would have done had the defendant not been negligent.

It also enacts substantially the same provisions in relation to assumption of risk (including obvious risks and inherent risks), but does not make any specific provision in relation to recreational activities. The *Recreational Services (Limitation of Liability) Act* 2002, however, allows for contractual modification of the duty of care owed to a consumer of recreational services, so that the duty of care is governed by a registered code of practice.

The NSW provisions relating to professional negligence and non-delegable duties have been enacted.

The South Australian legislation does not allow for a 100% reduction in damages on account of contributory negligence, but compensation to relatives claims are to be reduced on account of the contributory negligence of the deceased. It also contains a presumption of contributory negligence where the plaintiff is intoxicated, as well as where the plaintiff has relied upon the care and skill of an intoxicated person.

The South Australian legislation implements substantially the same reforms as the NSW legislation in relation to liability for mental harm.

There is no scheme of proportionate liability, although the government has committed to its introduction.

There are no provisions in relation to public authorities, although there is a statutory highway rule, which is substantially the same as that enacted in NSW.

Similar to the NSW legislation, there is a bar on recovery for injury sustained while committing an indictable offence. However, the self-defence provisions of the NSW legislation have not been enacted.

Provisions providing protection for

good samaritans are similar to those contained in the NSW *Civil Liability Act* 2002. There are also similar provisions protecting volunteers, although these are contained in the *Volunteers Protection Act* 2001.

There is also protection provided in relation to the use that can be made of an expression of regret by a defendant.

TASMANIA

The Tasmanian legislation is contained in the *Civil Liability Act* 2002. This is substantially based upon the NSW *Civil Liability Act* 2002, from which there are few departures.

The general principles in relation to the duty of care, causation (including the non-admissibility of *post hoc* evidence of what a plaintiff would have done had the defendant not been negligent), and the provisions relating to obvious risks, have all been enacted in Tasmania. There is no specific provision dealing with liability for materialisation of inherent risks (a redundant provision in any event).

As with the NSW *Civil Liability Act* 2002, in Tasmania there is no liability for the materialisation of obvious risks of dangerous recreational activities. There is also no liability where a risk warning in respect of recreational activities is provided. However, the Tasmanian provision applies only to public authorities, and not to the private sector.

The professional negligence provisions are substantially the same as in NSW.

There is no provision dealing with non-delegable duties.

There are no new provisions in relation to contributory negligence generally, so the common law position that precludes a 100% reduction for contributory negligence remains, and the contributory negligence statute provides for reduction in a compensation to relatives claim on account of the contributory negligence of the deceased. There is, as in NSW, a statutory presumption of contributory negligence where the plaintiff is intoxicated. Again as in NSW (but unlike other jurisdictions), there is no statutory presumption of contributory negligence where the plaintiff relies upon the care and skill of an intoxicated person.

The Tasmanian legislation provides that plaintiffs cannot recover damages if they are injured while committing a serious offence. However, there is no specific protection provided to persons acting in self-defence.

There is no specific protection afforded to good samaritans, although there are similar protections as in NSW for volunteers.

In Tasmania, as in NSW, an apology does not constitute an admission of, nor is it relevant to, the determination of liability, and it is otherwise inadmissible.

VICTORIA

The Victorian legislation is contained in amendments to the *Wrongs Act* 1958.

It contains similar provisions relating to duty of care, as well as causation, save that it does not render inadmissible *post hoc* evidence of what the plaintiff would have done had the defendant not been negligent.

There is a similar presumption of knowledge of obvious risks, but it applies only where the defence of *volenti* is pleaded. There is no provision dispensing with the duty to warn of obvious risks, but there is a similar provision to the NSW legislation to the effect that there is no liability for the materialisation of inherent risks.

There are no specific provisions relating to recreational activities, although the *Goods Act* 1958 has been amended to allow contracts for the supply of recreational services to include terms that limit liability.

Similar provisions to the NSW legislation have been enacted in relation to professional negligence, non-delegable duties, and contributory negligence, save that there is no reduction in a compensation to relatives claim on account of the contributory negligence of the deceased.

The Victorian reforms contain similar provisions to the NSW legislation in relation to mental harm.

They also introduce provisions in relation to proportionate liability which, at the time of writing, had not commenced. >>

There are no specific provisions relating to public authorities, nor in relation to highway authorities. However, amendments to the *Transport Act* 1983 restored the pre-*Brodie* highway immunity for a closed period.

The Victorian reforms do not enact the NSW provisions relating to intoxication, or the recovery of damages by criminals, other than to indicate that the court must take these facts into account.

There are provisions similar to those in NSW protecting good samaritans and volunteers.

Unusually, the Victorian legislation provides that an apology is not itself an admission of liability, but it is nevertheless admissible if it is relevant to a fact in issue.

WESTERN AUSTRALIA

The Western Australian legislation is contained in the *Civil Liability Act* 2002. Of all the states and territories, the Western Australia reforms most closely mirror those enacted in NSW.

The Western Australian legislation enacts in substantially the same form the NSW provisions relating to duty of care, causation (including the inadmissibility of *post hoc* evidence of what a plaintiff would have done if the defendant had not been negligent), assumption of risk (including obvious and inherent risks), and recreational activities.

Western Australia has not enacted provisions relating to professional negligence and non-delegable duties.

There are similar provisions in relation to contributory negligence (including reduction of damages in a compensation to relatives claim on account of the contributory negligence of the deceased), although the common law prohibition on the reduction of damages to the extent of 100% still applies. There is a similar statutory presumption of contributory negligence where the plaintiff was intoxicated at the time of injury.

The provisions relating to liability for mental harm are substantially the same as in NSW, although liability to bystanders and family members of an accident victim remains otherwise regulated by the other general reforms and, to some extent, the common law.

There are similar provisions to the NSW reforms relating to the liability of public authorities and highway authorities.

The Western Australia *Civil Liability Act* 2002 does not contain provisions relating to liability to persons injured in the course of criminal conduct, however, such provisions having already been enacted by the *Offenders (Legal Action) Act* 2000.

The Western Australian legislation provides similar protections for good samaritans and volunteers, and also provides for the inadmissibility and irrelevance of an apology in determining liability.

COMMONWEALTH

The Commonwealth has amended its legislation in order to ensure that various statutory causes of action operate consistently with the state and territory damages and liability regimes.

The first amendment was made by the *Trade Practices Amendment (Liability for Recreational Services) Act* 2002. This amendment allows a provision of a contract for the supply of 'recreational services' to limit or exclude the effect of the warranty implied by s74 of the *Trade Practices Act* 1974 ('the TPA'). Previously, such a provision would have been void by virtue of s68 of the TPA.

The second set of amendments was made by the *Trade Practices Amendment (Personal Injuries and Death) Act (No. 2)* 2004. These amendments insert a new Part VIB, which restricts awards of compensation for death or personal injury, and sets out a limitation period for such actions based upon discoverability. These provisions apply to claims brought under Part IVA, Division 1A or 2A of Part V, or under Part VA of the TPA. They do not apply to claims in respect of death or personal injury resulting from smoking or other use of tobacco products. The provisions are similar to, but not identical with, the provisions enacted in NSW.

The third set of amendments was made by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004, which introduced a scheme of proportionate liability for statutory causes of action for misleading and deceptive conduct under the *Australian Securities and Investments Commission Act* 2001, the *Corporations Act* 2001 and the TPA.

The final legislative response was the enactment of the *Commonwealth Volunteers Protection Act* 2003 which provides immunity from civil liability for acts or omissions done in good faith by persons who perform voluntary work for the Commonwealth or a Commonwealth authority.

CONCLUSION

Despite the Ipp Committee's exhortations, the response of legislatures around Australia has been inconsistent. Most jurisdictions (the Northern Territory being the glaring exception) have adopted substantially similar provisions addressing the general principles of negligence. However, in relation to assumption of risk and recreational activities – the areas which most publicly generated community concern about the so-called 'liability crisis' – the response has been far from uniform.

The implementation of schemes of proportionate liability – an area led by the Commonwealth – has not yet occurred in all jurisdictions, although all have committed to it.

Reforms relating to the liability of public authorities have also been inconsistent, although most jurisdictions have implemented a modified version of the highway immunity in the wake of the High Court's decision in *Brodie*.

The effect of intoxication and criminal behaviour are also areas where the response has been inconsistent.

Generally speaking, good samaritans and volunteers have been afforded significant protections from liability, and the benefits of early apologies for errors has also been recognised in reforms designed to encourage expressions of regret. ■

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