

Northern Territory Law Reform Committee

Report : Tort Law Reform in the Northern Territory

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ABBREVIATIONS

ACT	Australian Capital Territory
Committee, the	The Northern Territory Law Reform Committee
Ipp Panel	The Panel of Eminent Persons established to conduct the Review of the Law of Negligence, consisting of The Honourable David Ipp, Professor Peter Cane, Associate Professor Donald Sheldon, and Mr Ian Macintosh
Ipp Report	Final Report of the Review of the Law of Negligence, September 2002
NSW	New South Wales
NT	Northern Territory
QLD	Queensland
SA	South Australia
Tas	Tasmania
VIC	Victoria
WA	Western Australia

1.0 TERMS OF REFERENCE

I JOHAN WESSEL ELFERINK, Attorney-General and Minister for Justice, ask the Northern Territory Law Reform Committee to investigate, examine and report on law reform in relation to:

- (a) the effectiveness of the tort reforms adopted by the Northern Territory in response to the Final Report of the Review of the Law of Negligence (2002); and
- (b) whether the Northern Territory should consider legislative for those parts of tort reform that were not enacted in the Northern Territory, including a review of limitation periods and reform of principles in relation to liability for negligence.

Matters for the Committee to Consider

1. The Northern Territory is the only Australian jurisdiction where the common law prevails in respect of duty of care and causation. In other jurisdictions the laws have been, to a great extent, codified. This means that the law of negligence in the Northern Territory does not have the advantage of any significant case law development as nearly all negligence case law is being developed by the High Court by reference to various statutory version of the law of negligence. Should the Northern Territory codify common law principles of the law of negligence to be as close as practicable to the laws operating in the rest of Australia?
2. The Committee is directed to make recommendations relating to personal damages, including:
 - (a) the limits placed on available damages for personal injury, for both pecuniary and non-pecuniary loss;
 - (b) the impairment thresholds for personal injury imposed by the Personal Injuries (Liabilities and Damages) Act for non-pecuniary loss;
 - (c) discount rates applicable to lump sum damages awarded for future economic loss; and
 - (d) limitations on damages for future gratuitous services.
3. In formulating this report, the Committee ought to consider:
 - (a) whether any reforms would unduly impact on the price and/or availability of public liability or professional indemnity insurance in the Northern Territory;
 - (b) the risk faced by potential defendants of unmeritorious litigation;
 - (c) the possible impact on decision-making and administrative bodies, including courts; and
 - (d) consistency with other regimes prescribing compensation for personal injury, having regard to the different objectives of these regimes.

Background

In 2002 and 2003 significant legislative reforms were made across Australia aimed at addressing the insurance crisis of the late 1990's and early 2000's. The reforms sought to

address spiralling public liability and professional indemnity insurance premiums and the withdrawal or unavailability of insurance cover from many areas of economic and social activity.

The reforms were influenced by the Final Report of the Review of the Law of Negligence (2002) produced by a panel convened pursuant to a Ministerial Meeting on Public Liability and chaired by the Hon David Ipp (the Ipp Report). The reforms were designed to limit some common law rights to compensation for the negligent acts of others, with a view to reducing insurers' liability for damages, hence reducing premiums for insurance and increasing the availability of insurance.

The first recommendation of the Ipp Report, that there be a single and consistent uniform statute enacted in each jurisdiction, was not implemented. Therefore, each state and territory has different laws pertaining to negligence and different laws pertaining to damages. The Northern Territory was the only jurisdiction that did not make changes to the elements of negligence.

The NT's primary legislative response was the Personal Injuries (Liabilities and Damages) Act (the Act). Part 4 of the Act brought wide-ranging changes to personal injuries claims for the calculation of damages, including the following:

- a cap of three times average weekly earnings was applied in relation to the assessment of pecuniary loss;
- awards for future pecuniary loss must state the assumptions upon which they are based and must be adjusted for a percentage possibility that the events might have occurred regardless of the injury;
- gratuitous services damages threshold of six hours per week for six months or more, with a cap for full time services;
- the discount rate for the present value of a lump sum for future pecuniary loss set at 5%;
- abolition of common law principles relating to non-pecuniary loss;
- non-pecuniary loss must be awarded as a percentage of the statutory maximum amount (currently \$555,500.00). The percentage is determined by a court, based on evidence from medical practitioners who have assessed the plaintiff with the prescribed guide (currently the American Medical Association Guides to the Evaluation of Permanent Impairment); and
- where permanent impairment is assessed at less than 5%, no amount is payable for non-pecuniary loss.

I also draw to your attention the current review of related issues by the Victorian Competition and Efficiency Commission entitled 'Inquiry into aspects of the Wrongs Act 1958'.

I would be grateful to receive the Committee's Report by 31 December 2014.

Yours sincerely

JOHN ELFERINK

2.0 SUPPLEMENTARY TERMS OF REFERENCE

I refer to the Terms of Reference I gave the Northern Territory Law Reform Committee on 12 September 2013, to investigate, examine and report on law reform for the law of negligence in the Northern Territory.

As part of that review, I would also like you to also consider specifically the provision of statutory immunity for road authorities for both personal injury and property damage claims. In the Territory, road authorities include both the Northern Territory Government and local government councils.

Prior to the decision of the High Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, it was considered that the 'highway rule' existed at common law in Australia which provided road authorities immunity from civil liability in respect of any failure to repair or keep in repair public highways; including any failure to inspect a highway for that purpose.

Following the High Court decision, as well as recommendations made in the Final Report of the Review of the Law of Negligence (2002), various jurisdictions enacted legislation to replicate the immunity that had been thought to exist. For example, section 45 of the *Civil Liability Act 2002* (NSW) provides that a road authority is not liable in proceedings for civil liability unless, at the time, the authority had 'actual knowledge' of the particular risk, the materialisation of which resulted in the harm. In addition, section 42 of the *Civil Liability Act 2002* (NSW) outlines various principles that must be applied by the court when determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability.

Given that the Northern Territory has not legislated on the matter, claims for personal injury and property damage would be covered under common law principles. As a result, the local government sector has raised concerns regarding the remoteness of Northern Territory roads and the minimal funding of road authorities over vast areas.

I note that section 5 of the *Motor Accident (Compensation) Act* provides that an action for damages does not lie either at common law or by statute for the death of, or injury to, a person arising from a motor accident that occurs in the Territory.

I look forward to receiving the Committee's Report at the end of the year.

Yours sincerely

JOHN ELFERINK

3.0 INTRODUCTION

By Terms of Reference dated 12 September 2013, the Attorney-General requested the Northern Territory Law Reform Committee investigate, examine and report on law reform for the law of negligence in the Northern Territory. In particular, the reference was concerned with whether the Northern Territory should codify common law principles of the law of negligence to be as close as practicable to the laws operating in the rest of Australia, the adequacy of thresholds for personal injury damages, and the arrangements for public liability and indemnity insurance in the Northern Territory.

By a supplementary reference dated 12 June 2014, the Attorney-General requested the Committee give specific consideration to the provision of statutory immunity for roads authorities for both personal injury and property damage claims. The reference notes that in the Northern Territory, the NT government and local government councils variously have responsibility for the construction and maintenance of roads.

In extremely brief terms, and omitting much relevant detail, the basis for the referral appears to be as follows:

1. In May 2002 a meeting of Ministers from all states and territories agreed to set up a Panel chaired by Justice Ipp to conduct a comprehensive review of the laws of negligence.
2. The result was the 'Ipp Report', published in September 2002.
3. The Report refers to the 'widely held view in the Australian community':
 - (a) that the law of negligence as applied in the courts was unclear and unpredictable;
 - (b) that it had become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants; and
 - (c) that damages in personal injury cases were frequently too high.¹
4. What concerned the Ministers was the perceived result that increased insurance premiums were seriously affecting business practice.
5. Subsequent commentators agree that there was such a 'widely held view' at the time, but have cast considerable doubt on whether that view was correct.²
6. Nevertheless increased insurance premiums and the likelihood of further increases remained a reality.
7. The Ipp Panel itself was cautious, but expressed the following view:

*"The Panel's task is not to test the accuracy of these perceptions, but to take as a starting point for conducting its enquiry the general belief in the Australian community that there is an urgent need to address these problems"*³.

¹ Ipp Report, p.25

² See particularly the 2006 paper by Professor Wright commissioned by the Law Council of Australia titled "National Trends in Personal Injury Litigation Before and After Ipp".

³ Ipp Report, p.26

8. The Ipp Panel produced two broad areas of recommendations, with various particular recommendations designated to each area:-
 - (a) a redefinition, or at least a modification, of the meaning and extent of negligence and duty of care; and
 - (b) a 'cap' or 'threshold' for general damages on certain presently recognised heads of general damages.
9. Following the Ipp Report, each state and territory passed legislation adopting, to a greater or lesser degree, the recommendations in the Report.
10. Although the very first recommendation of the Ipp Report was for a general statute to be enacted in each jurisdiction, all States and Territories enacted separate statutes dissimilar in various respects from those in the other jurisdictions.
11. Apart from the Northern Territory, all other jurisdictions did, in individual ways, recognise the two broad divisions of the recommendations of the report, i.e for some changes in the concept of negligence and for "capping" certain general damages.⁴
12. The Northern Territory Statute confines itself to the second aspect, i.e the 'capping' or 'threshold' items. The Statute is the *Personal Injuries (Liabilities and Damages) Act*, and the Preamble makes this quite clear:

"An Act to modify the law relating to the entitlement to damages for personal injuries, to clarify principles of contributory negligence, to fix reasonable limits on certain awards of damages for personal injuries, to provide for periodic payments of damages for personal injuries, and for related purposes."

13. Hence the remarks of the Attorney-General in the Terms of Reference that:

"The Northern Territory is the only Australian jurisdiction where the common law prevails in respect of duty of care and causation. In other jurisdictions the laws have been, to a great extent, codified. This means that the law of negligence in the Northern Territory does not have the advantage of any significant case law development as nearly all negligence case law is being developed by the High Court by reference to various statutory versions of the law of negligence. Should the Northern Territory codify common law principles of the law of negligence to be as close as practicable to the laws operating in the rest of Australia?"

14. There would clearly be no sensible argument against this proposal if all other jurisdictions had uniform legislation. Unfortunately that is not the case. There is not one code, but seven different codes. Unless the Northern Territory elects to copy precisely the statute of one of the jurisdictions, it would otherwise merely produce an eighth code. No doubt the High Court would endeavour to resolve differences, but it is equally possible that their Honours might prefer the common law.
15. Shortly after the presentation of the Ipp Report, Chief Justice Spigelman of NSW commented in an article in the *Torts Law Journal* (2003) 11 TLJ 291:

"In collaboration, the Commonwealth and the States appointed a group to review the law of negligence. The panel was chaired by the Honourable David Ipp, formerly a judge of the Supreme Court of Western Australia and now a judge and

⁴ Cf, for example, Recommendation 28 of the Report with s.48 of the *Wrongs Act* (Vic).

judge of appeal of the Supreme Court of New South Wales. His Honour's panel proposed a range of changes in its two reports. Ministers of the Commonwealth and of the States agreed to implement the recommendations and the process of doing so is well advanced. There was an express commitment to proceeding on a nationally uniform, or at least nationally consistent, basis. At the time of his lecture, that is not yet apparent".

16. His Honour's comment that the process of implementation of the recommendations "is well advanced" must now be seen in light of later events, which show that the implementation has not been uniform in the various jurisdictions⁵ despite the fact that uniformity was the declared aim of the Ipp Panel.⁶

17. Professor Butler presents an exhaustive comparison of the adoption of the Ipp Report between the various jurisdictions and comments that:

"The recommendations have only been enacted in varying degrees by the various Australian jurisdictions. Indeed, in some cases legislation has been enacted that is either contrary to the recommendations, or which is a variation or embellishment on what was recommended. In addition, all jurisdictions have enacted reform measures which were not recommended by the panel".⁷

18. Professor Wright, in a review titled "National Trends in Personal Litigation – Before and After Ipp", comments that "*all of the States and Territories departed from the Review's recommendations in various respects...*". He also adopts the comments of Professor Butler referred to above.

19. Chief Justice Wayne Martin of the Supreme Court of WA addressed the Australian Law Association Conference in 2011 on the topic "The Civil Liability Act: Impact and Effect". In the course of his address his Honour referred to the legislation purporting to adopt the recommendations of the Ipp Panel:

"However, unfortunately for those who have advocated the development of a unified Australian law of tort, the language of the various statutes is far from uniform. Not only is the legislation variously expressed, but its stated objects are variously expressed both in the statutes and the secondary materials relating to the statutes, such as explanatory memoranda and Second Reading Speeches. The inevitable result is likely to be divergent interpretations in different jurisdictions."

⁵ Cf, for instance, the various approaches to causation.

⁶ Recommendation 1 and note also paragraph 2.2

⁷ (2005) 13 Torts Law Journal 203

4.0 NORTHERN TERRITORY LEGISLATION

The Northern Territory has dealt with actions arising out of claims for damages for negligence or breach of duty in two ways:

1. The first was the introduction of the *Motor Accidents (Compensation) Act*, which predated the tort law reforms by many years.

The *Motor Accidents (Compensation) Act* is described in the Preamble as:

“An Act to establish a no fault compensation scheme in respect of death or injury in or as a result of motor vehicle accidents, to prescribe the rates of benefits to be paid under the scheme, to abolish certain common law rights in relation to motor vehicle accidents, and for related purposes.”

Section 5 is headed ‘Abolition of common law rights’ and states specifically:

“An action for damages does not lie (either at common law or by statute) for the death of, or injury to, a person arising from a motor accident that occurs in the Territory.”

In effect, the Act provides that all injuries arising out of a motor accident irrespective of fault may be compensated by the government, through the Motor Accidents (Compensation) Fund administered by the Territory Insurance Office, in accordance with various prescribed formulae and scales of payment relating to the particular loss or injury sustained.

This scheme effectively displaced what was previously a substantial area of litigation; and since in reality compulsory third party insurance premiums paid not only the damages, if awarded, but the costs of litigation, the legislation removed any concerns in relation to the sustainability of insurance arrangements. The system is acknowledged to be fairer than the common law, since the entitlement to compensation does not depend on findings of fault, damages can be more precisely calculated, and the courts (and indeed the public) are spared a great deal of time in litigation which might be better employed elsewhere.

This legislation has operated in the Northern Territory since 1979 and, so far as this Committee can observe, is generally accepted by the community.

2. As with all other States and the ACT, the Northern Territory has adopted the recommendations of the Ipp Panel relating to such matters as exclusions and indemnities in respect of volunteers, occupiers and persons injured while engaged in criminal conduct; contributory negligence on the part of intoxicated persons; aggravated and exemplary damages; limitations on damages for loss of earning capacity; a threshold for general damages; and a cap on general damages.⁸

The immediate reason for the Ipp Report was the fear that insurance premiums against actions for negligence or breach of duty were becoming too high and that insurance companies might abandon the field.⁹

⁸ Ipp Report, Recommendations 47-49. See *Personal Injuries (Liabilities & Damages) Act* (NT).

⁹ See for instance, Ipp, “Negligence Where Lies the Future”: “The Panel received evidence to the effect that throughout the country the absence of insurance or the availability of insurance only at unaffordable rates has adversely affected many aspects of community life”. See also Butler (ibid),

The adoption of threshold tests and capping by all States and Territories appears to have resolved this problem and the Ipp Report may therefore be said to have achieved in this respect, one of its primary objectives.¹⁰

These provisions have had a dramatic (and in the view of the Committee, beneficial) effect on the previously numerous and costly court procedures for compensation for claims based on negligence. See, for instance “Negligence: On the edge of the abyss” by Bill Piper in (2013) 2 NTLJ 321:

“Bearing in mind a large number of injury cases do not involve significant medical expenses or loss of earnings, many cases of less serious but still severe injuries such as burns, breaks and anxiety became, after the reforms, simply uneconomical to litigate.

“The new legislation impacted severely on plaintiff legal practices and court lists.”

As previously noted, the States and the ACT have not adopted uniform legislation concerning duty of care and causation as recommended by the Ipp Panel. As Professor Butler comments:

“While it was the primary recommendation of the Ipp Panel that uniform legislation be enacted, a very different result has emerged. Although similarities do exist, in many respects jurisdictions have taken approaches that may differ significantly or marginally.”¹¹

In the light of these, and similar comments, it would seem that a separate Northern Territory Act to add to those already passed would do little more than add to the potential for divergent interpretations in different jurisdictions, or, as Milton would say ‘confusion worse confounded’.

The Northern Territory has not followed the States and the ACT in endeavouring to re-define concepts of negligence, duty of care and breach of duty. For the reasons discussed in the body of this report, this Committee considers that there are good reasons for retaining the common law in these matters.

p.203. “In the early years of the twenty-first century the cost of insurance for many activities spiralled alarmingly”. Spigelman (ibid), “A sudden explosion in insurance premiums, or, in many cases, a refusal by insurance companies to offer cover on any reasonable terms, or even at all, caused widespread alarm”.

¹⁰ Ipp J = “themes in the Law of Torts” Since the introduction of the reforms, the insurance crisis has abated”.

¹¹ (2005)13 Torts Law Journal 203

5.0 CODIFICATION OF THE COMMON LAW OF NEGLIGENCE

This section is concerned with the term of reference which asks whether the Northern Territory should codify common law principles of the law of negligence to be as close as practicable to the laws operating in the rest of Australia.

This discussion is limited in its scope to the first term of reference, and does not deal with thresholds for personal damages or public liability and indemnity insurance in the Northern Territory. Those matters are discussed in the next section of this report.

5.1 Legislative provisions in other Australian jurisdictions

Although the Ipp Panel recommended a redefinition of the meaning and extent of negligence and duty of care, the legislative intervention in the other Australian jurisdictions consists largely of a statement of the generally accepted common law principles, except perhaps in relation to a number of specific exemptions and limitations.

The modifications were enacted in the following provisions:

- *Civil Law (Wrongs) Act 2002* (ACT), Ch 4;
- *Civil Liability Act 2002* (NSW), Part 1A;
- *Civil Liability Act 2003* (Qld), Ch 2;
- *Civil Liability Act 1936* (SA), Part 6;
- *Civil Liability Act 2002* (Tas), Part 6;
- *Wrongs Act 1958* (Vic), Part X; and
- *Civil Liability Act 2002* (WA), Part 1A.

The core provisions from each of those enactments set out statutory formulations concerning precautions against risk, which stipulate the circumstances in which the failure to take precautions against a risk of harm will constitute negligence; and causation, which governs the decision whether negligence caused particular harm (refer Appendix 1 & Appendix 2).

In addition to the core provisions, each jurisdiction has variously enacted specific exemptions and limitations, including:

- an exclusion of liability for personal injury suffered from obvious risks incurred in undertaking “dangerous recreational activities” (NSW, QLD, Tas, VIC, WA);
- provisions stipulating the circumstances in which a doctor will be in breach of a duty to warn of risk (QLD, SA, Tas, VIC);
- provisions excluding breach of duty on the part of a professional if it is established that the professional acted in a way that was ‘widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice’. Peer professional opinion does not have to be universally accepted to be considered widely accepted (NSW, QLD, SA, Tas, VIC, WA);

- provisions permitting a court to determine a reduction of 100% on account of contributory negligence, effectively making the pleading a complete defence (ACT, NSW, QLD, SA, VIC);
- provisions which abrogate the ‘eggshell skull rule’ in nervous shock cases (SA, WA);
- provisions excluding the liability of highway authorities in certain circumstances (all jurisdictions excluding NT); and
- provisions barring recovery by persons who suffer injury in the course of criminal conduct in certain circumstances (SA, VIC).

The relevant statutory provisions from each jurisdiction are extracted at Appendix 1.

5.2 Definition of ‘negligence’

The term ‘negligence’ is generally defined in the legislation to mean ‘failure to exercise reasonable care and skill’.

The definition does not seek to incorporate notions of the duty of care, standard of care, foreseeability, magnitude of risk, the reasonable person similarly circumstanced, the likely seriousness of the harm, the burden of taking precautions to avoid the risk, and questions of causation. Rather, those matters are dealt with in succeeding provisions in terms largely reflective of common law principles.

The Western Australian legislation eschews the use of the term ‘negligence’, and rather applies its provisions to ‘any claim for damages for harm caused by the fault of a person’, including if the damages are sought to be recovered in an action for ‘breach of contract or any other action’.

5.3 Duty of care

The legislation does not address duty of care in the sense of stipulating the class of persons to whom a particular defendant owes a duty of care at law. This is one of the more vexed areas of negligence, and has been the subject of much judicial and academic debate over the years in relation to such matters as whether reasonable foreseeability is a sufficient basis on which to ground a duty of care and, if so, at what level of abstraction; the place of proximity in the negligence calculus; indeterminate liability; limitations on the imposition of a duty in cases of pure economic loss; the role of reliance; whether the existence of a duty of care is limited to established categories of relationship; and the extent to which policy considerations may be taken into account in determining whether a duty of care is owed in particular circumstances.

It is not immediately apparent whether those issues remain for determination independently of the legislative provisions, or if they are subsumed by the provisions dealing with precautions against risk (discussed further below). Only the Victorian legislation makes express reference to the question in providing, ‘Except as provided by this Part, this Part is not intended to affect the common law’.

5.4 Standard of care

Only the Australian Capital Territory and South Australia have made provision in relation to standard of care. That provision is to the effect that for deciding whether a defendant is negligent, the standard of care required is that of ‘a reasonable person in the defendant’s

position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose’.

That provision would appear to add nothing to the common law principle that the requisite standard of care is that of “the reasonable person” or simply “reasonable care”. The common law has always accepted that the measure for determining the standard of care is an objective and impersonal one which calls for the standard that the reasonable person should reach: see, for example, *Cook v Cook* (1986) 162 CLR 376 at 382.

The South Australian legislation also contains provisions in relation to intoxication which do not obviously advance the position at common law.

5.5 Precautions against risk

In general terms, the provisions dealing with precautions against risk operate to provide that a person is not negligent in failing to take precautions against a risk of harm unless:

1. the risk was foreseeable (i.e a risk of which the person knew or ought to have known);
2. the risk was not insignificant; and
3. a reasonable person in that person's position would have taken those precautions.

The formulation goes on to provide that in deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider:

1. the probability that the harm would happen if precautions were not taken;
2. the likely seriousness of the harm;
3. the burden of taking precautions to avoid the risk of harm; and
4. the social utility of the activity creating the risk of harm.

This may immediately be recognised as a statutory statement of Mason J's classic formulation in *Wyong Shire Council v Shirt*¹² of the matters properly taken into account in determining whether there has been a breach of the duty of care in a particular circumstance.

Under both the common law and the new statutory formulations, determining the content of the duty and whether there has been a breach of the requisite standard of care involves the same two-step process, viz:

1. asking whether a reasonable person in the defendant's position would have foreseen that their conduct involved a sufficient risk of injury to the plaintiff or to a class of persons including the plaintiff; and
2. if the answer to that question is yes, determining what a reasonable person would do by way of response having regard to the magnitude of the risk and the degree of the probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.

¹² (1979) 146 CLR 40 at 478

This has been the approach adopted by the High Court both before and following the introduction of the statutory provisions: see, for example, *Swain v Waverley Municipal Council*¹³; *Woods v Multi-Sport Holdings Pty Ltd*.¹⁴

Moreover, the High Court had expressly recognised prior to the tort law reform process that the requisite standard of care cannot be formulated retrospectively as an obligation to avoid the particular omission said to have caused loss, or to avert the particular harm that in fact eventuated. The proper inquiry involves identifying with precision what a reasonable person in the position of the defendant would have done by way of response to the reasonably foreseeable risk at the time it presented: see *Graham Barclay Oysters Pty Ltd and Anor v Ryan & Others*.¹⁵

The focus under both the common law and statute is upon reasonableness. In *Swain v Waverley Municipal Council*¹⁶, Gleeson CJ observed:

"In the legal formulations of the duty and standard of care, the central concept is reasonableness. The duty is usually expressed in terms of protecting another against unreasonable risk of harm, or of some kind of harm; the standard of conduct necessary to discharge the duty is usually expressed in terms of what would be expected of a reasonable person, both as to foresight of the possibility of harm, and as to taking precautions against such harm. Life is risky. People do not expect, and are not entitled to expect, to live in a risk-free environment. The measure of careful behaviour is reasonableness, not elimination of risk. Where people are subject to a duty of care, they are to some extent, their neighbours' keepers, but they are not their neighbours' insurers."

As to the requisite risk of injury being characterised as unreasonable or unnecessary, see also *Swain v Waverley Municipal Council*.¹⁷ The alleged tortfeasor need only act to protect another from an unreasonable risk of harm in circumstances where 'a reasonable person would have recognized that action was required': *Woods v Multi-Sport Holdings Pty Ltd*.¹⁸

This Committee is unaware of any case in which it has been suggested that the application of the statutory provisions concerning precautions against risk involve any different process, or lead to any different outcome, to the application of the common law principles.

5.6 Causation

The provisions in relation to causation generally state that a determination whether negligence caused particular harm comprises two elements, viz:

1. whether the negligence was a necessary condition of the happening of the harm ('factual causation'); and
2. whether it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (the 'scope of liability').

¹³ (2005) 220 CLR 517 at [79]-[81]

¹⁴ (2002) 208 CLR 460 at [39]

¹⁵ (2002) 211 CLR 540 per Gummow and Hayne JJ at [191]-[192]

¹⁶ (2005) 220 CLR 517 per Gleeson CJ at [5]

¹⁷ (2005) 220 CLR 517 per Kirby J at [190]-[194]

¹⁸ (2002) 208 CLR 460 at 493 per Gleeson CJ at [39]-[41]; Kirby J at [109]; Hayne J at [143]-[145]

The legislation also contains a statement to the effect that in deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party.

Again, this is clearly a statutory formulation of the common law principles. At common law, the causation question has two parts. The first is usually called the issue of 'factual causation'. The second is generally called 'causation in law' or 'attributive causation'.

Leaving aside 'loss of a chance' cases, the approach generally taken by the common law to factual causation is the common sense application of the 'but for' test. That is, would the plaintiff's loss have occurred but for the defendant's negligence? That in turn resolves to the question whether the defendant's negligence was a necessary condition of the plaintiff's loss, which is precisely the formulation adopted in the legislative provisions.

Similarly, at common law the assessment of causation in law and questions of remoteness are concerned essentially with the issue whether the harm suffered, or some part of it, ought to be treated as a consequence of negligent conduct which factually caused it for the purposes of allocating responsibility. That inquiry resolves to whether and why it is appropriate for the scope of the person's liability to extend to the harm, which is the statutory formulation.

The legislation in some jurisdictions goes on to provide expressly that in the case of multiple sufficient causes, additional causes and/or intervening causes, the court may continue to apply the established common law principles for assignment of fault. In other jurisdictions that is left unsaid.

Again, this Committee is unaware of any case in which it has been suggested that the application of the statutory provisions concerning causation involve any different process, or lead to any different outcome, to the application of the common law principles.

5.7 Obvious risks

Most other Australian jurisdictions have modified the negligence calculus in relation to "obvious risks". The provisions vary in their operation. Trindade, Cane & Lunney, *The Law of Torts in Australia* (Fourth ed), identify three areas of operation, viz:

1. in some jurisdictions a person's failure proactively to warn another of an obvious risk cannot attract liability for negligence unless a warning was required by a written law, or the risk was of personal injury or death resulting from the provision of a professional service;
2. in some jurisdictions, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk; and
3. in some jurisdictions, participants in 'recreational activities' are relieved from liability for harm suffered by other participants as a result of the materialisation of an obvious risk of the activity.

The authors observe that the aim of the provisions is to make it harder to use the law of negligence to obtain compensation. Whether the provisions achieve that effect will depend on how they are interpreted and applied. As matters presently stand, it is unclear how the courts will approach these provisions, but it might be expected that they will be strictly construed against a defendant seeking to avoid a finding of liability

Some jurisdictions also contain provision to the effect that there can be no liability in negligence for harm resulting from the materialisation of an 'inherent' risk. As the authors observe, this provision is entirely redundant because 'inherent risk' is defined as a risk that could not be avoided by the exercise of reasonable care. Such a risk could never, of course, attract liability for negligence.

It is again difficult to see what the statutory provisions add to the common law or, alternatively, the manner in which they depart from the common law.

It may be accepted that there was some legitimate concern arising from a series of decisions in the early 1990s that the courts were paying insufficient regard to the requirement that a person should take reasonable care for his or her own safety in the recreational context. That might be considered to have been a short-lived aberration.

There has since that time been a judicial trend away from imposing a requisite, or any onerous, standard of care in the face of obvious risk. That trend may be tracked through the following line of authority, starting with a Northern Territory case.

In *Romeo v Conservation Commission (NT)*¹⁹, the High Court held that there was no relevant breach by the Commission. The reasons of the majority vary. Brennan CJ held that to those who exercised reasonable care for their own safety, the cliff and its dangers were obvious, and that the Commission was under no duty to fence, light, erect warnings or take any other step to protect the public from those obvious dangers.²⁰ Toohey and Gummow JJ concluded that the posting of a sign warning of the danger would not have obviated the risk, and that there was no breach of the Commission's duty of care in failing to erect a barrier at the cliff edge. This did not fall within the Commission's general duty of care to take steps to prevent persons entering the Reserve from suffering injury.²¹ Kirby J found that because the risk was obvious and because the natural condition of the cliffs was part of their attraction, enclosing the cliffs by a barrier was not reasonable.²² Hayne J concluded that the content of the duty did not require the Commission to fence the cliff in the locus of the accident.²³

In *Prast v Town of Cottesloe*²⁴, the Western Australian Court of Appeal held that a council was not required to warn about the risks of body surfing, because those who indulge in pleasurable but risky pastimes must take personal responsibility for what they do. Where the risk is so well-known and obvious that it can be reasonably assumed that the individuals concerned would take reasonable care for their own safety, there is no duty to warn.

In *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council*²⁵, Gaudron, McHugh and Gummow JJ observed at [163], adopting the reasons for decision of Callinan J, that persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Whilst *Ghantous* was a footpath case, the reasoning is of general application. Only dangers, hazards and traps which are not readily perceived properly call for some protection or warning.

¹⁹ (1998) 192 CLR 431

²⁰ *Ibid*, see [25]

²¹ *Ibid*, see [54]-[56]

²² *Ibid*, see [132]

²³ *Ibid*, see [162]-[165]

²⁴ (2000) 22 WAR 474

²⁵ (2001) 206 CLR 512

In *Swain v Waverley Municipal Council*²⁶, the plaintiff developed quadriplegia after diving into the surf and hitting a sandbar. The case was heard before a jury. The jury delivered a verdict for the plaintiff. The New South Wales Court of Appeal held that where a person dives into a wave close to shore there is an inherent and well known risk of encountering a sandbar. The council had not breached the requisite duty of care in failing to erect warning signs. That determination was reversed by the High Court, but on the basis that a jury's verdict should not be displaced unless there was no evidence to support the finding. A reading of the reasons for decision of the High Court in *Swain* discloses that had the High Court been the tribunal of fact in the matter, the plaintiff probably would not have succeeded.²⁷

That process culminated in two High Court cases which contained a definitive statement of principles: *Vairy v Wyong Shire Council*²⁸ and *Mulligan v Coffs Harbour City Council*.²⁹

In *Vairy*, the plaintiff suffered irreversible tetraplegia after diving into the ocean from a rock platform and hitting his head on a sandbar. He claimed the defendant council was negligent in failing to prohibit diving from the rock, or warning of the dangers of doing so. In *Mulligan*, the plaintiff was a swimmer injured in a creek owned and controlled by multiple defendants. Again, the allegation was of a negligent failure to warn of the risk.

The High Court made the following general statements of principle:-

1. What is a reasonable response to a foreseeable risk is to be assessed by reference to **community standards** of reasonable behaviour.³⁰ Reasonableness may require **no response** to a foreseeable risk.³¹
2. The determination of the existence and content of a duty is to be assessed by looking at the nature of the risk assessed prior to the accident. It has to be determined looking forward to what was reasonably foreseeable, not looking back on what actually happened.³²
3. An activity that involves a **choice about participation** cannot be approached in the same way as involuntary activities.³³ There is a difference between choosing to participate in a recreational activity and 'the workplace, the roads, the marketplace and other areas into which people must venture.'³⁴ The former involves **personal autonomy**.³⁵
4. The obviousness of the risk is one factor to be considered in assessing the circumstances of a particular case and in some cases it may be a conclusive factor.³⁶

²⁶ (2005) 220 CLR 517

²⁷ Ibid, see [19], [23], [79]-[81], [156], [229]-[233] and [236]

²⁸ (2005) 221 ALR 711

²⁹ (2005) 221 ALR 764

³⁰ Ibid, at [3]

³¹ Ibid at [3] and [78]

³² Ibid at [22] and [53]; and *Vairy v Wyong Shire Council* (2005) 221 ALR 711 at [60], [61] and [79].

³³ *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764 at [76]

³⁴ *Vairy v Wyong Shire Council* (2005) 221 ALR 711 at [80] and [224]

³⁵ Ibid at [219]

³⁶ *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764 at [52] and [73] to [78]; *Vairy v Wyong Shire Council* (2005) 221 ALR 711 at [55], [162] to [163] and [223]

The **expectation that persons will take care for their own safety** is one factor to be taken into account in assessing the reasonableness of a response.³⁷

In addition, experience shows that attempts to draft statutory provisions which seek to exclude liability for injury suffered as a result of an obvious risk will not necessarily achieve that result. In the recent matter of *State of Queensland v Kelly*³⁸, the Queensland Court of Appeal had occasion to consider circumstances in which the respondent suffered injuries when he ran down a sand dune and fell into a lake on Fraser Island. Prior to doing so, the respondent had been shown an orientation video about Fraser Island by his tour company, and had passed two signs warning of dangers associated with the lake and sand dunes. Section 13 of the *Civil Liability Act 2003* (Qld) defined the term “obvious risk” to include “a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person”. Section 15 of the legislation went on to provide that “[a] person (defendant) does not owe a duty to another person (plaintiff) to warn of an obvious risk to the plaintiff”; and s 19 provided that “[a] person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm”. Those circumstances and provisions notwithstanding, the Court Appeal upheld the trial judge’s finding that the risk of serious injury which was inherent in the respondent’s activity was not an “obvious risk” within the meaning of the legislation, and that the appellant was liable in negligence.

At or about the same time, the Supreme Court of the ACT handed down its decision in *Ackland v Stewart, Vickery and Stewart*.³⁹ The plaintiff in that case had suffered injury from performing a backward aerial somersault on a fairground-style attraction known as a jumping pillow. The injury occurred in NSW, which brought into play s 5L of the *Civil Liability Act 2002* (NSW). That section provided that “[a] person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff”. The term “obvious risk” was defined in the same way as the Queensland legislation. The Court found in the circumstances that the defence was not available, as it would not have been obvious to a reasonable person in the position of the plaintiff that there was a risk of serious neck injury in attempting to perform a back somersault on the jumping pillow. The Court then went on to consider the principles established by the High Court in *Tame v State of NSW*⁴⁰ and *Swain*⁴¹, which were cases decided in accordance with the law in place before the statutory tort law reforms. In the application of those principles (which reflect Mason J’s formulation in *Shirt*⁴² and were reflected in s 5B of the NSW legislation), the Court found that the risk of harm to the plaintiff was foreseeable, the risk was not insignificant, and that reasonable persons in the position of the defendants would have taken precautions against that risk.

Even accepting at the outset that the result in every case will depend upon the particular facts of that case, three conclusions may be drawn in relation to the operation of statutory provisions concerning “obvious risk”. First, the promulgation of provisions excluding liability for injury suffered as a result of obvious risk will not necessarily achieve that result, even in cases where the relevant risk would appear obvious according to ordinary conceptions. Secondly, even where there is no statutory intervention in relation to “obvious risk”, courts may and do in the application of common law principles of negligence make findings that

³⁷ *Vairy v Wyong Shire Council* (2005) 221 ALR 711 at [8], [79], [80] and [222]; *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764 at [17] to [26].

³⁸ [2014] QCA 27

³⁹ [2014] ACTSC 18

⁴⁰ (2003) 21ICLR317 at 352-4

⁴¹ *Swain v Waverley Municipal Council* (2005) 220 CLR 517

⁴² *Wyong Shire Council v Shirt* (1979) 146 CLR 40 at 478

deny liability for injury suffered as a result of an obvious risk. Thirdly, whether a court will in any given circumstance exclude liability for injury suffered as a result of an obvious risk might arguably be seen to have little or no correlation with the existence or otherwise of a statutory provision.

Against that background, it is difficult to see any immediate need for statutory provisions to the effect that a person's failure proactively to warn another of an obvious risk cannot attract liability for negligence; or that a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

5.8 Duty to warn of risk

Some jurisdictions have provisions defining the scope of a medical practitioner's duty to warn of risk. Those provisions are generally to the effect that a doctor does not breach a duty owed to a patient to warn of risk before the patient undergoes any medical treatment unless the doctor at that time fails to give the following information about the risk:

1. information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice; or
2. information that the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

Leaving aside emergency situations, doctors have a common law duty to tell patients about 'material' risks. A risk is material if, in the circumstances of the case, a reasonable patient would attach significance to it; and the doctor must disclose such risks without being asked by the patient. A risk is also material if the doctor knows or ought to realise that the particular patient would attach significance to it.

The statutory provision would seem to be a direct statement of the scope of the duty at common law.

5.9 Standard of care for professionals

Some jurisdictions have provisions defining the standard of care for professionals. Those provisions are generally to the effect that:

1. a professional does not breach a duty if it is established that the professional acted in a way that was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice; and
2. peer professional opinion does not have to be universally accepted to be considered widely accepted.

This limitation on the circumstances in which there will be a breach of duty is generally expressed not to apply to the duty to warn of risk.

The purpose of the provision is clear. The position originally at common law was that courts would not normally attempt to choose between conflicting expert evidence as to how a professional (generally a doctor) ought to have acted. Under that test, a doctor was unlikely to be held negligent provided he or she acted in accordance with practice accepted at that time as proper 'by a responsible body of medical opinion even though other doctors adopt a

different practice', and even if the holders of the opinion were in the minority. This was known as the '*Bolam* test'.⁴³ The *Bolam* test was rejected by the High Court in *Rogers v Whitaker*⁴⁴, with the result that courts had greater freedom to decide for themselves whether or not medical practices were reasonable.

There is no doubt a practical difference between the application of the *Bolam* test and the relevant approach under the principles of the common law of Australia (bearing in mind that the courts of England and Wales adhere to the *Bolam* test). The purpose of the test, whichever one might be adopted, is to strike a balance between the interest of professionals in exercising their skill in accordance with their best judgement, and the interest of their clients in personal safety and financial security. How that balance ought to be struck is a matter of policy.

5.10 Contributory negligence

Some jurisdictions have enacted provisions permitting a court to determine a reduction of 100% on account of contributory negligence, effectively making the pleading a complete defence. The percentage reduction is to be calculated according to notions of justice and equity.

Part 5 of the *Law Reform (Miscellaneous Provisions) Act* (NT) already contains provisions dealing with contributory negligence. Those provisions empower the court to reduce the damages recoverable in respect of the wrong 'to the extent of the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.

Accordingly, it is already possible, in theory at least, for a Northern Territory court to determine a reduction of 100% if that is called for in the application of the test, without invoking the *volenti non fit iniuria* principle or now rejected notions of 'no breach of duty'.

5.11 Miscellaneous exclusions

There are also miscellaneous exclusions which have been adopted by one or two jurisdictions, and particularly:

1. provisions which abrogate the 'eggshell skull rule' in nervous shock cases;
2. provisions excluding the liability of highway authorities in certain circumstances; and
3. provisions barring recovery by persons who suffer injury in the course of criminal conduct in certain circumstances.

The incorporation of those inclusions would no doubt have a practical effect on the circumstances in which a claim in negligence will be available. Whether those limitations should be incorporated in Northern Territory legislation is a matter of policy.

5.12 The case for change

Speaking in the broadest terms, legislation is generally enacted for those matters that are essential to the government's objectives and which cannot be achieved in other ways, and for one of the following reasons:

1. to redefine or extend existing rights or obligations;

⁴³ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁴⁴ (1992) 175 CLR 479

2. to circumscribe or extend powers;
3. if there is a constitutional requirement;
4. to raise revenue and appropriate moneys; or
5. if it is justified for important policy reasons.

In the private law field, legislative intervention commends itself in the following circumstances:

1. where the law in a particular area has developed in a long series of decisions and mass of cases from which it was difficult to identify the central principles (e.g the *Partnership Act*, the *Sale of Goods Act* and recent proposals for the codification of the law of contract);
2. where the practice at common law had evolved to require enormously lengthy documents and/or cumbersome procedures (e.g the old common law system of titles which required an exhaustive and expensive inquiry into the chain of ownership going back many decades);
3. to deal with isolated points of private law where a rule had been established by the common law which was recognized to work injustice (e.g the *Limitation Act* was passed to ensure that people and businesses were not exposed to the risk of litigation long after the events said to give rise to the legal liability had arisen); or
4. for the purpose of a cooperative scheme to regulate a subject matter by the enactment of complementary applied schemes of legislation, in aid of uniformity and microeconomic reform.

Despite (or perhaps because of) its long history, it may be doubted that it is difficult to identify the central principles of the law of negligence. The only exceptions might be the outer limits of the categories of relationship which give rise to a duty of care and the principles governing recovery for pure economic loss, neither of which is dealt with by the legislation in other Australian jurisdictions.

The practice for the institution and conduct of claims in negligence is not problematic.

The law of negligence certainly does not work any general injustice, although particular areas of its operation might be said to yield results which are contrary to public policy (discussed further below).

The very first recommendation of the Ipp Report was for a general statute to be enacted in each jurisdiction, however, all States and Territories enacted separate statutes dissimilar in various respects from those in the other jurisdictions. Nor is this a case in which uniform legislation or a cooperative scheme is necessary due to some question about legislative authority, geographical reach of legislation, or jurisdiction to take enforcement action.

Concerns that the Northern Territory might be left as an anomalous island of the common law would appear to be unfounded, to this point at least. That result would require either the common law of negligence to be developed by the Supreme Court of the Northern Territory, and on occasion the High Court, such that it diverged from the legislative 'codes'; or for the courts to interpret what are essentially legislative statements of the common law principles in a manner that ultimately diverged from their common law source. Neither development is yet evident.

This Committee is not in possession of empirical data that would answer one way or another the question whether the codification of the common law has been effective in addressing concerns that it had become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants. We suspect it is impossible to disentwine the combined effect of all the tort law reform measures in order to identify the individual effect of any one of those measures.

The imposition of a minimum whole person impairment threshold has no doubt reduced the number of 'small claims', the principal concern with which was the disparity between the legal costs awarded in those claims and the quantum of damages awarded. The imposition of caps on awards of damages under various heads has no doubt reduced what was seen as an unsustainable level of exposure for insurers and governments, particularly in relation to awards for pain and suffering in cases of catastrophic injury, future care costs and '*Griffiths v Kerkemeyer* damages'.⁴⁵ The Northern Territory has already adopted those measures.

The enactment of specific exemptions and limitations, particularly in relation to 'dangerous recreational activities' and professional liability, has no doubt reduced the incidence of decisions which might attract condemnation from some sectors of the public. We are referring here to cases such as *Nagle v Rottneest Island Authority*⁴⁶, where the plaintiff succeeded in a claim for injuries sustained when he dived from a ledge notwithstanding his awareness that there were submerged rocks in the vicinity, and cases such as *Rogers v Whitaker*.⁴⁷ We suspect these categories of case attracted particular attention because they represented the exception rather than the rule, and that of themselves they had a limited impact on insurance premium levels. In any event, commentators such as Malcolm CJ suggest that prior to the legislative intervention the courts had already begun to address what might have been seen as anomalous results through the processes of the common law. The review of authority in this memorandum would seem to bear that out.

It would of course be possible for the Northern Territory to enact provisions dealing with obvious risks, dangerous recreational activities and professional liability without otherwise seeking to 'codify' the law of negligence.

This Committee sees no reason to develop a Code governing a principle so elastic as negligence where the common law can, by common sense, and variation by relevant case-law, develop as exigencies dictate.

In this respect the observations made by Chief Justice Wayne Martin, in a paper titled 'The Civil Liability Act: Impact & Effect', are of considerable relevance. The address was given to the Australian Insurance Law Association under the general heading "The Pendulum Swings" on 19 October 2011.

His Honour referred to 'what many commentators have described as the contraction of the scope of liability in tort evident since around the turn of the millennium'.

His Honour discussed various cases illustrating this principle. In effect he was suggesting that the common law was correcting such extremes as it may have been said to have reached, and developing an approach more in keeping with the realities and limitations of the law of negligence. This process, His Honour suggested, had been evident prior to the Ipp Report and Recommendations.

⁴⁵ *Griffiths v Kerkemeyer* (1977) 15 ALR 387

⁴⁶ (1993) 112 ALR 393

⁴⁷ (1992) 175 CLR 479

His Honour quoted the remarks of McHugh J in *Tame v State of NSW*⁴⁸ as follows:

“I think the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations”.

In the same case, Kirby J considered it ‘desirable for the Court to identify a universal methodology.’⁴⁹ His Honour Martin CJ concluded:

“From this review of the cases, the title chosen by the organisers of this conference becomes apparent. The trend of decision evident in cases decided over the last decade or so is firmly against expanding the scope of liability for negligence, and has served to constrain expansions in scope which took place during the latter part of the last millennium. Returning to my central theme, it is therefore clear that judicial development of the common law of Australia has significantly constrained the scope of liability for negligence”.

His Honour then considered the scope of the Civil Liability Acts passed by the States and the ACT subsequent to the Ipp Report.

“Not only is the legislation variously expressed, but its stated objects are variously expressed both in the statutes and in the secondary materials relating to the statutes, such as explanatory memoranda and Second Reading Speeches. The inevitable consequence is likely to be divergent interpretations in different jurisdictions”.

His Honour’s final conclusion is as follows:

“Fourth, and perhaps most significantly of all, the burden of this paper has been the advancement of the proposition that developments in the common law which have occurred over much the same time period as the impact of the civil liability legislation has been felt have had much the same effect as the legislation. It is I think very difficult to distinguish, at an empirical level, from the impact which the legislation has had upon the bringing of claims from the impact which the “swinging of the common law pendulum” has had.

Nevertheless, the size of the reduction in the number of claims for personal injury brought following the enactment of the legislation was significant. In that context, it would I think, be naïve and unrealistic to suggest that the legislation had no or negligible impact on the volume of claims brought. I do, however, suggest that developments in the common law have significantly reduced the impact which the legislation has had upon the legal principles applicable to the resolution of claims in negligence”.

His Honour Ipp J commented in a speech *“Themes in the Law of Torts”* that:

“The current position is that the courts are markedly less pro-plaintiff than in the pre-reform era. The approach is more balanced and it is difficult to discern a bias either way. Of course, that is as it should be”.

Later, he added:

⁴⁸ (2003) 21ICLR317 at 352-4

⁴⁹ Ibid p.616

“The High Court, in recent times, has clarified principles that were obscure or vague or conflicting (53). There is a need to continue with this task and this, I think, will be a future trend”.

The summary given in *Halsbury’s Laws of Australia*, 2007 (2nd ed) “Torts” is: -

“Finally, in 2002, the law of negligence in Australia was subject to unparalleled change and scrutiny; from the legislature, judiciary and the community. As noted at [33.2.30], significant legislative change has been introduced in all States and Territories to reform the law of negligence. Given the widespread legislative and community concern about the direction and expansion of the law of negligence, legislative reforms are always likely. Perhaps unsurprisingly given the background of community concern (see [33.2.360]), the common law of negligence is also in a state of flux. The proximity as a ‘general conceptual determinant and the unifying theme for categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid the foreseeable risk of injury to another’, has been rejected in decisions of the High Court. Indeed, the ‘search for a unifying principle in the law of negligence has [to date] proven to be as futile as the search for a unifying principle in the laws of physics”.

Assuming that there are some differences in the concept of negligence or breach of duty as it appears in the various Civil Liability Acts, and the concept as developed by the common law, this Committee is not convinced that the enactment of an eighth statutory iteration of duty of care and causation in the Northern Territory to add to the existing seven would add to the gaiety of nations. Rather, it considers that, in most cases on this topic which may come before the courts of the Northern Territory, there will be little, if any, difference between the statutory or common law interpretations; and such differences as may appear will ultimately be resolved and reconciled by judicial determination. If, as the learned editors of *Tort-Laws of Australia*⁵⁰ suggest, ‘the common law of negligence is in a state of flux’, nevertheless it is the common law which can ultimately and more effectively resolve the boundaries by the process of finding a pattern in a series of actual cases; i.e broadening down ‘from precedent to precedent’.

As Ipp J has stated (see above) the High Court has ‘clarified principles that were obscure or vague or conflicting’.

Inevitably it will be the common law that will be the vehicle for change and clarification.

NATURAM EXPELLAS CUM FURCA TAMEN USQUE REDDIT⁵¹

⁵⁰ *Supra*

⁵¹ ‘You may expel nature (i.e the common law) with a pitchfork (i.e statute) nevertheless she will return.’ See also Tennyson “...where freedom slowly broadens down, from precedent to precedent”.

6.0 ADEQUACY OF THRESHOLDS FOR PERSONAL INJURY DAMAGES, AND THE ARRANGEMENTS FOR PUBLIC LIABILITY AND INDEMNITY INSURANCE IN THE NORTHERN TERRITORY

The precursor and impetus that led to the commissioning of the Ipp Report and resultant recommendations stemmed from a number of Court decisions around Australia in which the Court handed down judgments in favour of plaintiffs that included substantial and large awards of damages for pain and suffering. At that time the level of awards by the Court for damages for pain and suffering were so high that they raised considerable concern in the community and amongst stakeholders, such as large corporations and insurers. Concern was held that the level of awards would adversely affect business operations and the provision of insurance for compensable risks. Damages for pain and suffering were awarded in addition to damages for past and future economic loss, special damages and any other entitlements that plaintiffs had, where liability was established against the defendant(s). There was a general and serious concern that if the Courts continued with awards of damages along the line of authorities that were prevalent at that time, then there would be serious difficulties to defendants and insurers in being able to respond to judgments.

Following on from this background, the Ipp enquiry and resulting report, which included a recommendation to cap any awards for pain and suffering, was designed to limit the Court's discretion in relation to potentially unlimited awards for damages for pain and suffering. The recommendations in the Ipp report led to the replacement of traditional damages for pain and suffering with statute setting out how the Courts were to deal with a plaintiff's claim for non-pecuniary loss. All States and Territories now have legislation that prescribes how a Court is to award any damages for non-pecuniary loss, including the imposition of a threshold whole person impairment percentage before the plaintiff is entitled to any damages for non-pecuniary loss. Once a plaintiff meets the threshold requirement, then their entitlement is calculated in accordance with the whole person impairment assessment, as a percentage of the maximum sum that a Court may award for such damages. The maximum sum is also prescribed by the legislature.

Accordingly, the concern that arose from the Court's earlier judgments, giving rise to large awards for pain and suffering, has been remedied in the sense that the Court's discretion has been curtailed and the legislation has imposed a more objective means of assessing a plaintiff's entitlement to non-pecuniary loss (namely by reference to a whole person permanent impairment which is calculated in accordance with the Australian Medical Association Guides to Permanent Impairment). The imposition of such an objective assessment and a maximum sum for non-pecuniary loss has also led to a consideration of the maximum sums set by the States and Territories to ensure that there is a general consensus in relation to the adequacy or otherwise of the maximum sums set by the different jurisdictions.

On the basis of the information set out in the Comparison Table (refer Appendix 3), the provisions of the relevant Civil Liability legislation for the awards to claimants for pecuniary loss and general damages are similar in that all have applicable thresholds for entitlements to such damages, as well as a cap on the maximum that a Court is allowed to award for same. In this regard, the Northern Territory's legislation is on par with and compares

adequately with similar provisions applicable in the other States and Territory. In some areas, the Northern Territory provisions may be considered to be more favourable to claimants than those operating in the other jurisdictions, as such, the Committee is generally satisfied that there is no need to consider any legislative changes to the current Act applicable in the Territory.

7.0 SUPPLEMENTARY REFERENCE - IMMUNITY OF ROADS AUTHORITIES

As noted at the outset, the Attorney-General has requested this Committee by supplementary reference to give specific consideration to the provision of statutory immunity for roads authorities for both personal injury and property damage claims.

The background to the request is that prior to the decision of the High Court in *Brodie v Singleton Shire Council*⁵², highway authorities enjoyed immunity from civil liability in respect of any failure to repair or keep in repair public highways; including any failure to inspect a highway for that purpose. For reasons discussed further below, the High Court abolished the immunity.

Following the High Court's decision, some jurisdictions enacted legislation to reinstate the immunity. Those enactments followed on from various recommendations made in the Ipp Report.

The Attorney-General's supplementary reference notes that the local government sector has raised concerns regarding the particular road maintenance difficulties which present in the Northern Territory as a consequence of vast distances, a dispersed population, river and marine barriers, seasonal inundation, a low tax base and inadequate funding levels. It also notes that s 5 of the *Motor Accidents (Compensation) Act* (NT) provides that an action for damages does not lie either at common law or under statute for the death of, or injury to, a person arising from a motor vehicle accident that occurs in the Northern Territory.

7.1 The decision in *Brodie v Singleton Shire Council*⁵³

The bases for the abolition of the 'highway rule' in *Brodie*⁵⁴ were summarised in the reasons of Gaudron, McHugh and Gummow JJ⁵⁵, who together with Kirby J formed the majority, in the following terms.

1. First, the rule operated capriciously and denied equal protection of the law, because it barred absolutely a remedy to victims of the negligent omissions of highway authorities in circumstances where victims of other negligent omissions of public authorities were entitled to compensation;
2. Secondly, the rule had developed such that an authority would escape liability if it had never attempted to repair some danger on a road or bridge, but could become liable if it attempted to repair such a danger. The practical consequence was to provide a strong incentive to a highway authority not to address a danger on a roadway;
3. Thirdly, because the operation of the rule made the taking of some 'positive' action the determinant of liability, it became necessary to undertake a detailed investigation of the authority's past records in order to determine whether any positive work had been carried out on the defective roadway. The need to conduct such an enquiry frequently made it impractical or impossible for a plaintiff to establish liability, particularly where the work had been performed by an independent contractor, or by some predecessor body, or in circumstances where the effluxion of time made the identification of records impossible in any practical sense. In many cases, plaintiffs with otherwise meritorious cases failed for want of evidence establishing when or by whom relevant work was carried out.

⁵² (2001) 206 CLR 512

⁵³ *Ibid*

⁵⁴ *Ibid*

⁵⁵ *Ibid* at [134] to [149]

4. Fourthly, the abolition of the immunity would not move the law from the extreme of non-liability to the other extreme of liability in all cases. There would not be the imposition of a duty which could be discharged only by repairing roads to bring them to a perfect state of repair.

The plurality reasons then went on to describe the content of a road authority's duty of care in the following terms:

*"The duty which arises under the common law of Australia may now be considered. Authorities having statutory powers of the nature of those conferred by the Local Government Act upon the present respondents to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist"*⁵⁶.

The decision may be seen as forming part of the jurisprudential trend to subsume into the general law of negligence various tortious causes of action for which highly complex and technical rules governing recovery had developed. Other examples of this trend in the common law include the law of occupier's liability and the 'Rylands v Fletcher cause of action.'⁵⁷

7.2 Recommendations made in the Ipp Report

The abolition of the 'highway immunity' was picked up in the Review of the Law of Negligence, chaired by the Honourable David Ipp. The Ipp Report contained a general discussion of the position of public authorities, with specific reference to highway authorities.⁵⁸

The Report stated there was evidence to suggest that since the decision in *Brodie*⁵⁹ the law of negligence was being applied in such a way as to allow decisions, made in good faith, about the allocation of scarce resources between competing activities, to provide the basis for findings of liability against public authorities. Submissions were made to the Ipp Panel to the effect that the decision in *Brodie*⁶⁰ should be reversed and the non-feasance rule restored. The Ipp Panel was not persuaded that should be done, because the judgments of the majority in *Brodie*⁶¹ provided compelling justification for the abolition of the non-feasance rule.

The Ipp Panel was satisfied, however, that the decision in *Brodie*⁶² had given rise to some undesirable consequences that needed to be addressed. In particular, when determining whether a public authority had taken reasonable steps to address some risk, courts were drawn into a consideration of whether an authority's conduct in relation to the risk was

⁵⁶ at [150]

⁵⁷ *Rylands v Fletcher* [1868] UKHL 1

⁵⁸ The Ipp Report, Ch 10

⁵⁹ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² *Ibid*

reasonable given the other demands upon resources available to the authority. In the opinion of the Ipp Panel, it was undesirable for the courts to be making assessments of what were essentially social and political considerations in determining negligence actions.

This undesirability was said to arise on a number of grounds. First, courts are not qualified to adjudicate upon the reasonableness of decisions that are essentially political in nature. Secondly, courts are inappropriate bodies to consider the reasonableness of such decisions because they are not politically representative or politically responsible. Thirdly, the proper consideration of reasonableness in the context of litigation is often expensive and time consuming.

In response to those concerns, the Ipp Report recommended the introduction of a policy defence to the effect that in any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a decision that is based substantially on financial, economic, political or social factors or constraints cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.⁶³ In other words, the Ipp Report was recommending the introduction of something akin to the 'Wednesbury test'⁶⁴ in administrative law to the determination of certain negligence claims against public authorities.

In making that recommendation, the Ipp Panel gave an example of how it contemplated the defence would operate. In that example, a public authority is sued for negligently failing to repair a pothole that caused a motor accident in which the plaintiff was injured. The authority leads evidence to the effect that:

1. it did not know about the pothole;
2. it maintains 10,000 km of roads, and inspects its roads on a six monthly cycle;
3. given its budget allocation, it could not afford a more frequent inspection cycle; and
4. the pothole developed after the last inspection.

On those facts it would not be open to the court to find that the budget decision constituted negligent conduct on the part of the authority unless the decision was one that no reasonable public authority in that position could have made.

On the other hand, if the plaintiff was able to establish that three months before the accident the authority had been informed that the pothole was dangerous and should be repaired, and if the authority decided to do nothing, the court would be unlikely to hold that the non-repair was the result of a decision based on financial, economic, political or social factors or constraints. The authority would not in those circumstances be able to rely on the policy defence, and the plaintiff's claim would be decided according to the ordinary principles of negligence. The plaintiff would be likely to succeed in the application of those principles.

⁶³ Recommendation 39 of the Ipp Report

⁶⁴ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

7.3 The legislative response in other jurisdictions

Every other Australian jurisdiction with road maintenance responsibilities has enacted some legislative response to the decision in *Brodie*⁶⁵ and the recommendation contained in the Ipp Report. A table setting out those provisions is contained at Appendix 4.

Some variation on the recommendation made by the Ipp Report appears to have been adopted in New South Wales, with application to public authorities generally.

Section 42 of the *Civil Liability Act 2002* (NSW) provides:

42 Principles concerning resources, responsibilities etc of public or other authorities

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,*
- (b) the general allocation of those resources by the authority is not open to challenge,*
- (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),*
- (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.*

This provision goes part way to implementing the Ipp Panel's recommendation in relation to policy decisions, but does not go so far as the application of the 'unreasonableness' test contained in that recommendation.

Section 43 of the *Civil Liability Act 2002* (NSW) goes on to provide for the application of the 'unreasonableness test', but only to the extent that the liability is based on a 'breach of statutory duty'. It provides:

43 Proceedings against public or other authorities based on breach of statutory duty

- (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.*
- (2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority*

⁶⁵ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512

having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

- (3) *In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.*

It is not entirely clear from the wording of the section whether the defence has application only to actions for the separate tort of breach of statutory duty, or whether it has application to proceedings in negligence where the liability is said to arise from the negligent exercise of a statutory duty.

Section 45 of the *Civil Liability Act 2002* (NSW), which deals specifically with roads authorities, provides:

45 Special non-feasance protection for roads authorities

- (1) *A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.*
- (2) *This section does not operate:*
- (a) *to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or*
 - (b) *to affect any standard of care that would otherwise be applicable in respect of a risk.*
- (3) *In this section:*

carry out road work *means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the Roads Act 1993.*

roads authority *has the same meaning as in the Roads Act 1993.*

This provision operates to make ‘actual knowledge’ of the particular risk on the part of an authority a prerequisite to the establishment of liability for harm arising from a failure to carry out work. Even where actual knowledge is established, it still falls to a plaintiff to establish that the authority in question had a duty of care in the circumstances, and that the authority was in breach of the requisite standard of care in the application of the ordinary principles of negligence.

The New South Wales provision dealing specifically with roads authorities has been considered in a number of cases. Those cases have turned largely on the question of ‘actual knowledge’, and their results may be summarised as follows:

1. In *Leichhardt Council -v- Serratore*⁶⁶, Giles JA concluded that for the purposes of section 45, actual knowledge could be inferred.

⁶⁶ [2005] NSWCA 406

2. In *Porter -v- Lachlan Shire Council*⁶⁷, the trial judge held the plaintiff could not prove actual knowledge for the purposes of section 45 by calling evidence “that two council employees walked past the area and ... there was a hole there”. The council employees had been present in the area to inspect a site where building works were to be carried out. The Court on appeal held that the trial judge was not in error in deciding the plaintiff had not proved the defendant had actual knowledge of the hole.
3. In *Port Stephens Council v Theodorakis*⁶⁸, Bryson JA observed that section 45 posed ‘no real difficulty’ to the appellant in circumstances where the council’s records showed that as part of a systematic observation of the footpath in which a number of defects were recorded, officers observed the 20 mm lip on or shortly before 30 November 2000. Bryson JA said directly in relation to section 42 of the *Civil Liability Act* and implicitly in relation to section 45 that if those provisions were to be relied upon they should be pleaded, a duty which was discharged in the defence in the present case.
4. In *North Sydney Council -v- Roman*⁶⁹, the defendant council submitted that to find actual knowledge for the purposes of section 45 it was necessary that there be a connection between the person with actual knowledge of the particular risk and the person able to, but who failed to, carry out the roadwork that would have avoided the harm which materialised. It argued that, even if it was assumed a street sweeper had actual knowledge of the pothole, such knowledge was not sufficient because street sweepers did not carry out repairs. The appeal was allowed with Basten and Bryson JJA agreeing that:
 - for the purposes of section 45 actual knowledge must be found in the mind of an officer within the council having statutory authority to carry out the necessary repairs; and
 - the evidence demonstrated that no council officer at a decision-making level had actual knowledge of the particular pothole and therefore the defendant did not have such knowledge.

Accordingly the exception to section 45 was not engaged and the statutory immunity prevailed. Basten JA observed particularly:

“The section confers an immunity on a roads authority where harm arises ‘from a failure of the authority to carry out road work’. The exception only arises where ‘at the time of the alleged failure’ the authority had actual knowledge of the particular risk. A purposive construction would require that the relevant knowledge exist in an officer responsible for exercising the power of the authority to mitigate the harm. The existence of the power is only coupled with a duty to act in circumstances where such knowledge exists. Accordingly, the knowledge must exist at or above the level of the officer responsible for undertaking necessary repairs. The knowledge of others without such responsibility will not, relevantly for the purposes of the provision, constitute ‘actual knowledge’ of the roads authority itself; at best it could give rise to ‘constructive’ or imputed knowledge...”

Basten JA also expressed the tentative view that the plaintiff bears the onus of proving the facts necessary to engage the exception to the immunity.

⁶⁷ [2006] NSWCA 126

⁶⁸ [2006] NSWCA 70

⁶⁹ [2007] NSWCA 27

Apart from the decision in *Leichhardt Council -v- Serratore*⁷⁰, the New South Wales Court of Appeal has taken a restrictive interpretation to the section in relation to what constitutes actual knowledge.

The *Civil Law (Wrongs) Act 2002* (ACT) (ss 110, 111 and 113), the *Civil Liability Act 2002* (Tas) (ss 38, 40 and 42), and the *Civil Liability Act 2003* (Qld) (ss 35, 36 and 37) are in largely the same terms as the New South Wales legislation.

Western Australia has taken a similar approach to New South Wales (in the enactment of ss 5W, 5X and 5Z of the *Civil Liability Act 2002* (WA)), save that the policy defence is expressed to extend to any claim for damages for harm caused by the fault of a public body or officer arising out of fault 'in the performance or non-performance of a public function'. Victoria has taken a similar approach, but has limited the defences to road authorities and related entities (ss 101, 102 and 103 of the *Road Management Act 2004* (Vic)).

A different approach has been taken in South Australia. Section 42 of the *Civil Liability Act 1936* (SA) provides:

42 Liability of road authorities

(1) *A road authority is not liable in tort for a failure—*

(a) *to maintain, repair or renew a road; or*

(b) *to take other action to avoid or reduce the risk of harm that results from a failure to maintain, repair or renew a road.*

(2) *In this section—*

road *means a street, road or thoroughfare to which public access is available to vehicles or pedestrians (or both), and includes—*

(a) *a bridge, viaduct, busway (including the O-Bahn) or subway;*

(b) *an alley, laneway or walkway;*

(c) *a carpark;*

(d) *a footpath;*

(e) *a structure associated with a road;*

road authority *means—*

(a) *a body or person in which the ownership of a road is vested by statute, or to which the care, control and management of a road is assigned by statute; or*

(b) *if the road is on land of the Crown—the Crown or the Minister responsible for the care, control and management of the land; or*

(c) *any other public authority or public body that is in fact responsible for the care, control and management of a road;*

⁷⁰ [2005] NSWCA 406

vehicle includes—

- (a) a motor vehicle;
- (b) a bicycle;
- (c) an animal that is being ridden;
- (d) an animal that is being used to draw a vehicle,

but does not include a tram or other vehicle (except an O-Bahn bus) that is driven on a fixed track.

This provision operates essentially as a statutory statement of the old ‘highway rule’. Although it was enacted in 2004, there would not appear to be any authority in relation to the operation of the rule. This would seem to suggest that it operates consistently with the common law immunity, and is not a controversial issue in South Australia.

This Committee has been unable to locate any quantitative data addressing the question whether the introduction of the statutory provisions in other jurisdictions has had any bearing on the incidence or outcomes of negligence actions brought against roads authorities. This is not entirely surprising. The provisions were introduced relatively quickly following the decision in *Brodie*.⁷¹ During that interstice, the Ipp Panel had received only anecdotal or impressionistic accounts from local councils concerning problems with the application of the law of negligence to road maintenance issues.

7.4 The position in the Northern Territory

Under the Australian *Constitution*, roads are the responsibility of state/territory and local governments. However, the Federal government also provides road funding assistance. The division of responsibility between the Northern Territory and local governments is provided by statute.

Section 7 of the *Control of Roads Act* (NT) provides that all roads in the Northern Territory are the property of and vested in the Northern Territory and are under the care, control and management of the Minister. That vesting is expressed to be subject to Part 12.3 of the *Local Government Act* (NT).

Part 12.3 of the *Local Government Act* provides relevantly that the Northern Territory may by *Gazette* place roads under the care, control and management of a council. While a road remains under the care, control and management of a council it will bear responsibility for the maintenance of the road, and will bear liability for any breach of the requisite standard of care in maintaining the road.

In broad terms, highways and arterial roads remain vested in the Northern Territory government, whilst local roads in populated areas are vested in local government councils. The Committee is uncertain of the extent to which that responsibility has been devolved in remote Aboriginal communities.

⁷¹ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512

Section 5 of the *Motor Accidents (Compensation) Act* provides:

5 Abolition of common law rights

- (1) *An action for damages does not lie (either at common law or by statute) for the death of, or injury to, a person arising from a motor accident that occurs in the Territory.*
- (2) *It is the Legislative Assembly's intention:*
 - (a) *that this section should apply within and outside the Territory; and*
 - (b) *that it should apply outside the Territory to the full extent of the extraterritorial legislative capacity of the Territory.*

The term 'motor accident' is defined in the legislation as an occurrence caused by or arising out of the use of a motor vehicle, and resulting in the death of, or injury to, a person. Such an accident 'is caused by or arises out of the use of a motor vehicle' only if it results directly from the driving of the motor vehicle, the motor vehicle moving out of control, or a collision with the motor vehicle (whether stationary or moving). The legislation goes on to provide a 'no fault' scheme of compensation for death and personal injury arising as a consequence of a motor vehicle accident.

The effect of these provisions is that the issue of fault does not arise in relation to personal injuries or deaths arising from a motor vehicle accident in the Northern Territory. Accordingly, the question of the liability of roads authorities in negligence is largely irrelevant in the Northern Territory. There are, however, three potential exceptions:

1. First, it is conceivable that an injured person, or the dependants of a deceased person, might in unusual circumstances seek to bring proceedings under the trade practices legislation for damages for unconscionable conduct or some other statutory cause of action outside the scope of the 'no fault' legislation. The single authority in relation to this issue is to the effect that the motor accidents legislation in the Northern Territory does not preclude a plaintiff from recovering damages under the Commonwealth legislation: see *Pritchard v Racecage Pty Ltd*.⁷² Two observations may be made in relation to that proposition. First, the decision is attended by significant doubt. Secondly, amendments subsequently made to s 5 of the Northern Territory legislation largely undermine the basis upon which the decision was made. It is difficult to see that the remote prospect of a claim under the trade practices legislation, which would only be available in highly unusual circumstances, would of itself warrant the statutory reinstatement of the immunity of roads authorities.
2. Secondly, the abolition of common law actions in relation to motor vehicle accidents has application only to personal injuries or deaths. That leaves open the prospect that a plaintiff might bring proceedings against a roads authority in respect of property damage. The experience in the Northern Territory since the decision in *Brodie*⁷³ does not suggest that the incidence of claims of that nature has been problematic for either the Northern Territory government or local government councils.
3. Thirdly, the immunity of roads authorities also extended to infrastructure within a road reserve, such as footpaths. For that reason, the immunity provided some protection in relation to 'slip and trip' cases. Again, however, the experience in the

⁷² [1997] FCA 27

⁷³ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512

Northern Territory since the decision in *Brodie*⁷⁴ does not suggest that there is a high incidence, or indeed any incidence, of such cases requiring statutory intervention. This may probably be attributed to the other tort law reform measures that were introduced in order to preclude actions for minor injuries, and because the common law itself developed to place a greater emphasis upon personal responsibility and the obligation of a prospective plaintiff to take reasonable care for his or her own safety. That approach was exemplified in the matter of *Ghantous*⁷⁵, which was decided at the same time and dealt with in the same decision as *Brodie*.⁷⁶

For those reasons, this Committee does not see any compelling reason for the introduction of a statutory immunity for roads authorities for personal injury and property damage claims.

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

8.0 RECOMMENDATIONS

1. That, insofar as the Reference inquires as to the effectiveness of tort reforms adopted by the Northern Territory in respect of negligence or breach of duty as recommended by the Ipp Committee, this Committee sees no need for the Northern Territory to add an eighth version to the seven disparate Acts passed by the States and ACT (contrary to the Ipp Committee recommendation that there be a general Act for all States and Territories); and this Committee recommends that the common law, with its capacity to develop as circumstances dictate, continue to apply in the Northern Territory.
2. That, insofar as the Reference inquires of the effectiveness of tort reforms adopted by the Northern Territory in response to recommendations of the Ipp Committee relating to threshold tests and capping of damages in cases of negligence or breach of duty, this Northern Territory Committee observes that these objectives have been achieved by the *Personal Injuries (Liabilities and Damages) Act* (NT), and notes that the areas of compensation therein set out are within boundaries accepted by other States and the ACT. This Committee therefore recommends no changes to the legislation save those contemplated within the legislation itself to adjust minimum and maximum figures as circumstances dictate.
3. By Supplementary Terms of Reference this Committee was asked to consider specifically the provision of statutory immunity for road authorities for both personal injury and property damage claims. This Committee considers that, because of the *Motor Accidents (Compensation) Act* (NT) providing a 'no fault' scheme for death or personal injury arising as a consequence of a motor vehicle accident, the question of the liability of road authorities in negligence leading to personal injuries claims is largely irrelevant in the Northern Territory.

APPENDIX 1: AUSTRALIAN LEGISLATIVE PROVISIONS - CODIFYING ASPECTS OF THE LAW OF NEGLIGENCE

A. *Civil Law (Wrongs) Act 2002 (ACT)*, Ch 4

Part 4.1 Preliminary—negligence

40 Definitions—ch 4

In this chapter:

harm means harm of any kind, and includes—

- (a) personal injury; and
- (b) damage to property; and
- (c) economic loss.

negligence means failure to exercise reasonable care and skill.

41 Application—ch 4

- (1) This chapter applies to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise.
- (2) However, this chapter does not apply to a claim under the [Workers Compensation Act 1951](#).

Part 4.2 Duty of care

42 Standard of care

For deciding whether a person (the ***defendant***) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

43 Precautions against risk—general principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
 - (a) the probability that the harm would happen if precautions were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity creating the risk of harm.

44 Precautions against risk—other principles

In a proceeding in relation to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which it was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and is not of itself an admission of liability in relation to the risk.

Part 4.3 Causation

45 General principles

- (1) A decision that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the happening of the harm ('factual causation');
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (the **scope of liability**).
- (2) However, if a person (the **plaintiff**) has been negligently exposed to a similar risk of harm by a number of different people (the **defendants**) and it is not possible to assign responsibility for causing the harm to any 1 or more of them—
 - (a) the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but
 - (b) the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) In deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party.

46 **Burden of proof**

In deciding liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Part 4.4 Other provisions—negligence

47 **Contributory negligence can defeat claim**

In deciding the extent of a reduction of damages because of contributory negligence, a court may decide on a reduction of 100% if the court considers it is just and equitable to do so, with the result that the claim for damages is defeated.

48 **Remedy available if claim fraudulent**

- (1) This section applies to a person if—
 - (a) the person did, or omitted to do, something in relation to a claim; and
 - (b) the person did, or omitted to do, the thing—
 - (i) for the purpose of obtaining a financial benefit; or
 - (ii) knowing that the thing (or something else resulting from doing or omitting to do the thing) is false or misleading.

Example of something done in relation to claim

the making of a statement

Example of something resulting from the doing of the thing

the statement

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) If this section applies to a claimant in relation to a claim—
 - (a) a person who has a liability in relation to a payment, settlement, compromise or judgment relating to the claim is relieved from the liability to the extent of the financial benefit obtained by the claimant; and
 - (b) a person who has paid an amount to the claimant in relation to the claim (whether under a settlement, compromise, judgment or otherwise) is entitled to recover from the claimant the amount of the financial benefit obtained by the claimant and any costs incurred in relation to the claim.
- (3) If this section applies to a person other than a claimant in relation to a claim, the claimant is entitled to recover from the person as a debt the amount of the financial benefit obtained by the person and any costs incurred by the claimant in relation to the claim.

B. *Civil Liability Act 2002 (NSW), Part 1A*

5A Application of Part

- (1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

Division 2 – Duty of Care

5B General principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
 - (b) the risk was not insignificant, and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
 - (a) the probability that the harm would occur if care were not taken,
 - (b) the likely seriousness of the harm,
 - (c) the burden of taking precautions to avoid the risk of harm,
 - (d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 3 - Causation

5D General principles

- (1) A determination that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
 - (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
 - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4 – Assumption of risk

5F Meaning of obvious risk

- (1) For the purposes of this Division, an "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

5G Injured persons presumed to be aware of obvious risks

- (1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
- (2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5H No proactive duty to warn of obvious risk

- (1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an obvious risk to the plaintiff.
- (2) This section does not apply if:
 - (a) the plaintiff has requested advice or information about the risk from the defendant, or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk, or
 - (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

5I No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
- (2) An "inherent risk" is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 5 – Recreational activities

5J Application of Division

- (1) This Division applies only in respect of liability in negligence for harm to a person ("**the plaintiff**") resulting from a recreational activity engaged in by the plaintiff.
- (2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

5K Definitions

In this Division:

"dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm.

"obvious risk" has the same meaning as it has in Division 4.

"recreational activity" includes:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

5L No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) A person ("**the defendant**") is not liable in negligence for harm suffered by another person ("**the plaintiff**") as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

5M No duty of care for recreational activity where risk warning

- (1) A person ("**the defendant**") does not owe a duty of care to another person who engages in a recreational activity ("**the plaintiff**") to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
- (2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:
 - (a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or

- (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).
- (3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).
- (5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).
- (6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.
- (7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.
- (8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.
- (9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.
- (10) The fact that a risk is the subject of a risk warning does not of itself mean:
 - (a) that the risk is not an obvious or inherent risk of an activity, or
 - (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.
- (11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.
- (12) In this section:

"incapable person" means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

"parent" of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

5N Waiver of contractual duty of care for recreational activities

- (1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.
- (3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (4) In this section, "**recreation services**" means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.
- (5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.
- (6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

Division 6 – Professional negligence

5O Standard of care for professionals

- (1) A person practising a profession ("**a professional**") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the

failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

Division 7 – Non-delegable duties and vicarious liability

5Q Liability based on non-delegable duty

- (1) The extent of liability in tort of a person ("**the defendant**") for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.
- (2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

Division 8 – Contributory negligence

5R Standard of contributory negligence

- (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
- (2) For that purpose:
 - (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
 - (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

5T Contributory negligence--claims under the Compensation to Relatives Act 1897

- (1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.
- (2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.

C. *Civil Liability Act 2003 (Qld), Ch 2*

Part 1 – Breach of Duty

Division 1 – General standard of care

9 General principles

- (1) A person does not breach a duty to take precautions against a risk of harm unless -
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things) -
 - (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.

10 Other principles

In a proceeding relating to liability for breach of duty happening on or after 2 December 2002 -

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 2 - Causation

11 General principles

- (1) A decision that a breach of duty caused particular harm comprises the following elements -

- (a) the breach of duty was a necessary condition of the occurrence of the harm (factual causation);
 - (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability).
- (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty - being a breach of duty that is established but which can not be established as satisfying subsection (1)(a) - should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
- (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach -
- (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
 - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

12 Onus of proof

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 3 – Assumption of risk

13 Meaning of obvious risk

- (1) For this division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
- (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure

on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

Examples for subsection (5) -

- 1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.
- 2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.

14 Persons suffering harm presumed to be aware of obvious risks

- (1) If, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk.

Editor's note -

'Voluntary assumption of risk' is sometimes stated as 'volenti non fit injuria'.

- (2) For this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

15 No proactive duty to warn of obvious risk

- (1) A person (defendant) does not owe a duty to another person (plaintiff) to warn of an obvious risk to the plaintiff.
- (2) Subsection (1) does not apply if -
 - (a) the plaintiff has requested advice or information about the risk from the defendant; or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk; or
 - (c) the defendant is a professional, other than a doctor, and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

Note -

In relation to paragraphs (a) and (b), see section 21 for the duty of a doctor to warn of risk.

- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

- (4) In this section -
a professional has the same meaning as it has in division 5.

16 No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
- (2) An inherent risk is a risk of something occurring that can not be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 4 - Dangerous recreational activities

17 Application of div 4

- (1) This division applies only in relation to liability in negligence for harm to a person resulting from a dangerous recreational activity engaged in by the plaintiff.
- (2) This division does not limit the operation of division 3 in relation to a recreational activity.

18 Definitions for div 4

In this division—

dangerous recreational activity means an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.

obvious risk has the same meaning as it has in division 3.

19 No liability for personal injury suffered from obvious risks of dangerous recreational activities

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.
- (2) This section applies whether or not the person suffering harm was aware of the risk.

Division 5 - Duty of professionals

20 Definition for div 5

In this division—

a professional means a person practising a profession.

21 Proactive and reactive duty of doctor to warn of risk

- (1) A doctor does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of being given medical advice) that will involve a risk of personal injury to the patient, unless the doctor at that time fails to give or arrange to be given to the patient the following information about the risk—
 - (a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
 - (b) information that the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.
- (2) In this section—

patient, when used in a context of giving or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

Example—

the responsibility a parent has for an infant child

22 Standard of care for professionals

- (1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.
- (2) However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.
- (3) The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service.

Division 6 Contributory negligence

23 Standard of care in relation to contributory negligence

- (1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence in failing to take precautions against the risk of that harm.
- (2) For that purpose—
 - (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and
 - (b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.

24 Contributory negligence can defeat claim

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

D. *Civil Liability Act 1936 (SA), Part 6*

Division 1—Duty of care

31—Standard of care

- (1) For determining whether a person (the ***defendant***) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.
- (2) The reasonable person in the defendant's position will be taken to be sober unless—
 - (a) the defendant was intoxicated; and
 - (b) the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and
 - (c) the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs,

and, in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant.

32—Precautions against risk

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
 - (a) the probability that the harm would occur if precautions were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.

33—Mental harm—duty of care

- (1) A person (the ***defendant***) does not owe a duty to another person (the ***plaintiff***) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness.

- (2) For the purposes of this section—
- (a) in a case of pure mental harm, the circumstances of the case to which the court is to have regard include the following:
 - (i) whether or not the mental harm was suffered as the result of a sudden shock;
 - (ii) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
 - (iii) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
 - (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant;
 - (b) in a case of consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose.
- (3) This section does not affect the duty of care of a person (the **defendant**) to another (the **plaintiff**) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

Division 2—Causation

34—General principles

- (1) A determination that negligence caused particular harm comprises the following elements:
- (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
- (2) Where, however, a person (the **plaintiff**) has been negligently exposed to a similar risk of harm by a number of different persons (the **defendants**) and it is not possible to assign responsibility for causing the harm to any one or more of them—
- (a) the court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm¹; but
 - (b) the court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

Note—

1 See *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89.

35—Burden of proof

In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 3—Assumption of risk

36—Meaning of obvious risk

- (1) For the purposes of this Division, an **obvious risk** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or matters of common knowledge.
- (3) A risk may be obvious even though it is of low probability.

37—Injured persons presumed to be aware of obvious risks

- (1) If, in an action for damages for negligence, a defence of voluntary assumption of risk (*volenti non fit injuria*) is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not actually aware of the risk.
- (2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.
- (3) However, in order to establish a defence of voluntary assumption of risk, it is necessary to establish that the risk was such that a reasonable person in the plaintiff's position would have taken steps (which the plaintiff did not in fact take) to avoid it.

38—No duty to warn of obvious risk

- (1) A person (the **defendant**) does not owe a duty of care to another person (the **plaintiff**) to warn of an obvious risk to the plaintiff.
- (2) Subsection (1) does not apply if—
 - (a) the plaintiff has requested advice or information about the risk from the defendant; or
 - (b) the defendant is required to warn the plaintiff of the risk by a written law; or
 - (c) the risk is a risk of death or of personal injury to the plaintiff from the provision of a health care service by the defendant.
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

39—No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

- (2) An ***inherent risk*** is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 4—Negligence on the part of persons professing to have a particular skill

40—Standard of care to be expected of persons professing to have a particular skill

In a case involving an allegation of negligence against a person (the ***defendant***) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care and skill is, subject to this Division, to be determined by reference to—

- (a) what could reasonably be expected of a person professing that skill; and
- (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

41—Standard of care for professionals

- (1) A person who provides a professional service incurs no liability in negligence arising from the service if it is established that the provider acted in a manner that (at the time the service was provided) was widely accepted in Australia by members of the same profession as competent professional practice.
- (2) However, professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing professional opinions widely accepted in Australia by members of the same profession does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of a risk of death or injury associated with the provision of a health care service.

E. *Civil Liability Act 2002 (Tas), Part 6*

PART 6 - Breach of Duty

Division 1 Preliminary

9 Interpretation

In this Part,

Harm means harm of any kind, including the following:

- (a) personal injury or death;
- (b) damage to property;
- (c) pure economic loss.

10 Application of Part 6

This Part applies to civil liability of any kind for damages for harm resulting from breach of duty, except civil liability that is excluded from the operation of this Part by section 3B.

Division 2 - Standard of care

11 General principles

- (1) A person does not breach a duty to take reasonable care unless -
 - (a) there was a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought reasonably to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the position of the person would have taken precautions to avoid the risk.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things):
 - (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the potential net benefit of the activity that exposes others to the risk of harm.
- (3) For the purpose of subsection (2)(c), the court is to consider the burden of taking precautions to avoid similar risks of harm for which the person may be responsible.

12 Other principles

In a proceeding relating to liability for breach of duty -

- (a) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (b) the subsequent taking of action that (had the action been taken earlier) would have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute evidence of liability in connection with the risk.

Division 3 - Causation

13 General principles

- (1) Prerequisites for a decision that a breach of duty caused particular harm are as follows:
 - (a) the breach of duty was a necessary element of the occurrence of the harm ("factual causation");
 - (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ("scope of liability").
- (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty, being a breach of duty that is established but which can not be established as satisfying subsection (1)(a), should be taken as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
- (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach -
 - (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
 - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

14 Onus of proof

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact on which the plaintiff wishes to rely relevant to the issue of causation.

Division 4 - Obvious risks

15 Meaning of "obvious risk"

- (1) For the purpose of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
- (5) A risk is not an obvious risk merely because a warning about the risk has been given.

16 Persons suffering harm presumed to be aware of obvious risks_

- (1) If, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the existence of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the existence of the risk.
- (2) For the purpose of this section, a person is aware of the existence of a risk if the person is aware of the existence of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

17 No proactive duty to warn of obvious risk

- (1) A person ("the defendant") does not owe a duty to another person ("the plaintiff") to warn of an obvious risk to the plaintiff.
- (2) Subsection (1) does not apply if -
 - (a) the plaintiff has requested advice or information about the risk from the defendant; or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk; or
 - (c) the defendant is a professional, other than a medical practitioner, and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service to the plaintiff by the defendant in the defendant's professional capacity.
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

Division 5 - Dangerous recreational activities

18. Application of Division

- (1) This Division applies only in respect of liability for breach of duty resulting in harm to a person from a dangerous recreational activity engaged in by that person.
- (2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

19. Interpretation

In this Division –

dangerous recreational activity means a recreational activity that involves a significant degree of risk of physical harm to a person;

obvious risk has the same meaning as it has in Division 4;

recreational activity includes –

- (a) any sport (whether or not the sport is an organised activity); and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure.

20. No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) A person is not liable for a breach of duty for harm suffered by another person ("the plaintiff") as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

Division 6 - Professional negligence

21. Proactive and reactive duty of registered medical practitioner to warn of risk

- (1) A medical practitioner does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of the patient being given medical advice) that will involve or give rise to a risk of personal injury to the patient, unless the medical practitioner at that time fails to give or arrange to be given to the patient the following information about the risk (whether or not the patient asks for the information):
 - (a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
 - (b) information that the medical practitioner knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

- (2) This section does not apply where a medical practitioner has to act promptly to avoid serious risk to the life or health of the patient and –
 - (a) the patient is not able to hear or respond to a warning about the risk to the patient; and
 - (b) there is not sufficient time for the medical practitioner to contact a person responsible for making a decision for the patient.
- (3) In this section,

patient, when used in a context of asking for or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

22. Standard of care for professionals

- (1) A person practising a profession ("a professional") does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) Peer professional opinion cannot be relied on for the purpose of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purpose of subsection (1).
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in relation to the risk of harm associated with the provision by a professional of a professional service to a person.

Division 7 - Contributory negligence

23. Standard of contributory negligence

- (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent for the purpose of apportioning liability under section 4 of the Wrongs Act 1954.
- (2) For the purpose of apportioning liability under section 4 of the Wrongs Act 1954 –
 - (a) the standard of care required of the person who suffered harm is that required of a reasonable person in the position of that person; and

- (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

F. *Wrongs Act 1958 (Vic), Part X*

PART X—NEGLIGENCE

Division 1—Preliminary

s. 45

43 Definitions

S. 43
inserted by
No. 102/2003
s. 3.

In this Part—

court includes tribunal, and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;

damages includes any form of monetary compensation;

harm means harm of any kind and includes—

- (a) injury or death; and
- (b) damage to property; and
- (c) economic loss;

injury means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease;

negligence means failure to exercise reasonable care.

44 Application of Part

S. 44
inserted by
No. 102/2003
s. 3.

This Part applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

45 Exclusions from Part

S. 45
inserted by
No. 102/2003
s. 3.

- (1) This Part does not apply to the following claims for damages—
 - (a) a claim to which Part 3, 6 or 10 of the **Transport Accident Act 1986** applies;
 - (b) a claim to which Part IV of the **Accident Compensation Act 1985** applies;
 - (c) a claim in respect of an injury which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the **Workers Compensation Act 1958** to compensation under that Act;

- (d) a claim in respect of an injury which entitles, or may entitle, a person or a dependant of a person to compensation under any of the following—
- (i) Part V of the **Country Fire Authority Act 1958** or the regulations made under that Act;
 - (ii) Part 4 of the **Victoria State Emergency Service Act 2005**;
 - (iii) Part 6 of the **Emergency Management Act 1986**;
 - (iv) the **Police Assistance Compensation Act 1968**;
 - (v) Part 8 of the **Juries Act 2000** or Part VII of the **Juries Act 1967**;
 - (vi) Part 5.6 of the **Education and Training Reform Act 2006**;
- (e) subject to subsection (2), a claim for damages in respect of an injury that is a dust-related condition within the meaning of the **Administration and Probate Act 1958**; or
- (f) subject to subsection (2), a claim for damages in respect of an injury resulting from smoking or other use of tobacco products, within the meaning of the **Tobacco Act 1987**, or exposure to tobacco smoke.
- (2) A claim for damages referred to in subsection (1)(e) or (1)(f) does not include a claim for damages that relates to the provision of or the failure to provide a health service.
- (3) This Part does not apply to claims in proceedings of a class that is excluded by the regulations from the operation of this Part.

s. 46

S. 45(1)(d)(ii) substituted by No. 51/2005 s. 58(13).

S. 45(1)(d)(vi) amended by No. 24/2006 s. 6.1.2(S ch. 7 item 49).

46 Application to contract

- (1) This Part does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the **express provision**) in relation to any matter to which this Part applies and does not limit or otherwise affect the operation of the express provision.
- (2) Subsection (1) extends to any provision of this Part even if the provision applies to liability in contract.

S. 46 inserted by No. 102/2003 s. 3.

47 Effect of this Part on the common law

Except as provided by this Part, this Part is not intended to affect the common law.

S. 47 inserted by No. 102/2003 s. 3.

Division 2—Duty of care

48 General principles

S. 48
inserted by
No. 49
102/2003
s. 3.

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
 - (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.
- (3) For the purposes of subsection (1)(b)—
 - (a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and
 - (b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

49 Other principles

S. 49
inserted by
No. 49
102/2003
s. 3.

In a proceeding relating to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

50 Duty to warn of risk—reasonable care

A person (the **defendant**) who owes a duty of care to another person (the **plaintiff**) to give a warning or other information to the plaintiff in respect of a risk or other matter, satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information.

S. 50
inserted by
No. 102/2003
s. 52

Division 3—Causation

51 General principles

- (1) A determination that negligence caused particular harm comprises the following elements—
 - (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
- (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- (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 negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

S. 51
inserted by
No. 102/2003
s. 3.

52 Burden of proof

In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

S. 52
inserted by
No. 102/2003
s. 3.

Division 4—Awareness of risk

53 Meaning of obvious risk

- (1) For the purposes of section 54, an **obvious risk** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

S. 53
inserted by
No. 102/2003
s. 3.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

s. 58

S. 54
inserted by
No. 102/2003
s. 3.

54 Voluntary assumption of risk

(1) If, in a proceeding on a claim for damages for negligence, a defence of voluntary assumption of risk (*volenti non fit injuria*) is raised and the risk of harm is an obvious risk, the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was not aware of the risk.

(2) Subsection (1) does not apply to—

(a) a proceeding on a claim for damages relating to the provision of or the failure to provide a professional service or health service; or

(b) a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

(3) Without limiting section 47, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2).

S. 55
inserted by
No. 102/2003
s. 3.

55 No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An **inherent risk** is a risk of something occurring that cannot be avoided by the exercise of reasonable care.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

S. 56
inserted by
No. 102/2003
s. 3.

56 Plaintiff to prove unawareness of risk

(1) In any proceeding where, for the purpose of establishing that a person (the **defendant**) has breached a duty of care owed to a person who suffered harm (the **plaintiff**), the plaintiff alleges that the defendant has—

(a) failed to give a warning about a risk of harm to the plaintiff; or

(b) failed to give other information to the plaintiff—

the plaintiff bears the burden of proving, on the balance of probabilities, that the plaintiff was not aware of the risk or information.

(2) Subsection (1) does not apply to a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

- (3) Despite subsection (2), subsection (1) applies to a proceeding referred to in subsection (2) if the proceeding relates to the provision of or the failure to provide a health service.
- (4) Without limiting section 47, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2) to which subsection (1) does not apply.
- (5) Nothing in this section is intended to alter any duty of care to give a warning of a risk of harm or other information.

s. 57

Division 5—Negligence of professionals and persons professing particular skills

57 Definition

In this Division **professional** means an individual practising a profession.

58 Standard of care to be expected of persons holding out as possessing a particular skill

In a case involving an allegation of negligence against a person (the **defendant**) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care is, subject to this Division, to be determined by reference to—

- (a) what could reasonably be expected of a person possessing that skill; and
- (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

59 Standard of care for professionals

- (1) A professional is not negligent in providing a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field (**peer professional opinion**) as competent professional practice in the circumstances.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) If, under this section, a court determines peer professional opinion to be unreasonable, it must specify in writing the reasons for that determination.
- (6) Subsection (5) does not apply if a jury determines the matter.

S. 57
inserted by
No. 102/2003
§.3. 58
inserted by
No. 102/2003
s. 3.

S. 59
inserted by
No. 102/2003
s. 3.

S. 60
inserted by
No. 102/2003
s. 3.

60 Duty to warn of risk

Section 59 does not apply to a liability arising in connection with the giving of (or the failure to give) a warning or other information in respect of a risk or other matter to a person if the giving of the warning or information is associated with the provision by a professional of a professional service.

Division 6—Non-delegable duties and vicarious liability

S. 61
inserted by
No. 102/2003
s. 3.

61 Liability based on non-delegable duty

- (1) The extent of liability in tort of a person (the **defendant**) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the defendant were vicariously liable for the negligence of the person in connection with the performance of the work or task.
- (2) This section applies to a claim for damages in tort whether or not it is a claim for damages resulting from negligence, despite anything to the contrary in section 44.

Division 7—Contributory negligence

S. 62
inserted by
No. 102/2003
s. 3.

62 Standard of care for contributory negligence

- (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
- (2) For that purpose—
 - (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and
 - (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

S. 63
inserted by
No. 102/2003
s. 3.

63 Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

Division 8—General

S. 64
inserted by
No. 102/2003
s. 3.

64 Regulations

The Governor in Council may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.

65 Supreme Court—limitation of jurisdiction

It is the intention of sections 48(2), 51(2), 51(3), 51(4), 58, 59(5) and 62 to alter or vary section 85 of the **Constitution Act 1975**.

S. 65
inserted by
No. 102/2003
s. 65
s. 66
inserted by
No. 102/2003
s. 3.

66 Transitional

- (1) This Part extends to negligence arising before, on or after the commencement day.
- (2) Section 61 extends to liability in tort arising before, on or after the commencement day.
- (3) Despite subsections (1) and (2), this Part does not apply to proceedings commenced in a court before the commencement day.
- (4) In this section **commencement day** means the day on which section 3 of the **Wrongs and Other Acts (Law of Negligence) Act 2003** comes into operation.

G. *Civil Liability Act 2002 (WA), Part 1A*

Part 1A — Liability for harm caused by the fault of a person

[Heading inserted by No. 58 of 2003 s. 8.]

Division 1 — Preliminary

[Heading inserted by No. 58 of 2003 s. 8.]

5A. Application of Part

- (1) Subject to sections 3A and 4A, this Part applies to any claim for damages for harm caused by the fault of a person unless this section states otherwise.
- (2) This Part extends to a claim for damages for harm caused by the fault of a person even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) Divisions 2, 3, 4, 5 and 6 do not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after 1 December 2003 (being the day on which the *Civil Liability Amendment Act 2003* section 8, which inserted those Divisions, came into operation).
- (3a) Division 7 does not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after the day on which the *Civil Liability Amendment Act 2004* section 5 comes into operation¹.
- (4) If in a claim for damages —
 - (a) it cannot be ascertained whether or not the incident out of which personal injury arises happened on or after the commencement day; and
 - (b) the symptoms of the injury first appeared on or after the commencement day,

the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

- (5) In subsection (4) —

commencement day means the day referred to in subsection (3) or (3a), as is relevant to the case.

[Section 5A inserted by No. 58 of 2003 s. 8; amended by No. 43 of 2004 s. 4.]

Division 2 — Duty of care

[Heading inserted by No. 58 of 2003 s. 8.]

5B. General principles

- (1) A person is not liable for harm caused by that person's fault in failing to take precautions against a risk of harm unless —

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) —
- (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.

[Section 5B inserted by No. 58 of 2003 s. 8.]

Division 3 — Causation

[Heading inserted by No. 58 of 2003 s. 8.]

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**).
- (2) In determining in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) —
- (a) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor; and
 - (b) whether and why the harm should be left to lie where it fell.
- (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 5C inserted by No. 58 of 2003 s. 8.]

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.

[Section 5D inserted by No. 58 of 2003 s. 8.]

Division 4 — Recreational activities

[Heading inserted by No. 58 of 2003 s. 8.]

5E. Terms used

In this Division —

dangerous recreational activity means a recreational activity that involves a significant risk of harm;

inherent risk means a risk of something occurring that cannot be avoided by the exercise of reasonable skill and care;

obvious risk has the meaning given by section 5F;

recreational activity includes —

- (a) any sport (whether or not the sport is an organised activity); and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- (c) any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

[Section 5E inserted by No. 58 of 2003 s. 8.]

5F. Term used: obvious risk

- (1) For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

[Section 5F inserted by No. 58 of 2003 s. 8.]

5G. Application of Division

- (1) This Division applies only in respect of liability for harm resulting from a recreational activity.
- (2) This Division does not limit the operation of Division 6 in respect of a recreational activity.

[Section 5G inserted by No. 58 of 2003 s. 8.]

5H. No liability for harm from obvious risks of dangerous recreational activities

- (1) A person (the **defendant**) is not liable for harm caused by the defendant's fault suffered by another person (the **plaintiff**) while the plaintiff engaged in a dangerous recreational activity if the harm is the result of the occurrence of something that is an obvious risk of that activity.
- (2) This section applies whether or not the plaintiff was aware of the risk.
- (3) This section does not apply if —
 - (a) the plaintiff has requested advice or information about the risk from the defendant; or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk.
- (4) Subsection (3) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

[Section 5H inserted by No. 58 of 2003 s. 8.]

5I. No liability for recreational activity where risk warning

- (1) Subject to this section, a person (the **defendant**) does not owe a duty of care to another person who engages in a recreational activity (the **plaintiff**) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
- (2) If a child suffers harm, the defendant may rely on a risk warning to a parent of the child if the parent is not an incompetent person —
 - (a) whether or not the child was accompanied by the parent; and
 - (b) whether or not the child was under the control of the parent.
- (3) If a child suffers harm, the defendant may rely on a risk warning to another person who is not a parent of the child if —
 - (a) the other person is not an incompetent person; and
 - (b) either —

- (i) the child was accompanied by that other person; or
 - (ii) the child was under the control of that other person.
- (4) For the purpose of subsections (1), (2) and (3), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.
- (5) The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (6) A risk warning can be given orally or in writing (including by means of a sign or otherwise).
- (7) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).
- (8) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.
- (9) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety.
- (10) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.
- (11) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.
- (12) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from an act done or omission made with reckless disregard, with or without consciousness, for the consequences of the act or omission.
- (13) A defendant is not entitled to rely on a risk warning to an incompetent person.
- (14) The fact that a risk is the subject of a risk warning does not of itself mean —
 - (a) that the risk is not an obvious risk or inherent risk of an activity; or
 - (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from that activity.
- (15) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.
- (16) In this section —

child means a person who has reached 16 years but is under 18 years of age;

incompetent person means a person who is under 18 years of age or who, because of a physical or mental disability, lacks the capacity to understand the risk warning.

[Section 5I inserted by No. 58 of 2003 s. 8.]

5J. Waiver of contractual duty of care for recreational activities

- (1) Despite any written law or other law of the State, a term of a contract for the supply of recreational services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (2) No written law renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.
- (3) A term of a contract for the supply of recreational services that is to the effect that a person to whom recreational services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (4) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.
- (5) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety.
- (6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from an act done or omission made with reckless disregard, with or without consciousness, for the consequences of the act or omission.
- (7) In this section —

recreational services means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of a recreational activity.

[Section 5J inserted by No. 58 of 2003 s. 8.]

Division 5 — Contributory negligence

[Heading inserted by No. 58 of 2003 s. 8.]

5K. Standard of contributory negligence

- (1) The principles that are applicable in determining whether a person is liable for harm caused by the fault of the person also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

- (2) For that purpose —
- (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and
 - (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

[Section 5K inserted by No. 58 of 2003 s. 8.]

5L. Presumption if person who suffers harm is intoxicated

- (1) This section applies when it is established that the person whose harm is the subject of proceedings for the recovery of damages for that harm was intoxicated at the time of the act or omission that caused the harm.
- (2) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.
- (3) If this section applies, it is to be presumed that the person was contributorily negligent unless the plaintiff establishes, on the balance of probabilities, that the person's intoxication did not contribute in any way to the cause of the harm.
- (4) In this section —

intoxicated means affected by alcohol or a drug or other substance capable of intoxicating a person to such an extent that the person's capacity to exercise reasonable care and skill is impaired.

[Section 5L inserted by No. 58 of 2003 s. 8.]

Division 6 — Assumption of risk

[Heading inserted by No. 58 of 2003 s. 8.]

5M. Term used: obvious risk

In this Division —

obvious risk has the meaning given by section 5E.

[Section 5M inserted by No. 58 of 2003 s. 8.]

5N. Injured person presumed to be aware of obvious risk

- (1) In determining liability for damages for harm caused by the fault of a person, the person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
- (2) For the purpose of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

[Section 5N inserted by No. 58 of 2003 s. 8.]

50. No duty to warn of obvious risk

- (1) A person (the **defendant**) does not owe a duty of care to another person (the **plaintiff**) to warn of an obvious risk to the plaintiff.
- (2) This section does not apply if —
 - (a) the plaintiff has requested advice or information about the risk from the defendant; or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk; or
 - (c) the defendant is a professional and the risk is a risk of harm to the plaintiff from the provision of a professional service by the defendant.
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

[Section 50 inserted by No. 58 of 2003 s. 8.]

5P. No liability for harm from inherent risk

- (1) A person (the **defendant**) is not liable for harm caused by the fault of that person suffered by another person if the harm is the result of the occurrence of something that cannot be avoided by the exercise of reasonable skill and care by the defendant.
- (2) This section does not operate to exclude liability in connection with a duty to warn of a risk.

[Section 5P inserted by No. 58 of 2003 s. 8.]

Division 7 — Professional negligence

[Heading inserted by No. 43 of 2004 s. 5.]

5PA. Term used: health professional

In this Division —

health professional means —

- (a) a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in any of the following health professions —
 - (i) Aboriginal and Torres Strait Islander health practice;
 - (ii) Chinese medicine;
 - (iii) chiropractic;
 - (iv) dental;
 - (v) medical;
 - (vi) medical radiation practice;

- (vii) nursing and midwifery;
 - (viii) occupational therapy;
 - (ix) optometry;
 - (x) osteopathy;
 - (xi) pharmacy;
 - (xii) physiotherapy;
 - (xiii) podiatry;
 - (xiv) psychology;
- or

- (b) any other person who practises a discipline or profession in the health area that involves the application of a body of learning.

[Section 5PA inserted by No. 43 of 2004 s. 5; amended by No. 28 of 2005 Sch. 3 cl. 1; No. 29 of 2005 Sch. 3 cl. 1; No. 30 of 2005 Sch. 3 cl. 1; No. 31 of 2005 Sch. 3 cl. 1; No. 32 of 2005 Sch. 3 cl. 1; No. 33 of 2005 Sch. 3 cl. 1; No. 42 of 2005 Sch. 3 cl. 1; No. 21 of 2006 Sch. 3 cl. 1; No. 50 of 2006 Sch. 3 cl. 2; No. 22 of 2008 Sch. 3 cl. 8; No. 25 of 2008 s. 16; No. 35 of 2010 s. 41.]

5PB. Standard of care for health professionals

- (1) An act or omission of a health professional is not a negligent act or omission if it is in accordance with a practice that, at the time of the act or omission, is widely accepted by the health professional's peers as competent professional practice.
- (2) Subsection (1) does not apply to an act or omission of a health professional in relation to informing a person of a risk of injury or death associated with —
 - (a) the treatment proposed for a patient or a foetus being carried by a pregnant patient; or
 - (b) a procedure proposed to be conducted for the purpose of diagnosing a condition of a patient or a foetus being carried by a pregnant patient.
- (3) Subsection (1) applies even if another practice that is widely accepted by the health professional's peers as competent professional practice differs from or conflicts with the practice in accordance with which the health professional acted or omitted to do something.
- (4) Nothing in subsection (1) prevents a health professional from being liable for negligence if the practice in accordance with which the health professional acted or omitted to do something is, in the circumstances of the particular case, so unreasonable that no reasonable health professional in the health professional's position could have acted or omitted to do something in accordance with that practice.
- (5) A practice does not have to be universally accepted as competent professional practice to be considered widely accepted as competent professional practice.

- (6) In determining liability for damages for harm caused by the fault of a health professional, the plaintiff always bears the onus of proving, on the balance of probabilities, that the applicable standard of care (whether under this section or any other law) was breached by the defendant.

APPENDIX 2: COMPARATIVE TABLE OF RECOMMENDATION 28

In the view of this Committee, it is of vital importance that Recommendation 1 of the Ipp Report be noted.

Recommendation 1

The Panel's recommendations should be incorporated (in suitably drafted form) in a **single statute** (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act') to be enacted **in each jurisdiction** (Emphasis added).

It is true that the Ipp Panel made allowance for what might be called 'local' variations.

'**Within limits** it would be possible for some elements of the package to be accepted and others to be rejected without seriously undermining the value of the exercise'. (Emphasis again added).

The Ipp Report makes the following recommendations under the heading 'Standard of Care':

Standard of Care

Recommendation 28

The Proposed Act should embody the following principles:

- (a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).
- (b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as 'not insignificant'.
- (c) A person is not negligent by reason of failing to take precautions against a risk that can be described as 'not insignificant' unless, under the circumstances, the reasonable person in that person's position would have taken precautions against the risk.
- (d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):
 - (i) The probability that the harm would occur if care was not taken;
 - (ii) The likely seriousness of that harm;
 - (iii) The burden of taking precautions to avoid the harm; and
 - (iv) The social utility of the risk-creating activity.

All States and ACT follow generally the principles laid down in Recommendation 28 of the Ipp Report, though with some variations.

The pattern generally adopted appears in section 5B of the NSW Act:

5B General Principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:

- (a) The risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) The risk was not insignificant; and
 - (c) In the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things);
- (a) The probability that the harm would occur if care were not taken;
 - (b) The likely seriousness of the harm;
 - (c) The burden of taking precautions to avoid the risk of harm;
 - (d) The social utility of the activity that creates the risk of harm.

These precise words are used in the Victorian Act (section 48), the ACT Act (section 43) and the SA Act (section 32).

The Qld Act (section 32) does not use the opening words 'A person is not negligent...' but prefers the words 'A person does not breach a duty to take precautions against a risk of harm unless...'

The WA Act (section 5B) also does not use the opening words, 'A person is not negligent...' but prefers the words, 'A person is not liable for harm caused by that person's fault in failing to take precautions against a risk unless...'

The Tasmanian Act (section 11) opens with the words 'A person does not breach a duty to take reasonable care unless...'

The Tasmanian Act (s.11) then follows what is set out in s.5B of the NSW Act save that for the expression in section 5B(2)(d) of the NSW Act. which is '(d) the social utility of the activity that creates the risk of harm', the Tasmanian Act substitutes the words '(d) the potential net benefit of the activity that exposes others to the risk of harm'.

The Tasmanian Act also expands section 5B(2)(c) of the NSW Act – '(c) the burden of taking precautions to avoid the risk of harm' by adding in the Tasmania Act an additional subsection (3) –

“(3) for the purpose of subsection 2(c), the court is to consider the burden of taking precautions to avoid similar risks of harm for which the person may be responsible”.

The Victorian Act also adds directions as to how the term 'insignificant risks' is to be applied:

- (3) For the purposes of subsection (1)(b) –
 - (a) **Insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and
 - (b) Risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

The ACT Act (section 42) & SA Act (section 31) seem to be the only Acts in which a positive direction as to 'Standard of Care' is provided.

This may be of some interest insofar as all the other provisions referred to above are couched in the negative (i.e 'a person is not negligent' etc.)

While it may be said that the various provisions referred to follow substantially Recommendation 28 of the Ipp Report, it is puzzling that the draftsmen in each State and the ACT seem to have chosen the different terminology set out above. Did each draftsman consider that he or she was thereby clarifying, altering or expanding the definition of negligence; and if so, why? Will the variations become a subtle game of interpretation for the High Court to decide? Does the legislation significantly alter the principles of the common law or do no more than point to a new expression 'not insignificant' which the common law may well adopt in its general development?

On the question of causation, the Ipp Report Recommendations appear as Recommendation 29.

This recommendation appears to have been generally adopted by the States and ACT but, in some cases in differing terms.

Thus the legislation of ACT (section 45), NSW (section 5D), WA (section 5C), Vic (section 51) and Qld (section 10) and Tasmania are in similar terms (though some prefer 'decision' rather than 'determination'). The SA provision import apparently different terms in s.34(2).

- (2) Where, however, a person (the **plaintiff**) has been negligently exposed to a similar risk of harm by a number of different persons (the **defendants**) and it is not possible to assign responsibility for causing the harm to any one or more of them –
 - (a) the court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm; but
 - (b) the court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability

APPENDIX 3: COMPARISON OF LIMITATION PERIOD AND PECUNIARY AND GENERAL DAMAGES IN AUSTRALIA (AS AT APRIL 2014)

	NSW	QLD	VIC	ACT	WA	SA	TAS	NT
Limitation Period for Claims	3 years	3 years	3 years	3 years	3 years	3 years	Earlier of 3 years commencing on date of discoverability or 12 years commencing on date of act or omission which it is alleged resulted in the personal injury	3 years However no limitation on Dust Disease related personal injuries.
Cap on Pecuniary Damages	Future economic loss, Court must consider Claimant's most likely future economic	Future economic loss, Court must consider Claimant's most likely future economic	There is a cap on the awarding of damages for past or future economic loss of three times the average	There is a cap on the awarding of damages for past or future economic loss of three times average	When assessing damages for economic loss, the court is to disregard earnings lost that would	No loss of earning capacity awarded for first week of incapacity. Total damages for	No award of damage for loss of earning capacity greater than three times the adult average	In assessing damages for past and future economic loss, the court may not award an amount

	circumstances. For past economic loss, Court is to disregard claimant's earnings that exceed 3 times the average weekly earnings.	circumstances. For past economic loss, Court is to disregard claimant's earnings that exceed 3 times the average weekly earnings.	weekly earnings as taken from the Victorian statistics at the date of the award.	weekly earnings.	have accrued at the date of more than three times the average weekly earnings at the date of the award.	loss of earning capacity (including past loss) are not to exceed sum (calculated to the nearest multiple of \$10) that bears to \$2.2 million the same proportion as the CPI for the September quarter of the preceding years bears to the CPI index for the September quarter 2001.	weekly earnings. Where damage is a consequence of mental harm, no award can be sought unless the harm is a recognised psychiatric illness.	exceeding three times average week earnings.
Discount Rate	5%	5%	5%	3%	6%	5%	5%	5%
Prescribed Maximum	\$551,500	\$337,300	\$497,340	No Caps on general	Where general	The claimant is ascribed a	Amount awarded =	\$571,000

General Damages				damages – Court may refer to previous decisions in determining award	damages assessed is below \$18,000 (A) – no award. Where general damages are assessed between A and \$55,000 (C), the amount assessed shall be reduced by A.	numerical value between 60 and 0 and each point equates to a monetary value up to \$274,200	1.25 x (amount assessed – amount A) Where assessment of damages exceeds Amount B, amount awarded is equal to amount assessed	% impairment of 5% or more determines amount of general damages awarded based on prescribed percentage of maximum amount.
Permanent Impairment Percentage threshold for General Damages	15%	Injury Scale Value between 0 and 100	5% physical impairment or 10% mental impairment		Where the amount assessed lies between \$55,000 and \$73,000 (A+C) the amount awarded is the difference between the damages assessed	No award of general damages unless claimant's ability to lead a normal life was significantly impaired for period of at least 7 days or medical	Index threshold Amount A is \$4000 for financial year ending 2004 or the amount calculated for financial year commencing 1 July 2004 and for each	5%

					and the result of A – (damages asessed- C)	expenses above the prescribed minimum have been incurred.	subsequent financial year. Amount B is five times Amount A	
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APPENDIX 4: JURISDICTIONAL COMPARISON: STATUTORY IMMUNITY FOR ROAD AUTHORITIES

Jurisdiction	General Policy Defence	Specific Immunity for Road Authorities	Legislation	Provision	Inserted
NSW	Yes (Breach of statutory duty only)	Yes	<i>Civil Liability Act 2002</i>	<p>42 Principles concerning resources, responsibilities etc of public or other authorities</p> <p>The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:</p> <p>(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,</p> <p>(b) the general allocation of those resources by the authority is not open to challenge,</p> <p>(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),</p> <p>(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.</p> <p>43 Proceedings against public or other authorities based on breach of statutory duty</p> <p>(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to</p>	92/2002

				<p>exercise a function of the authority.</p> <p>(2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.</p> <p>(3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.</p> <p>45 Special non-feasance protection for roads authorities</p> <p>(1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.</p> <p>(2) This section does not operate:</p> <p>(a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or</p> <p>(b) to affect any standard of care that would otherwise be applicable in respect of a risk.</p> <p>(3) In this section:</p> <p>"carry out road work" means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the <i>Roads Act 1993</i>.</p>	
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				"roads authority" has the same meaning as in the <i>Roads Act 1993</i> .	
SA	No	Yes	<i>Civil Liability Act 1936</i>	<p>42—Liability of <u>road</u> authorities</p> <p>5 (a) to maintain, repair or renew a <u>road</u>; or (b) to take other action to avoid or reduce the risk of <u>harm</u> that results from a failure to maintain, repair or renew a <u>road</u>.</p> <p>(2) In this section— "road" means a street, <u>road</u> or thoroughfare to which public access is available to <u>vehicles</u> or pedestrians (or both), and includes— (a) a bridge, viaduct, busway (including the O-Bahn) or subway; (b) an alley, laneway or walkway; (c) a carpark; (d) a footpath; (e) a structure associated with a <u>road</u>;</p> <p>"road authority" means— (a) a body or person in which the ownership of a <u>road</u> is vested by statute, or to which the care, control and management of a <u>road</u> is assigned by statute; or (b) if the <u>road</u> is on land of the Crown—the Crown or the Minister responsible for the care, control and management of the land; or (c) any other public authority or public body that is in fact responsible for the care, control and management of a <u>road</u>;</p>	9/2004

				<p>"vehicle" includes—</p> <ul style="list-style-type: none"> (a) a motor vehicle; (b) a bicycle; (c) an animal that is being ridden; (d) an animal that is being used to draw a vehicle, <p>but does not include a tram or other vehicle (except an O-Bahn bus) that is driven on a fixed track.</p>	
WA	Yes	Yes	<i>Civil Liability Act 2002</i>	<p>5W. Principles concerning resources, responsibilities etc. of public body or officer</p> <p>The following principles apply in determining whether a public body or officer has a duty of care or has breached a duty of care in proceedings in relation to a claim to which this Part applies —</p> <ul style="list-style-type: none"> (a) the functions required to be exercised by the public body or officer are limited by the financial and other resources that are reasonably available to the public body or officer for the purpose of exercising those functions; (b) the general allocation of those resources by the public body or officer is not open to challenge; (c) the functions required to be exercised by the public body or officer are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate); (d) the public body or officer may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate. 	58/2003

				<p>5X. Policy defence</p> <p>In a claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function, a policy decision cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant's position could have made it.</p> <p>5Z. Special protection for road authorities</p> <p>(1) In this section —</p> <p>carry out road work means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road;</p> <p>road has the meaning given to that term in the Main Roads Act 1930 section 6;</p> <p>roads authority, in relation to a road, means a public body or officer whose functions include carrying out road work on that road.</p> <p>(2) A roads authority is not liable in proceedings to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the failure the authority had actual knowledge of the particular risk that caused the harm.</p> <p>(3) This section does not operate —</p> <p>(a) to create a duty of care in respect of a risk merely because a road authority has actual knowledge of the risk; or</p> <p>(b) to affect any standard of care that would otherwise be applicable in respect of the risk.</p>	
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ACT	Yes (Breach of statutory duty only)	Yes	<i>Civil Law (Wrongs) Act 2002</i>	<p>110. Principles about resources, responsibilities etc of public or other authorities</p> <p>The following principles apply in deciding in a proceeding whether a public or other authority has a duty of care or has breached a duty of care:</p> <p>(a) the functions required to be exercised by the authority are limited by the financial and other resources reasonably available to the authority for exercising the functions;</p> <p>(b) the general allocation of the resources by the authority is not open to challenge;</p> <p>(c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not only by reference to the matter to which the proceeding relates);</p> <p>(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.</p> <p>111. Proceedings against public or other authorities based on breach of statutory duty</p> <p>(1) This section applies to a proceeding based on a claimed breach of a statutory duty by a public or other authority (the <i>defendant authority</i>) in relation to the exercise of, or a failure to exercise, a function of the defendant authority.</p> <p>(2) For the proceeding, an act or omission of the defendant authority is a breach of statutory duty only if the act or omission was in the circumstances so unreasonable that no authority having the functions of the defendant authority could properly consider the act or omission to be</p>	35/2003
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				<p>a reasonable exercise of its functions.</p> <p>(3) For a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 112.</p> <p>113. Special nonfeasance protection in relation to roads etc</p> <p>(1) A public or other authority is not liable in a proceeding for harm arising from a failure of the authority to maintain, repair or renew a road, or to consider maintaining, repairing or renewing a road, unless at the time of the claimed failure the authority knew, or ought reasonably to have had known, of the particular risk the materialisation of which resulted in the harm.</p> <p>(2) This section does not operate—</p> <p>(a) to create a duty of care in relation to a risk only because the authority has actual knowledge of the risk; or</p> <p>(b) to affect any standard of care that would otherwise apply in relation to a risk.</p> <p>(3) In this section:</p> <p>"road" means a street, road, lane, cyclepath, footpath or paved area that is open to, or used by, the public.</p>	
Tasmania	Yes (Breach of statutory duty only)	Yes	<i>Civil Liability Act 2002</i>	<p>38. Principles concerning resources, responsibilities, etc., of public or other authorities</p> <p>The following principles apply in determining whether a public or other authority has a duty or has breached a duty in proceedings to which this Part applies:</p> <p>(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;</p>	54/2002

				<p>(b) the reasonableness of the allocation of those resources by the authority is not open to challenge;</p> <p>(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate);</p> <p>(d) the authority may rely on evidence of its compliance with its general procedures and any relevant standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.</p> <p>40. Proceedings against public or other authorities based on breach of statutory duty</p> <p>(1) This section applies to proceedings in respect of a claim to which this Part applies that are based on an alleged breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.</p> <p>(2) For the purpose of any such proceedings in respect of a claim, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.</p> <p>(3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 41.</p> <p>42. Special non-feasance protection for failure to carry out road work</p> <p>(1) A public or other authority responsible for carrying out road work is not liable in proceedings in respect of a</p>	
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				<p>claim to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the facts creating the particular risk the materialisation of which resulted in the harm.</p> <p>(2) This section does not operate –</p> <p>(a) to create a duty of care in respect of a risk merely because the public or other authority referred to in subsection (1) has actual knowledge of the risk; or</p> <p>(b) to affect any standard of care that would otherwise be applicable in respect of a risk.</p> <p>(3) In this section –</p> <p>carry out road work means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road;</p> <p>road means any street, road, lane, thoroughfare, footpath, bridge, or place open to or used by the public, or to which the public have or are permitted to have access, whether on payment of a fee or otherwise.</p>	
QLD	Yes (Breach of statutory duty only)	Yes	<i>Civil Liability Act 2003</i>	<p>35 Principles concerning resources, responsibilities etc. of public or other authorities</p> <p>The following principles apply to a proceeding in deciding whether a public or other authority has a duty or has breached a duty—</p> <p>(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of</p>	16/2003

				<p>exercising the functions;</p> <p>(b) the general allocation of financial or other resources by the authority is not open to challenge;</p> <p>(c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);</p> <p>(d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.</p> <p>36 Proceedings against public or other authorities based on breach of statutory duty</p> <p>(1) This section applies to a proceeding that is based on an alleged wrongful exercise of or failure to exercise a function of a public or other authority.</p> <p>(2) For the purposes of the proceeding, an act or omission of the authority does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.</p> <p>37 Restriction on liability of public or other authorities with functions of road authorities</p> <p>(1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority—</p> <p>(a) to repair a road or to keep a road in repair; or</p> <p>(b) to inspect a road for the purpose of deciding the need</p>	
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				<p>to repair the road or to keep the road in repair.</p> <p>(2) Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.</p> <p>(3) In this section—</p> <p>road see the Transport Operations (Road Use Management) Act 1995, schedule 4.</p> <p>road authority means the entity responsible for carrying out any road work.</p>	
Victoria	Yes	Yes	<i>Road Management Act 2004</i>	<p>101. Principles concerning performance of road management functions</p> <p>(1) In determining whether a road authority, infrastructure manager or works manager has a duty of care or has breached a duty of care in respect of the performance of a road management function, a court is to consider the following principles (amongst other relevant things including the principles specified in section 83 of the Wrongs Act 1958)—</p> <p>(a) the character of the road and the type of traffic that could reasonably be expected to use the road;</p> <p>(b) the standard of maintenance and repair appropriate for a road of that character used by traffic of that type;</p> <p>(c) the state of repair in which a reasonable person would have expected to find a road or infrastructure of that character;</p> <p>(d) whether the road authority, infrastructure manager or works manager knew, or could reasonably be expected to have known, the condition of the road or</p>	39/2004

				<p>infrastructure at the time of the relevant incident;</p> <p>(e) in the case where the road authority, infrastructure manager or works manager could not have reasonably been expected to repair the road or infrastructure or take other preventative measures before the relevant incident, whether the road authority, infrastructure manager or works manager did display, or could be reasonably expected to have displayed, appropriate warnings.</p> <p>(2) Subsection (1) applies to the EastLink Corporation as if the reference to the principles specified in section 83 of the Wrongs Act 1958 were excluded.</p> <p>(3) Subsection (1) applies to the Peninsula Link Freeway Corporation as if the reference to the principles specified in section 83 of the Wrongs Act 1958 were excluded.</p> <p>102. Limitations on liability of road authority</p> <p>(1) Subject to this section, a road authority is not liable in any proceeding for damages, whether for breach of the statutory duty imposed by section 40 or for negligence, in respect of any alleged failure by the road authority—</p> <p>(a) to remove a hazard or to repair a defect or deterioration in a road; or</p> <p>(b) to give warning of a hazard, defect or deterioration in a road.</p> <p>(2) Subsection (1) does not apply if, at the time of the alleged failure, the road authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.</p> <p>(3) For the purposes of subsection (2), the road authority is to be taken to have had actual knowledge of</p>	
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				<p>the particular risk if it is proven in the proceedings that the deterioration in the road had been reported in writing to the road authority under section 115.</p> <p>(4) This section does not affect any liability of a road authority arising out of a breach of the duty to inspect a public road imposed by section 40.</p> <p>103. Policy defence</p> <p>For the purposes of any proceeding to which this Division applies, an act or omission which is in accordance with a policy—</p> <p>(a) determined by the relevant Minister under section 22 does not constitute a wrongful exercise or failure unless the policy is so unreasonable that no Minister in that Minister's position acting reasonably could have made that policy;</p> <p>(b) determined by the relevant road authority under section 39 does not constitute a wrongful exercise or failure unless the policy is so unreasonable that no road authority in that road authority's position acting reasonably could have made that policy.</p> <p>Notes</p> <ol style="list-style-type: none"> 1. One of the ways in which a road authority may determine a policy with respect to its road management functions is by a road management plan: see section 52. 2. Section 27 enables a relevant Code of Practice to be used as evidence of the reasonableness of a road management plan. <p>105. Defence to prove that reasonable care was taken</p> <p>(1) In any proceeding against a road authority for damages resulting from the performance or non-performance of a road management function in respect of</p>	
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				<p>a public road it is a defence to prove that the road authority had taken such care as in all the circumstances was reasonably required to ensure that the relevant part of the public road was not dangerous for traffic.</p> <p>(2) In any proceeding against an infrastructure manager or works manager for damages resulting from the performance or non-performance of a road management function in respect of non-road infrastructure it is a defence to prove that the infrastructure manager or works manager had taken such care as in all the circumstances was reasonably required to ensure that the relevant non-road infrastructure was not dangerous for traffic.</p> <p>(3) For the purposes of the defence referred to in subsection (1), a road authority is to be taken to have established the defence if the road authority proves to the satisfaction of the court that—</p> <p>(a) the road authority had a policy which addressed the matter which was a cause of the incident giving rise to the action; and</p> <p>(b) the road authority complied with the relevant part of the policy.</p> <p>Notes</p> <ol style="list-style-type: none"> 1. One of the ways in which a road authority may determine a policy with respect to its road management functions is by a road management plan: see section 52. 2. Section 27 enables a relevant Code of Practice to be used as evidence of the reasonableness of a policy or road management plan. <p>(4) The defence referred to in subsection (1) or (2) does not prejudice any other defence or the application of the law relating to contributory negligence.</p>	
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