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Brief

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Maryjane Crabtree

The Committee of NPLA wishes all our members and readers a safe and happy holiday and a prosperous New Year. See you again in 2003!

The views expressed in BRIEF are those of the authors of the articles and do not necessarily represent those of the editors or of NPLA. BRIEF aims to keep NPLA members informed on current issues and developments in Product Liability. It should not be used or relied on as a substitute for legal advice. Members and readers should seek professional advice on any specific product liability issues.

Contributions are welcome from all members. Please submit articles to:

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PRESIDENT'S REPORT 2002

In 2002 the National Product Liability Association again continued to promote its charter through seminars and lobbying efforts in Melbourne and Sydney. Given the issues raised by the so-called crisis in public liability insurance and the potential outcomes of the Commonwealth Government's Negligence Review Panel (the "Ipp Report"), the Association's efforts this year were more closely directed towards its lobbying role with a relatively lighter focus on seminars.

In 2003, as various legislative "remedial" schemes come into force, the Association's attention will again turn more directly towards its role in disseminating information and promoting discussion amongst its members.

The Executive Committee this year consisted of :

David Poulton (Vice President)
Maryjane Crabtree (Immediate Past President)
Annette Hughes (Treasurer)
George Karalis (Secretary)

and Committee Members:

Derek Begg
Neil Campbell
Peter Holloway
Michael Klug (Qld)
Pam Madafoglio (NSW)
Peter O'Donahoo
Sally Sheppard
Ian Taylor
Belinda Thompson
John Van Wetering
John Waters
Jane Wilhelm.

Pam Madafoglio again assumed the demanding job of coordinating further growth in the New South Wales Committee and chapter.

BRIEF

The September 2002 issue of Brief provided a complementary follow-up to the "Back to Basics" seminar series held earlier in the year. In addition to the very useful written papers by Sam Downes and Annabel Evans from Minters, Gaynor Hall, now working with Freshfields in London, provided an

excellent analysis of issues for those with, or in need of, product liability insurance.

This edition also provided advance notice of both the Commonwealth Government's Panel appointed to review the law of negligence and the legislative changes now underway in New South Wales.

It is intended that Brief will devote an entire issue to the Ipp Report. In the wake of the final report, the New South Wales Parliament has now passed a second Civil Liability Act which adopts many of the Panel's recommendations. Further, the Council of Ministers has been very quick to announce their intention(s) to enact legislation similar to the NSW model. Given the importance of these developments, a December edition of Brief is planned in order to give members an overview of the Report and the various responses.

SEMINARS

In her 2001 report, outgoing President Maryjane Crabtree gave notice of the "Back to Basics" series of seminars to be held in the first half of 2002. An important feature of this program was the fact that they were to be shared with the Australian Corporate Lawyers Association. It also reflected the view of the Executive Committee that the Association has a role to play in informing younger members and their colleagues, who are often at the start of their various careers, as to the precepts of product liability.

Accordingly, the first half of 2002 saw three seminars devoted to seminal parts of product liability law and, as importantly, risk management practice.

The first session held at the offices of Minters provided a general overview of Product Liability including recent cases. The presentations by Sam Downes and Annabel Evans of that firm were extremely popular with more than 100 attendees who were rewarded with the informative and amusing style of both speakers.

The second session devoted to Product Recall was presented by the writer at Clayton Utz. A more modest audience considered the legal and practical demands which product recalls place on organisations, often in very stressful situations.

The third session presented by Maryjane Crabtree and new Committee Member, Belinda Thompson at Allens, focused on the spectre of Class Actions. With a judgment expected before Christmas in the first trial of the Longford gas plant explosion class action, this was a timely review of the class action phenomenon in Australia.

This strong first half showing was not repeated in the second half of 2002. In part, this reflected the focus of the Executive Committee on lobbying the Negligence Review Panel. In part, it reflected the Committee's desire to run a broad seminar focusing on the product liability implications of the 2002 insurance crisis and the consequences of the Ipp Report. It is this second matter which has proven most difficult to negotiate. As noted above, it now appears that the early New Year will be the most appropriate time to tackle the issues thrown up by the Report and various legislative responses. This will be a priority for the Committee in 2003.

The New South Wales Committee ran four mirror seminars including the excellent Communication in a Product Liability Crisis with David Bannatyne and Steve Cropper and the three Back to Basics seminars. In addition, in a session chaired by Mark Coss (Munich Re), Peter Holtmann (RQA Asia Pacific) presented Product Recall Protocol and Case Histories.

In 2003 the New South Wales Committee is looking at a range of seminars including sessions focusing on advertising in the product liability context.

LOBBYING COMMITTEE

The Commonwealth Government's Review of the Law of Negligence was announced with Terms of Reference that required submissions to be lodged under an inordinately tight timetable. However, mindful of the Association's charter to lobby government in the interest of all members, the Executive Committee resolved to prepare a written submission. In his role as head of the Lobbying Committee, Peter Holloway, again assumed responsibility for making this happen.

I am pleased to report that, in the event, a lengthy written submission focusing on product liability issues raised by the Terms of Reference was lodged by the first submission date. While it is not clear precisely how this submission was viewed by the Panel, it is clear that the views expressed on behalf of the Association played a part in the outcome which recommended changes

which, if legislatively enacted, are likely to alter the product liability landscape in Australia.

The NPLA submission is included in this issue of Brief together with the other submissions and the Ipp Report, can be found at <http://revofneg.treasury.gov.au>.

Special thanks go to Neil Campbell, Jane Wilhelm and Belinda Thompson for their contributions to the final paper.

WEBSITE

The website has been static this year and is in need of attention. Unlike written papers, this form of media requires ongoing maintenance. That is never easy in a small organisation propelled by the goodwill of members and, in particular, Committee Members. However, it is an indispensable part of the NPLA armoury. In 2003, new Committee Member, Melissa Daly has kindly agreed to take on this task.

RETIREMENT AND THANKS

In 2000, long standing Committee Member Neil Campbell retired as Treasurer having been, as the then President described him, the most efficient Treasurer she had ever encountered. Neil has decided not to renominate to the Committee in 2003 and his calm presence and manner will be sorely missed. I thank him for his contribution over many years.

At last year's AGM, Gaynor Hall retired from the Committee in anticipation of a leave of absence at Freshfields in London. Belinda Thompson joined in her place and has been actively involved in this her first year on the Committee.

John Bushby also retired from the Committee. John is a Past President of NPLA.

John van Wetering's interstate obligations have made it difficult for him to participate in 2002 and he is not seeking re-election for 2003.

In New South Wales, David Miller (CSR) and Peter Holtmann (RQA Asia Pacific) joined the Committee.

My thanks to those Committee members who were able to participate in the Committee and its activities during 2002. I would again encourage all those who are seeking re-election to provide support to an organisation which has an important and worthwhile

charter. Your time, active thoughts and efforts are essential.

Finally, I would personally thank Maryjane Crabtree who, as Immediate Past President and Editor of Brief, continues to inject her abundant enthusiasm and ideas into the Association.

2003 looks set to be a time in which product liability law in Australia changes in a number of substantive ways. On behalf of the Executive Committee, I again

commit the Association to the principles set out in its charter, specifically the need to ensure that members know of and understand product liability developments and issues as they occur.

Andrew Morrison _____
President
National Product Liability Association
26 November 2002



NPLA SUBMISSION TO THE NEGLIGENCE REVIEW PANEL

BY THE NATIONAL PRODUCT LIABILITY ASSOCIATION INC.

7 August 2002

1. This submission is made in response to the invitation by the Negligence Review Panel (the "Panel") concerning paragraphs 3(d), 3(f), 4 and 5 of the Panel's Terms of Reference, being to:
 - 3(d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;
 - 3(f) develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury (other than for intentional torts);
 - 4 review the interaction of the Trade Practices Act 1974 (as proposed to be amended by the Trade Practices Amendment (Liability for Recreational Services) Bill 2002) with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk)
 - 5 develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons.
2. This contents of this submission include:
 - (a) What is the National Product Liability Association ("NPLA")?
 - (b) NPLA's approach to this submission.
 - (c) Preliminary comment: Changing the law of negligence is a multi-jurisdictional task.
 - (d) Preliminary comment: The law of negligence in Australia directly impacts on the availability of insurance.
 - (e) What are the issues of importance to NPLA members?
 - (f) Classes of potential claimants.
 - (g) Limitation periods generally.
 - (h) Interaction between the law of negligence and the Trade Practices Act.
 - (i) Limitation periods under the Trade Practices Act.
 - (j) Standard of care for professional negligence claims.
 - (k) Limiting or exempting liability for eligible not for profit organisations.
 - (l) Waivers and the voluntary assumption of risk: stopping the blame game.

What is the National Product Liability Association Inc?

3. The National Product Liability Association Inc (“NPLA”) is an organisation which represents the interests of members, all of whom have an interest in product liability issues.
4. Members include:
 - product manufacturers, retailers, wholesalers and distributors,
 - participants in the insurance industry
 - and those who advise them, including
 - risk managers,
 - insurance brokers; and
 - legal practitioners

What are the objectives of the NPLA?

5. NPLA’s objectives include:
 - promoting a better understanding of the potential costs of product liability and measures to minimise those costs, including insurance, liability prevention, recovery and risk management;
 - evaluating current and proposed Australian and international product liability laws and regulation; and
 - making representations to other associations, government and semi-government bodies and other persons to further the common business interests of members.
- It is in this context that NPLA makes the following submission in relation to the terms of reference relating to the Panel’s Review

Approach taken in this submission

6. In the limited time available, NPLA does not propose to make any detailed submission concerning particular amendments which it considers should be made to the law of negligence.
7. Rather, the approach taken is one of identifying particular issues that are of concern to NPLA members and which NPLA considers ought be taken into account by the Panel in determining the appropriate response to the issues that have emerged in recent times concerning tort law reform in the context of the so-called insurance and public liability crisis.

8. NPLA notes the reference to professional negligence matters in paragraph 3(d) of the Terms of Reference and the particular reference to medical negligence. NPLA members are not often directly involved in claims that concern medical negligence. However, any reform to the laws relating to negligence in that context is likely to have an impact on the potential rights and liabilities of NPLA members in circumstances where a claim for compensation arises out of an injury said to have been caused by an allegedly defective product.
9. Similarly, any reform that concerns not-for-profit organisations may impact on NPLA members.
10. Paragraphs 4 and 5 of the Terms of Reference are clearly matters that concern NPLA members.

Changing the law of negligence is a multi-jurisdictional task

11. It is notable, and of some concern, that an issue as important as the one under review by the Panel has not to date seen an overtly co-ordinated legislative approach amongst the Commonwealth and the States.
12. The speedy enactment of the Civil Liability Act 2002 (NSW) exemplifies this concern. That Act represents a reflexive response to the issues under debate, rather than a co-ordinated approach which produces consistency and predictability for business in Australia. In contrast, other States still have Bills pending. Others are yet to exhibit interest in any legislative response.
13. At a time when demands for a response to a perceived crisis in the availability of (affordable) public liability and professional indemnity insurance is fuelling demands for changes in the law of negligence, such an ad hoc approach is regrettable.
14. The Commonwealth Government has taken the role of establishing the Panel under given terms of reference. Accordingly, it might be expected that the outcome of this review will impact directly on those matters within the area of federal legislative competence. Potential amendments to the Trade Practices Act, particularly the consumer protection provisions of Part V and VA and relief available under Part VI, are concrete steps which could be taken to ameliorate the upwards pressure on civil judgments for damages.

15. However, it is the impact of this review on the various executive governments and legislatures within the Australian federation which will be needed to produce more fundamental and lasting outcomes. In the event that the Panel recommends measures that will require modification of the common law, then it will primarily fall to the States to embrace those suggestions. That is a more diffuse, and difficult, expectation to achieve.
16. In these circumstances, it falls to this Panel to identify the principled need and then call, loudly, for a joint approach between the Commonwealth and State governments. The Panel seemingly has the platform from which to make this call, being a Panel jointly established by the Commonwealth, State and Territory governments.
17. Unless there is some clear statement and understanding about the difficulties of implementing changes such as those under consideration in a federal system, then there is a real risk that any changes will, at best, be piecemeal, and, at worst, inconsistent across jurisdictions. Harmonisation between jurisdictions in a federation is an important key to business efficiency. That is no less the case when addressing the way in which the law of negligence, both in its statutory and common law guises, is applied across the country

The law of negligence in Australia directly impacts on the availability of insurance

18. There are traditionally a number of responses to the risk to business of claims for damages in negligence or for breaches of statutory duties of care :
 - traditional risk management, which requires the potential insured to undertake basic risk reduction techniques. This may involve, for example, the insured in undertaking a review of the design of a product to ensure that, so far as possible, risks are “designed out” of the product;
 - transferring risk by contract, including where possible potential liability for tortious acts such as negligence, including limiting or excluding potential liability to identified categories of claimants; and
 - risk financing through insurance, the availability of which is affected by the above.
19. It is well established that the risk presented by a potential insured directly affects the availability and cost of insurance. Furthermore, the industry

or business segment in which the potential insured operates will also impact on the assessment of the risk.

Risk financing

20. Liability insurance comes in various commercial and professional forms, but all provide certain essential functions, namely, risk financing, business continuity and social responsibility
21. Liability insurance is the most popular and effective method available to finance third party risk. It provides business organisations and professional persons with the financial means to meet their legal obligations to customers and other relevant third parties who have suffered loss or incurred liability as a result of acts committed by, or on behalf of, such organisations or persons in the conduct of their business or profession. Other methods of risk financing, such as self-insurance or capital market financing, are not as cost effective, and may represent a significant opportunity cost to the relevant organisation or person.

Business continuity

22. Liability insurance is an essential ingredient in any business continuity plan. Typically, governments and large corporations require their suppliers of products and services to maintain current liability insurance arrangements to protect the suppliers from the threat of insolvency from third party liability, and in doing so maintain the continuity of the source of supply. The reason for this requirement is that most small-to-medium size enterprises do not have a balance sheet of sufficient strength to meet the consequences of an adverse legal finding. Any prospective supplier who cannot provide evidence of current liability insurance could not hope to be successful in any open tender bid exercise conducted by a government or large corporation.

Social responsibility

23. Liability insurance provides the means by which the social responsibility of a business organisation or professional person to customers and the broader community is underwritten. It provides the financial basis for consumer protection. For this reason, governments have legislated in certain areas of commercial and professional enterprise to require the participants in those enterprises to maintain

current liability insurance arrangements. In addition, the rules of self-regulated industries often require the same discipline. An inability to obtain current liability insurance in such circumstances may prevent or otherwise disqualify a participant from engaging in the occupation.

24. Presently, the efficient operation of commercial and professional life in the Australian economy is under serious threat due to the inability of those engaged in these fields to obtain adequate liability insurance coverage. Insurers are not only requiring substantially increased premiums in order to profitably underwrite this class of insurance, but are also applying increasingly stringent underwriting guidelines to the liability business they choose to accept. The effect of these concurrent impacts of cost increase and decreased availability is being widely felt throughout the economy, with some extensively publicised disastrous corporate and individual consequences.
25. As the risk of claims in negligence or for breaches of statutory duties of care rises, together with the direct and indirect cost of those claims, it is doubtless that the cost and availability of insurance is affected. That impact operates inversely. The cost of insurance rises, whereas its availability falls. Perversely, this has the capacity to leave more consumers more exposed in respect of products and services claims because the manufacturer or distributor holds no insurance.
26. It follows that any proposals for reform which increase the prospect that insurance will become less costly and, hence, more widely available, carries with it an increased prospect that where claims are made then the injured consumer will have an improved prospect of recovering appropriate compensation.

What are the issues of importance to NPLA members?

27. As indicated above, the approach taken in this submission is to identify the issues of concern to NPLA members and which it is considered should be given significant weight by the Panel in determining an appropriate response to tort law reform, specifically in the context of the areas identified by the Terms of Reference.
28. In identifying a number of such issues below, NPLA also makes the observation that the current laws of negligence have evolved over a substantial period

of English and Australian jurisprudence. Before fundamental changes are made to these laws, NPLA considers that there should be a period of public comment and debate concerning the specific aspects of any changes to the law that are recommended by the Panel.

29. Issues of concern to NPLA members include:
- It is often the case that the categories or classes of persons to whom they may be potentially liable has become indeterminate.
 - The period of time between when they have been involved in one way or another in the release of a product to the market, and when a claim is made, has become unmanageably long.
 - The approach taken by courts is seemingly to allow claimants their “day in court” rather than to shut out a potential claim, no matter how unmeritorious that claim might be.
 - The ability to exclude or limit liability by contract or similar means has been practically eliminated.
 - The Trade Practices Act has become a predominant driver of potential liability, with the result that any amendment to the common law would be ineffectual unless there is also reform of the Act.
30. The following comments are provided concerning each of these issues:

Classes of potential claimant

31. The approach traditionally adopted by courts to avoid “indeterminate liability to an indeterminate class of persons” has been through the device of reasonable foreseeability, both in terms of establishing a duty of care and in the regulation of damages claimable as a result of a breach of that duty.
32. However, the experience of NPLA members has been that the application of this device has become less and less robust, with the result that there has been an enlargement of the number of claims against them and the impact of those claims has become increasingly unpredictable.
33. It is not to the point that these claims may or may not be successful; the increased incidence of itself impacts on the assessment of the insurance risk presented or the cost of the insurance.
34. It is submitted that one area for potential reform is to strengthen the reasonable foreseeability threshold.

Limitations periods

35. One of the primary objectives of business is certainty.
36. Uncertainty creates an environment which stifles risk taking (because the risk is less able to be evaluated) which in turn stifles business activity.
37. Uncertainty concerning whether claims might be made is one aspect of uncertainty which is particularly troublesome to managers.
38. Accordingly, it is submitted that another area which should be the subject of close scrutiny for reform is the area of limitations periods.
39. The law as it currently stands in relation to limitation periods is in need of significant review. Whilst limitation periods for claims in negligence are prescribed by statute in each State, experience reveals that these periods are not as finite as intended and, accordingly, provide manufacturers and other commercial entities with little comfort. The discretion vested in courts to extend the limitation period on application by a plaintiff results in a situation where defendant companies have little or no assurance that claims arising out of a particular event will not continue indefinitely.
40. It is in the interests of both the public and commercial defendants that claims be resolved without delay. This interest is not necessarily cultivated under the current limitations regime. For example, Part VA of the Trade Practices Act 1974 (Cth) provides that personal injury claims for defective products must be made within three years after discovery of the loss, the defect and the identity of the manufacturer, but the level of certainty which this might at first glance provide to manufacturers is diminished by the further proviso that claims be made no later than ten years after the supply by the manufacturer of the allegedly defective goods.
41. In addition, it should be noted that there is no specified limitation period applicable to section 87(1) of the TPA. On the basis of current judicial authority, section 87(1) is only subject to any limitation period that affects the primary proceeding¹. Thus, as section

87(1) empowers the court to award damages, it is open to a plaintiff to seek damages under section 87(1) as ancillary relief to an application for an injunction under section 80 TPA² in circumstances where that action for damages is barred under section 82 TPA, and argue that there is no applicable limitation period. This ability to ‘shop’ for avenues of relief undermines the policy underlying limitation periods.

42. The proposal for limiting claims to within three years of an event is likely to be welcomed by traditional defendant bodies for whom a level of ‘certainty of liability’ is a paramount consideration. This is not to say that appropriate protections for minors and persons under a disability should not be maintained.

Interaction between the law of negligence and the Trade Practices Act

43. Legal experience shows that the majority of product related claims allege causes of action based upon common law and statute. In the case of product liability claims involving personal injury, the absence of a contractual nexus between claimant and manufacturer or importer has resulted in substantial reliance on the law of negligence, which is on-going in its development, and, in more recent times, on the provisions of the Trade Practices Act.
44. It is now unusual to see claims pleaded other than alternatively in negligence and on the basis of alleged contraventions of Part V and VA of the Trade Practices Act.
45. In turn, it is not surprising that the jurisprudence which has informed the development of the common law of Australia in terms of products liability and personal injury claims has also played a significant role in the application and interpretation of the Trade Practices Act and the various State and Territory Fair Trading Acts.
46. However, there are aspects of the statutory scheme which are significantly different to the common law and which have and will continue to generate a jurisprudence of its own.

¹ Section 87(1) TPA provides only for relief that is ancillary to a primary cause of action.

² Section 80 TPA is not subject to a limitation period.

47. An obvious example is section 52 of the Trade Practices Act which deals with misleading and deceptive conduct by corporations engaged in trade and commerce. In absence of any need to demonstrate intent and where the potential for a person to be misled or deceived is sufficient, this legislative provision has the requirement of reliance as its primary touchstone to found a contravention. This contrasts sharply with the requirements of a cause of action in negligence.
48. Section 52 cases have become the single most litigated type of claim under this Act. They are ubiquitous in products or services related cases. Perhaps most notably, as a provision which forms part of the consumer protection provisions of the Trade Practices Act, section 52 is actually most widely used in commercial claims, especially disputes between market competitors.
49. In products liability cases, where personal injury, financial loss or loss of property are the issues at stake, the presence of a section 52 claim adds an extra dimension to the claim. It is not at all unusual for the pleadings in such cases to distinguish between the claim in negligence, with concepts of duty, breach and damage, and the section 52 case on alleged misrepresentations. The defence of such claims may well overlap but is likely to involve substantively different evidence and issues.
50. Another example is the provisions of Part VA of the Trade Practices Act, which, since 1992, have effected a regime in respect of manufacturers' (as broadly defined) liability for defective products. In this setting the principal issue is whether the product is defective or not. This is determined by reference to a consumer expectation test. Subject to certain defences, manufacturers are deemed liable for their defective products. Those defences, which include a state of art defence, are by their nature difficult to make out. Again, while there are significant points of connection between the law of negligence and this regime, the contrast is substantial.
51. It follows that measures which are proposed to address perceived problems in the application of the law of negligence in this country will only do part of

the work if the broad reaching nature and effect of provisions such as section 52 or those under Part VA are overlooked.

52. The reverse is also true. If the Panel limits itself to addressing only those things which the Commonwealth has legislative competence to address then the common law will remain unaffected.

Limitation of liability under the Trade Practices Act

53. The issue which is raised squarely by the operation of many of the consumer protection provisions of the Trade Practices Act is the inability of business to exclude, limit or otherwise regulate their potential exposure to liability.
54. Under Division 2A of Part V and Part VA of the Trade Practices Act, it is not possible to exclude or modify provisions which fix manufacturers and importers with particular obligations in respect of goods and services or liability in respect of defective products. Those mandatory provisions clearly have an important role to play as they give efficacy to the underlying consumer protection measures. However, their inflexible application places no obligation on consumers, who may have been properly informed about the characteristics and risks associated with a product and, in fact, assumed some part of that risk in choosing to use that product.
55. Recent proposed amendments to the Trade Practices Act are designed to enable those involved in the provision of certain recreational activities to limit or exclude liability in respect of the product or service they provide to consumers. These amendments reflect a willingness to require a particular class of consumer to take personal or legal responsibility should they choose to engage in a particular activity. That risk will generally be borne by the consumer in the event that they have been reasonably informed as to the risks which they are assuming in undertaking the activity.
56. There is no logical reason why the application of that concept of personal autonomy³ to the potential liability of service providers should be limited to a class of services where the businesses concerned

³ as to autonomy: cf. *Perre v Apand* (1999) 198 CLR 180 and the recent jurisprudence of the NSW Court of Appeal in *Reynolds v Katoomba RSL* [2001] NSWCA 234 and *South Tweed Heads Rugby League Football Club Limited v Cole & I Or* [2002] NSWCA 205.

are unable to obtain adequate insurance. Without derogating from the substantial obligations on manufacturers and importers to provide products which are generally free from defect, this response to a perceived crisis in the availability of insurance should not be determined as a matter of ad hoc expediency and, hence, limited to certain recreational activities. If certain classes of consumers are to be expected to take legal responsibility for the services they use, then that criterion should apply uniformly in respect of the limitation of liability provisions under the Trade Practices Act.

Standard of care for professional negligence claims

57. Paragraph 3(d) of the Panel's terms of reference requires the Panel to consider the appropriate standard of care in professional negligence matters. When considering this issue regard should be had to the fact that many professions act as intermediaries between the manufacturer and distributor of a product and the ultimate end consumer. That intermediary is often an important source of product information for the consumer, and is relied on by the manufacturer and distributor to communicate that information to the consumer. For example, doctors provide important information to their patients about drugs that are being prescribed.
58. Accordingly, limiting the standard of care required of certain professions has the real potential of transferring risk from the profession to other participants in the supply chain, such as the manufacturer or distributor. This potential for loss transfer should be carefully assessed when developing and evaluating options regarding the standard of care in professional negligence matters. Any loss transfer that is likely to occur should be an identified and acknowledged consequence of the recommendation, not an unintended by-product.

Exempting or limiting liability of eligible not-for profit organisations

59. The question of exempting or limiting the liability of eligible not-for-profit organisations from damages for death or personal injury does not directly relate to NPLA's members. However, such proposals may have the potential to transfer risk to others involved in the

supply chain and, if so, that loss transfer potential should be considered when assessing any proposals.

60. Further, the potential impact of possible death or personal injury claims (or the cost of insuring against such claims) on the operations of not-for-profit operations are equally applicable to many businesses, particularly small business. Accordingly, the applicability and appropriateness to business of any proposals for managing the risk of death and personal injury claims for not-for-profit organisations should also be considered.

Waivers and the voluntary assumption of risk: stopping the "Blame Game"

61. In the section above dealing with the interaction between the law of negligence and the Trade Practices Act, reference has been made to the importance for business of being able to exclude, limit or, at least, fix liability in respect of products related claims. It is submitted that the ability of certain businesses to limit or modify their exposure on the basis that consumers choose to engage in certain "risky" recreational activities is a doctrine which is capable of wider more uniform application.
62. Such an approach would not be intended to affect the substantial range of measures available for the protection of consumers who are injured as a result of matters which are truly within the manufacturer's control, such as an identifiable manufacturing defect. Instead it would re-evaluate legal responsibility in situations where consumers elect to use certain products and services in the knowledge that, like recreational activities, those products and services provide a benefit but also carry risks.
63. The current political and economic concerns about the spiralling cost of personal injury claims together with the more limited availability of insurance for business and professional service providers has created a climate in which options for change in social responsibility must also focus the obligations of consumers. Measures, such as those recently introduced in New South Wales, which focus closely on the way in which the legal profession should now take responsibility for litigated claims, simply do not address this more fundamental concern.

64. In this country, the law of negligence and provisions of the Trade Practices Act offer plaintiffs a considerable level of protection, particularly in their ability to bring claims for personal injury associated with the use of products and services. However, in part, it is that legal environment which has prompted the review being conducted by this Panel. Accordingly, the Panel should consider the current balance in that legal environment. In practice, the ability of manufacturers and distributors to access waivers, warranties and disclaimers or rely on volenti defences is very limited.
65. The question remains as to why consumers making rational choices should not also be obliged to consider the risks and benefits and, where appropriate, assume responsibility for the choices they make to use products or services which, by their very nature, are not entirely free from risk.
66. Is there any reason why, with appropriate safeguards, a manufacturer should not be entitled to present a consumer with the option of agreeing to use a product or service subject to an enforceable waiver of statutory liability in respect of the risks that accompany that product or service?
67. Why should the law continue to maintain that consumers are not capable, or should not be obliged, to voluntarily assume the risk of their own actions?
68. Is it now the case that the price of legal paternalism is rising so rapidly that our legislature(s) should take steps to stop or break what the Chief Justice of Australia has so aptly described as “the blame game”? It is submitted that, while the answer to that question is yes, the response does not simply lie in making business and the legal profession more accountable for the high cost rise in personal injury and economic loss litigation.

Further discussion

69. NPLA would welcome the opportunity to discuss these issues and the concerns of its membership as raised in this Submission and generally under the Terms of Reference.

70. Please contact:

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THE IPP REVIEW

A summary of the terms of reference and the key recommendations

INTRODUCTION

The Review, chaired by the Honourable Justice David Ipp, was established as one of the measures agreed by the second Ministerial Meeting on Public Liability Insurance in May 2002. The Panel, comprising Justice Ipp, Professor Peter Cane, Associate Professor Donald Sheldon and Mr Ian Macintosh, was asked to inquire into the law of negligence, and to develop a series of proposals which provide a principled approach to reforming the law of negligence.

The Report was released in two stages: the First Report on 2 September 2002 and the Final Report, incorporating the First Report, on 2 October 2002. The Panel indicates that the two Reports should be read as offering a single, integrated set of proposals for reform of personal injury law on a national basis.

TERMS OF REFERENCE: PRINCIPLES BASED REVIEW OF THE LAW OF NEGLIGENCE

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

Accordingly, the Panel is requested to:

1. Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death, including:
 - (a) the formulation of duties and standards of care;
 - (b) causation;
 - (c) the foreseeability of harm;
 - (d) the remoteness of risk;
 - (e) contributory negligence; and
 - (f) allowing individuals to assume risk.
2. Develop and evaluate principled options to limit liability and quantum of awards for damages.

3. In conducting this inquiry, the Panel must:
 - (a) address the principles applied in negligence to limit the liability of public authorities;
 - (b) develop and evaluate proposals to allow self assumption of risk to override common law principles;
 - (c) consider proposals to restrict the circumstances in which a person must guard against the negligence of others;
 - (d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;
 - (e) develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant is only partially responsible for damage, they do not have to bear the whole loss; and
 - (f) develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury (other than for intentional torts).
4. Review the interaction of the Trade Practices Act 1974 (as proposed to be amended by the Trade Practices Amendment (Liability for Recreational Services) Bill 2002) with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk). In conducting this inquiry, the Panel must:
 - (a) develop and evaluate options for amendments to the Trade Practices Act to prevent individuals commencing actions in reliance on the Trade Practices Act, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and
 - (b) evaluate whether there are appropriate consumer protection measures in place (under the Trade Practices Act, as proposed to be amended, or

otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Trade Practices Act.

5. Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons. In developing options the panel must consider:
 - (a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and
 - (b) establishing the appropriate date when the limitation period commences.

Terms 3(d), 3(f), 4 and 5 are dealt with in the First Report, and the remainder of terms in the Final Report.

FIRST REPORT

The First Report was released on 2 September 2002, and forms Chapters 3-6 of the Final Report dealing with professional negligence, liability of not-for-profit organisations, Trade Practices legislation, and limitation of actions.

Overview of recommended reforms

- (a) A national response embodied in a single statute;
- (b) Overarching reach of the legislative scheme, to apply to any claim for damages for personal injury or death resulting from negligence;
- (c) Changes to negligence law to protect doctors who provide treatment that accords with the widely held views of a significant number of respected practitioners in the relevant medical field; and
- (d) Individuals taking part in recreational activities be more responsible for their own actions and be unable to sue for obvious risks.

List of Recommendations

Implementation of the Panel's Recommendations

A national response

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.

Overarching recommendation

Recommendation 2

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.

Professional Negligence

Treatment by a medical practitioner – standard of care

Recommendation 3

In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

Standard of care – professionals generally

Recommendation 4

The Proposed Act should embody the following principles:

In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:

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

Duties to inform

Recommendation 5

In the Proposed Act the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.

Recommendation 6

The medical practitioner's duties to inform should be expressed as duties to take reasonable care.

Recommendation 7

The legislative statement referred to in Recommendation 5 should embody the following principles:

- (a) There are two types of duties to inform, a proactive duty and a reactive duty.
- (b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.
- (c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.
- (d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient, unless giving the information is required by statute.
- (e) Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.
- (f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

Procedural recommendations

Recommendation 8

Consideration should be given to implementing trials of a system of court-appointed experts.

Recommendation 9

Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.

Not-for-Profit Organisations

No exemption for NPOs

Recommendation 10

Not-for-profit organisations as such should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.

Recreational services generally

Recommendation 11

The Proposed Act should embody the following principles:

The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.

- (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.
- (b) Obvious risks include risks that are patent or matters of common knowledge.
- (c) A risk may be obvious even though it is of low probability.

Recommendation 12

For the purposes of Recommendation 11:

- (a) 'Recreational service' means a service of
 - (i) providing facilities for participation in a recreational activity; or
 - (ii) training a person to participate in a recreational activity; or
 - (iii) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.
- (b) 'Recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

Recommendation 13

The principles contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.

Warning and giving notice of obvious risks

Recommendation 14

The proposed Act should embody the following principles:

A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.

- (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.
- (b) Obvious risks include risks that are patent or matter of common knowledge.
- (c) A risk may be obvious even though it is of low probability.

Recommendation 15

The principles contained in Recommendation 14 should not apply to ‘work risks’, that is, risks associated with work done by one person for another.

Emergency services

Recommendation 16

There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.

Trade Practices

Part IVA

Recommendation 17

The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel’s second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.

Recommendation 18

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel’s second report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.

Part V Div I

Recommendation 19

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.

Recommendation 20

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

Part V Div IA, Part V Div 2A and Part VA

Recommendation 21

The TPA should be amended to provide that the rules relating to limitation of actions recommended in this Report, and those relating to the quantum of damages that will be recommended in the Panel’s second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.

Recommendation 22

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, and that will be recommended in the Panel’s second report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.

Limitation of Actions

General provision

Recommendation 23

The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.

The limitation period and the long-stop period

Recommendation 24

The Proposed Act should embody the following principles:

- (a) The limitation period commences on the date of discoverability.

- (b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:
 - (i) had occurred; and
 - (ii) was attributable to negligent conduct of the defendant; and
 - (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.
- (c) The limitation period is 3 years from the date of discoverability.
- (d) Subject to (e), claims become statute-barred on the expiry of the earlier of
 - (i) the limitation period; and
 - (ii) a long-stop period of 12 years after the events on which the claim is based ('the long-stop period').
- (e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.
- (f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:
 - (i) whether the passage of time has prejudiced a fair trial of the claim.
 - (ii) the nature and extent of the plaintiff's loss.
 - (iii) the nature of the defendant's conduct.
- (iii) a minor whose custodial parent or guardian is a person under a disability.
- (c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.
- (d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.
- (e) A close relationship is a relationship such that:
 - (i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
 - (ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.
- (f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

Suspending the limitation period – minors and incapacitated persons

Recommendation 25

The Proposed Act should embody the following principles:

- (a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.
- (b) 'Person under a disability' means:
 - (i) a minor who is not in the custody of a parent or guardian;
 - (ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.

Survival of actions

Recommendation 26

The Proposed Act should embody the following principles:

- (a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.
- (b) In such a case, the limitation period should begin at the earliest of the following times:
 - (i) When the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;
 - (ii) When the personal representative was appointed, if he or she had the necessary knowledge at that time;
 - (iii) When the personal representative first acquired or ought to have acquired that knowledge, if

he or she acquired that knowledge after being appointed.

Contribution between tortfeasors

Recommendation 27

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.

FINAL REPORT

In its Final Report released on 2 October 2002, the Panel reported on the remaining terms, and developed principled options for limiting liability and the quantum of awards for damages. The Panel also evaluated proposals to allow self-assumption of risk to override the common law.

The Final Report incorporates the First Report, and recommends a range of additional significant reforms in the areas of:

- (a) Foreseeability of risk, standard of care, causation and remoteness of damage;
- (b) Contributory negligence, assumption of risk and duties of protection;
- (c) Mental harm;
- (d) Public authorities;
- (e) Non-delegable duties and vicarious liability;
- (f) Proportionate liability;
- (g) Limitations on legal costs; and
- (h) Caps and thresholds.

List of Recommendations

Foreseeability, Standard of Care, Causation and Remoteness of Damage

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.

Causation

Recommendation 29

The Proposed Act should embody the following principles:

Onus of proof

- (a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The two elements of causation

- (b) The question of whether negligence caused harm in the form of personal injury or death (‘the harm’) has two elements:

- (i) ‘factual causation’, which concerns the factual issue of whether the negligence played a part in bringing about the harm; and
- (ii) ‘scope of liability’ which concerns the normative issue of the appropriate scope of the negligent person’s liability for the harm, once it has been established that the negligence was a factual cause of the harm. ‘Scope of liability’ covers issues, other than factual causation, referred to in terms such as ‘legal cause’, ‘real and effective cause’, ‘commonsense causation’, ‘foreseeability’ and ‘remoteness of damage’.

Factual causation

- (c) The basic test of ‘factual causation’ (the ‘but for’ test) is whether the negligence was a necessary condition of the harm.
- (d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.
- (e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.
- (f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:
 - (i) whether (and why) responsibility for the harm should be imposed on the negligent party, and
 - (ii) whether (and why) the harm should be left to lie where it fell.
- (g)
 - (i) For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff’s own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible.
 - (ii) Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances.

Scope of liability

- (h) For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:
 - (i) whether (and why) responsibility for the harm should be imposed on the negligent party; and
 - (ii) whether (and why) the harm should be left to lie where it fell.

Contributory Negligence, Assumption of Risk and Duties of Protection

Contributory negligence

Recommendation 30

The Proposed Act should embody the following principles:

- (a) The test of whether a person (the plaintiff) has been contributorily negligent is whether a reasonable person in the plaintiff’s position would have taken precautions against the risk of harm to himself or herself.
- (b) For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence.
- (c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:
 - (i) The probability that the harm would occur if care was not taken.
 - (ii) The likely seriousness of the harm.
 - (iii) The burden of taking precautions to avoid the harm.
 - (iv) The social utility of the risk-creating activity in which the person was engaged.
- (d) Whether a plaintiff has been contributorily negligent according to the criteria listed in (a) and (c) must be determined on the basis of what the plaintiff knew or ought to have known at the date of the alleged contributory negligence.

Apportionment

Recommendation 31

The Proposed Act should embody the following principle:

Under the Apportionment Legislation (that is, legislation providing for the apportionment of damages for contributory negligence) a court is entitled to reduce a plaintiff’s damages by 100 per cent where the court considers that it is just and equitable to do so.

Assumption of risk

Recommendation 32

The Proposed Act should embody the following principles:

For the purposes of the defence of assumption of risk:

- (a) Where the risk in question was obvious, the person against whom the defence is pleaded (the plaintiff) is presumed to have been actually aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.
- (b) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.
- (c) The test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk, not its precise nature, extent or manner of occurrence.

Mental Harm

Recognised psychiatric illness

Recommendation 33

A panel of experts (including experts in forensic psychiatry and psychology) should be appointed to develop guidelines, for use in legal contexts, for assessing whether a person has suffered a recognised psychiatric illness.

Duty of care – mental harm

Recommendation 34

The Proposed Act should embody the following principles:

- (a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.
- (b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.
- (c) For the purposes of (b), the circumstances of the case include matters such as:
 - (i) whether or not the mental harm was suffered as the result of a sudden shock;

- (ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;
- (iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;
- (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and
- (v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

Recommendation 35

The Proposed Act should embody the following principle:

The rules about when a duty to take reasonable care to avoid pure mental harm arises are the same regardless of whether the claim for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

Contributory negligence

Recommendation 36

The Proposed Act should embody the following principle:

In an action for damages for negligently-caused pure mental harm arising out of an incident in which a person was injured, killed or put in peril as a result of negligence of the defendant, any damages awarded shall be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Consequential mental harm

Recommendation 37

The Proposed Act should embody the following principles:

- (a) Damages for economic loss resulting from negligently-caused consequential mental harm are recoverable only if:
 - (i) the mental harm consists of a recognised psychiatric illness; and
 - (ii) the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken
- (b) In determining the question of foreseeability in (a)(ii), the test is whether it was foreseeable, in the light of

all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm.

Expert evidence

Recommendation 38

The expert panel referred to in Recommendation 33 should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

Public Authorities

Policy defence

Recommendation 39

The Proposed Act should embody the following principle:

In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision 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.

Recommendation 40

In the Proposed Act, the term 'public functionary' should be defined to cover both corporate bodies and natural persons.

Compatibility

Recommendation 41

The Proposed Act should embody the following principle:

A public functionary can be liable for damages for personal injury or death caused by the negligent exercise or non-exercise of a statutory public function only if the provisions and policy of the relevant statute are compatible with the existence of such liability.

Breach of statutory duty

Recommendation 42

The Proposed Act should embody the following principle:

In the absence of express provision to the contrary in the relevant statute, any action for damages for negligently-caused personal injury or death made in the form of a claim for breach of statutory duty is subject to the provisions of this Act.

Non-Delegable Duties and Vicarious Liability

Recommendation 43

The Proposed Act should embody the following principle:

Liability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.

Proportionate Liability

Recommendation 44

In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability.

Damages

Legal costs

Recommendation 45

The Proposed Act should embody the following principles:

- (a) No order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than \$30,000.
- (b) In any case where the award of damages is between \$30,000 and \$50,000, the plaintiff may recover from the defendant no more than \$2,500 on account of legal costs.

Tariffs for general damages

Recommendation 46

The Proposed Act should embody the following principles:

- (a) In assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it.

- (b) Counsel may bring to the court’s attention awards of general damages in such earlier cases.
- (c) The Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the English Judicial Studies Board’s Guidelines for the Assessment of General Damages in Personal Injury Cases.

Threshold for general damages

Recommendation 47

The Proposed Act should impose a threshold for general damages based on 15 per cent of a most extreme case.

Cap on general damages

Recommendation 48

- (a) The Proposed Act should provide for a cap on general damages of \$250,000.
- (b) If such a provision is not enacted, each State and Territory should enact legislation providing for a single cap on general damages that will apply to all claims for personal injury and death.

Cap on damages for loss of earning capacity

Recommendation 49

The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).

Health care costs

Recommendation 50

The Proposed Act should embody the following principle:

For the purposes of assessing damages for health care costs, the issue of reasonableness should be determined by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable).

Gratuitous services

Recommendation 51

The Proposed Act should embody the following principles:

- (a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely

to be provided for more than six hours per week and for more than six consecutive months.

- (b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.
- (c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.
- (d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.

Loss of capacity to care for others

Recommendation 52

The Proposed Act should embody the following principles:

- (a) Damages for loss of capacity to provide gratuitous services for others shall not be recoverable unless, prior to the loss of capacity, such services were being provided for more than six hours per week and had been provided for more than six consecutive months.
- (b) Such damages are recoverable only in relation to services that were being provided to a person who (if the provider had been killed rather than injured) would have been entitled to recover damages for loss of the deceased’s services.

- (c) The maximum hourly rate for calculating damages for loss of capacity to provide gratuitous services for others shall be one fortieth of average weekly FTOTE.
- (d) The maximum weekly rate for calculating damages for loss of capacity to provide gratuitous services shall be average weekly FTOTE.

Future economic loss

Recommendation 53

The Proposed Act should embody the following principles:

- (a) The discount rate used in calculating damages awards for future economic loss in cases of personal injury and death is 3 per cent.
- (b) An appropriate regulatory body should have the power to change the discount rate, by regulation, on six months notice.

Interest

Recommendation 54

The Proposed Act should provide that pre-judgment interest may not be awarded on damages for non-economic loss.

Death claims – damages for loss of support

Recommendation 55

The Proposed Act should embody the following principles:

- (a) In calculating damages for loss of financial support any amount by which the deceased's earnings exceeded twice average FTOTE shall be ignored.
- (b) A dependant may not recover damages for the loss of gratuitous services the deceased would have provided unless such services would have been provided for more than six hours per week and for more than six consecutive months.
- (c) The maximum hourly rate for calculating damages for loss of gratuitous services the deceased would have provided is one fortieth of average weekly FTOTE.
- (d) The maximum weekly rate for calculating damages for loss of gratuitous services the deceased would have provided is average weekly FTOTE.
- (e) A dependant shall be entitled to damages for loss only of those gratuitous services that the deceased would have provided to the dependant but for his or her death.

Death claims – contributory negligence

Recommendation 56

The Proposed Act should provide that in a claim by dependants for damages in respect of the death of another as a result of negligence on the part of the defendant, any damages payable to the dependants shall be reduced on account of contributory negligence on the part of the deceased by the same proportion as damages payable in an action by the estate of the deceased person would be reduced.

Structured settlements

Recommendation 57

Rules of court in every jurisdiction should contain a provision to the following effect:

Before judgment is entered in any action for damages for negligently-caused personal injury or death where:

(a) In a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits, loss of gratuitous services and future health-care expenses) that in aggregate exceed \$2 million; or

(b) In a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed \$2 million,

the parties must to attend mediation proceedings with a view to securing a structured settlement.

Superannuation contributions

Recommendation 58

The Proposed Act should embody the following principles:

- (a) Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).
- (b) The percentage should be the minimum level of compulsory employers' contributions required under the relevant Commonwealth legislation (the Superannuation Guarantee (Administration) Act 1992 (Cwth)).

Collateral benefits

Recommendation 59

The Proposed Act should embody the following principles:

- (a) In assessing damages in an action under this Act, whether for personal injury or death, all collateral benefits received or to be received by the plaintiff as a result of the injury or death (except charitable benefits and statutory social-security and health-care benefits) should be deducted from those damages on the basis of the like-against-like principle.
- (b) Collateral benefits should be set off against the relevant head of damages before any relevant damages cap is applied.

Exemplary and aggravated damages

Recommendation 60

The Proposed Act should contain a provision abolishing exemplary and aggravated damages.

Indexation

Recommendation 61

The Proposed Act should provide that the fixed monetary amounts referred to Recommendations 45, 48 and 57 should be indexed to the CPI.

GOVERNMENT REACTION TO THE REPORT

The Report has attracted broad in-principle support from both the Federal Government and Federal Opposition, State and Territory Governments, and professional groups.

However, State and Territory Ministers have stopped short of agreeing to unilaterally adopt the Report's recommendations and to develop nationally consistent negligence legislation, in line with the Report's first recommendation. Several State and Territory Governments have already started to reform negligence law, and appear set to go their own way on limits to payouts and the legal costs that push up insurance premiums.

The Ministers have asked Justice Ipp to restrict the Report's 61 recommendations to only those that require a national response. The States have also demanded actuarial advice on the likely economic impacts of implementing the panel's findings, and intend to seek detailed briefings on the Report's implications from their own public servants.

Although many of the Panel's recommendations require action by State and Territory Governments, the Commonwealth has undertaken to look closely at what steps it can take to encourage and facilitate a nationally coordinated response.

State Government reaction to the Report is discussed in more detail below:

New South Wales

The New South Wales Government has indicated that it intends to adopt key parts of the Report, and will look at amending the draft version of its second tranche of tort law reforms, including the Civil Liability Amendment (Personal Responsibility) Bill.

On the day of the Final Report's release, State and Territory Ministers encouraged New South Wales to forge ahead with its radical rewriting of negligence

laws, in light of the acuteness of the insurance problem in that state. In any event, New South Wales Treasurer Michael Egan has commented that the recommendations of the Report are largely consistent with his Government's own reform program.

Victoria

Victorian Finance Minister John Lenders has suggested that his Government is keen to see uniform laws across the country. However, the State Government announced ahead of the Spring session of Parliament a number of its own compensation and procedural reforms to damages claims. These include a cap on general damages and loss of earnings for personal injury awards, a legal cost threshold, procedures to encourage early settlement of claims, protection for volunteers from civil liability, and a 3 year limitation period for personal injury claims.

Queensland

Queensland Premier Peter Beattie has stated that changes agreed to at the treasurers' meeting immediately following the release of the Final Report will not interfere with his Government's plans to introduce the second stage of its legislative reform package to State Parliament by the end of the year. The first package of reforms was introduced earlier this year in an attempt to drive down premiums, and included a ban on jury trials for personal injury cases, and caps on certain types of payments.

Mr Beattie has indicated that the changes will include prohibiting the recovery of damages when an injured person was engaged in criminal activity at the time of injury, and taking into account the use of drugs or alcohol. The package will also provide for waivers and self-assumption of risk for certain high-risk activities, and protection of volunteers from exposure to liability except for gross negligence.

Brigid Harradine _____
Allens Arthur Robinson



PRODUCT LIABILITY REFORM

A comparative table of how the key issues are being dealt with in New South Wales, Victoria and Queensland

	Ipp Recommendations	NSW	Victoria	Queensland
Professional Negligence	Bolam principle should be reinstated, with proviso that the court consider the opinion was rational.	A professional is not negligent if he/she acted in a manner widely accepted by peer professional opinion as competent professional practice. (Civil Liability (Personal Responsibility) Bill (Personal Responsibility Bill))	Not addressed.	Not addressed.
Non Profit Organisations (NPO's)/Volunteers/RecreationalActivities	NPO's should not be liable for personal injury or death of a voluntary participant in recreational activity as a result of an obvious risk.	Volunteers will not be liable for their good faith acts. No duty owed to participants in recreational activities if warned, nor in respect of obvious risks. Warning can be general. Participants can waive rights. (Personal Responsibility Bill)	Volunteers not liable for good faith actions for community organisations, unless acting outside scope or contrary to instructions. Liability transferred to community organisation. Sellers of recreational services may limit the liability for personal injury or death claims, using prescribed form. Participants can waive rights. Excludes volunteer's criminal conduct or conscious/flagrant indifference to the rights or safety of the plaintiff. (Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Insurance Reform Act) and Volunteer Protection Bill)	Not addressed.

	Ipp Recommendations	NSW	Victoria	Queensland
Limitation of Actions	<p>Jurisdictional uniformity.</p> <p>3 years, with 12 year long stop (with discretion, and minors).</p> <p>From 'Date of Discoverability'</p> <ul style="list-style-type: none"> • When plaintiff knew/ ought to have known injury had occurred and attributable to defendant and significant enough to warrant proceedings. 	Not addressed.	<p>3 years for personal injury claims (from the date on which the cause of action is taken to have accrued), with discretion to extend.</p> <p>Limitation period for a person under a disability remains at 6 years.</p> <p>(Limitation of Actions (Amendment) Act 2002)</p>	Not addressed.
Foreseeability/ Standard of care/ Remoteness of damage	<p>Wyong SC v Shirt gives too much emphasis to 'far fetched and fanciful' as the test for existence of duty – should be whether a reasonable person would take precautions.</p> <p>Should limit liability where risk of harm is 'not insignificant'.</p> <p>Consider:</p> <ul style="list-style-type: none"> • Probability of harm • Severity of harm • Burden of preventing harm • Social ability of activity <p>Replace 'But For' test with 'material contribution to harm/ risk of harm'.</p>	<p>A possibility does not have to be far fetched or fanciful before it is not reasonably foreseeable.</p> <p>No civil liability to take reasonable care, or warn, of an inherent or obvious risk (a matter of common knowledge).</p> <p>(Personal Responsibility Bill)</p>	Not addressed.	Not addressed.

	Ipp Recommendations	NSW	Victoria	Queensland
Contributory negligence and Voluntary Assumption of Risk	<p>Contributory negligence on same principles as defendant's negligence.</p> <p>Contributory negligence available in death claims.</p> <p>Plaintiff should be presumed to be aware of obvious risk.</p> <p>Not necessarily the actual risk.</p>	<p>Contributory negligence extended to Compensation to Relatives Claims.</p> <p>(Civil Liability Act 2002)</p>	<p>Provides for self-assumption of risk by participants in inherently risky activities.</p> <p>(Insurance Reform Act)</p>	<p>Provides for self-assumption of risk in connection with sporting and recreational activities, where the activity provider has taken reasonable care.</p> <p>(Voluntary Assumption of Risk Bill)</p>
Mental Harm Claims	<p>An expert panel for assessing mental harm claims.</p> <p>Limit to where defendant should foresee mental harm, and limit the circumstances.</p>	<p>Nervous shock recovery limited to victims, those present or a family member with a demonstrable psychological injury beyond grief.</p>	Not addressed.	Not addressed.
Proportionate Liability	No change.	<p>For economic loss claims, or property damage in non personal injury claims – person only liable to the extent of their proportionate responsibility.</p> <p>(Personal Responsibility Bill)</p>	Not addressed.	Not addressed.
Intoxication, Good Samaritans, Self defence and other limitations on liability	Not addressed.	<p>Ability to recover damages limited where:</p> <ul style="list-style-type: none"> • Plaintiff intoxicated • Plaintiff committing criminal offence • Defendant acting in self defence <p>Defendant acting in good faith as a Good Samaritan, if exercising reasonable care</p> <p>(Personal Responsibility Bill)</p>	<p>Must consider plaintiff's intoxication or illegal activity when evaluating existence and breach of duty.</p> <p>Good Samaritans not liable for good faith acts.</p> <p>(Insurance Reform Act)</p>	<p>Good Samaritans not liable for good faith acts.</p> <p>(Personal Injuries Proceedings Act 2002 (PIP Act))</p>

	Ipp Recommendations	NSW	Victoria	Queensland
Apologies/Waiver of Fees	Not addressed.	Apologies do not constitute admissions. (Personal Responsibility Bill)	Apologies and waiver of fees do not (of themselves) constitute admissions. (Insurance Reform Act)	Apologies/expressions of regret do not constitute admissions. (PIP Act)
Damages	Overcome the Planet Fisheries case, ie courts may refer to other cases.	Not addressed.	Not addressed.	Not addressed.
	Threshold for general damages – 15% of a most extreme case Cap general damages at \$250,000.	Threshold for general damages – 15% of a most extreme case. Cap general damages at \$350,000 (for most extreme case). Table of specified damages.	Cap general damages at \$371,380, indexed.	Considering caps and thresholds on general damages as part of a later set of reforms.
	Cap loss of earnings at calculations based on twice the average full time adult ordinary time earnings (FTOTE). Discount rate of 3% on future loss.	Cap economic loss at calculation based on 3 times average weekly earnings. Court must state assumptions on which calculation is founded. Discount rate to be prescribed. (Civil Liability Act 2002)	Cap economic loss at calculation based on 3 times average weekly earnings. Discount rate 5% (or varied by regulation). (Insurance Reform Act)	Cap economic loss at calculation based on 3 times average weekly earnings. Discount rate 5%. (PIP Act)
Exemplary/Punitive/Aggravated Damages	Abolish for negligence claims.	Abolished for negligence claims. (Civil Liability Act 2002)	Not addressed.	Abolished for negligence claims. (PIP Act)
Gratuitous Services Damages	Gratuitous Services Damages should only be allowed when provided for more than 6 hours per week for more than 6 months – at an hourly rate linked to FTOTE.	Limited to where there is a reasonable need and services would not otherwise be provided. No allowance if less than 6 hours a week for less than 6 months. (Civil Liability Act 2002)	Not addressed.	Limited to where the services are necessary and arise solely from the injury and the incident in question. No allowance if less than 6 hours per week and for less than 6 months. (PIP Act)

	Ipp Recommendations	NSW	Victoria	Queensland
Legal costs	Legal costs should be limited – no costs on claims of less than \$30,000, limited to \$2,500 on claims between \$30,000 and \$50,000.	<p>Legal costs capped on claims under \$100,000 to whatever is the greater of \$10,000 or 20% of the amount recovered (plaintiffs and defendants, barristers and solicitors' fees) unless a costs agreement in place.</p> <p>Potential to limit unnecessary costs and unmeritorious claims.</p> <p>Solicitors must hold a reasonable belief in the reasonable prospects of success of the claim or defence.</p> <p>(Legal Profession Act 1987)</p>	<p>Legal costs capped on small claims.</p> <p>Costs penalties for proceedings commenced in the Supreme or County Courts, where an award of damages does not meet the threshold specified by the legislation in relation to the relevant Court.</p> <p>Costs penalties to discourage the commencement of proceedings without full preparation for resolution of the claim.</p> <p>(Personal Injuries Procedures Bill)</p>	<p>Legal costs capped for small claims (under \$50,000).</p> <p>(PIP Act)</p>