

Tort law reform throughout Australia

MinterEllison
L A W Y E E R S

special report

A BRIEF REVIEW
OF RECENT AMENDMENTS
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sixth edition.

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1 Introduction

The past three years has seen the implementation throughout Australia of the recommendations put forward by the Ipp Committee. This has resulted in an unprecedented amount of legislative activity at both the state and territory government levels in the law relating to negligence, covering both liability and damages. The various state and territory governments have legislated to both:

- narrow the scope of the potential liability (eg. to limit the personal liability of medical practitioners providing assistance to people at risk of injury or in need of emergency medical assistance); and
- reduce the damages which may be awarded, in order to confine underwriters' exposure, with a view to permitting them to offer more affordable cover.

Ironically, these diverse changes contrast with the tenor of the Ipp Report, which favoured a national and uniform legislative response to the perceived ongoing crisis in liability insurance and the ever increasing award of damages within the courts.

Much has been written about the Ipp Committee and its two reports. The Federal Government established Mr Justice Ipp's panel to examine possible reforms to negligence law, in response to media and community concern about the rising costs of insurance premiums and the ever increasing large damages for personal injury.

The first report was released in August 2002 and the final report released a month later in September 2002.

The reports outline a number of recommendations to reform the principles of common law negligence and the assessment of damages by legislation, with the ultimate aim of reducing the costs of insurance premiums and thereby passing such savings on to the community.

Much of the Ipp Report was predicated upon the introduction of a Federal or National framework for reform. Given that Australia's Constitution effectively rests responsibility for this area of law with the various states, this would need a cooperative effort by the states to achieve a uniform solution.

Unfortunately, on 15 November 2002, hopes for a uniformed scheme of legislation applying throughout the states and territories were dashed when Federal and state governments rejected uniform tort law reform. The

various finance ministers of the states instead opted for individual legislation to be enacted (indeed, some states had already made some preliminary steps) as they were unable to reach agreement on a number of the key Ipp recommendations.

Quasi-consistency developing

Despite the various states and territories opting to individually legislate in the area of tort reform, it is becoming increasingly evident that the states and territories are complying with many of the Ipp Report recommendations, developing a quasi-consistency across the various jurisdictions.

Governments expect the insurance industry to deliver affordable insurance products to the community as a result of these reforms.

In July 2002, the Federal Government asked the Australian Competition and Consumer Commission (ACCC) to monitor costs and premiums in public liability and professional indemnity insurance, to assess the extent to which insurance companies are passing on to consumers the benefits of insurance reforms.

To do this, the ACCC asked several major insurers in the public liability and professional indemnity insurance sectors to provide quantitative and qualitative information on costs and premiums in the insurance business, as well as their views as to how they expected government reforms to impact on costs and premiums.

In October 2002, the Prime Minister also announced that the ACCC would monitor medical indemnity premiums to assess whether they are actuarially and commercially justified.

Since this time, the ACCC has released four reports monitoring public liability and professional indemnity insurance premiums and released two medical indemnity insurance monitoring reports.

This paper reviews and compares legislative changes throughout Australia's various state and territory jurisdictions, as at December 2005. It also provides a brief commentary on the ACCC's findings.

2 The patchwork picture: the states' legislation

The following legislative framework currently exists throughout Australia in response to recent tort law reform.

Although such a patchwork approach is unacceptable, a national unity is slowly beginning to develop in relation to the reform, with some jurisdictions following the leads set by others when developing new legislation. A glance at the legislative state responses table commencing on page 5 demonstrates there is still a long way to go before national unity is achieved.

The legislative amendments made to date differ principally in respect of the thresholds and caps on damages, said to reflect the different economic conditions in the different localities. The other area in which the responses have been slow to adopt Ipp recommendations is in the matter of professional negligence reform.

In relation to the world of medical negligence litigation, any solution to the so called 'medical indemnity crisis' needs to recognise the right to receive adequate compensation for negligence, the rights of the community to a full range of safe and high quality medical services and the right of medical practitioners to affordable premiums.

It is important to ensure alternative forms of claims resolution are utilised and further tort reform is considered.

The Australian Government is currently working in conjunction with the medical indemnity industry to find a solution to the issue of affordability of premiums for medical practitioners.

It is worth noting that the majority of states and territories have recently released professional standards legislation aimed at creating schemes to limit the civil liability of professionals and members of occupational associations and groups specified in the scheme. A scheme would require those to whom it applies to adopt specified risk management practices and adhere to a complaints and disciplinary regime, so as to both improve professional standards and reduce the likelihood of claims. In return, the scheme would cap the professional liability of the practitioners covered at a figure not less than the minimum cap fixed by law. Those who want the benefit of the cap will need to maintain insurance cover or business assets sufficient to meet claims up to the cap.

The patchwork picture: the states' legislation	
ACT	
<i>Civil Law (Wrongs) Act 2002</i>	Commenced 30 April 2003, 1 July 2003, 1 November 2003.
<i>Civil Law (Wrongs) Amendment Act 2003</i>	Commenced effectively 28 March 2003.
<i>Civil Law (Wrongs) Amendment Act (No. 2) 2003</i>	Majority commenced 9 September 2003.
<i>Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004</i>	Commenced 8 March 2005.
NSW	
<i>Civil Liability Act 2002</i>	Applies retrospectively from 20 March 2002 to proceedings commenced after that time.
<i>Civil Liability Amendment (Personal Responsibility) Act 2002</i>	Sections regarding nervous shock and criminals apply retrospectively from 3 September 2002. All other sections apply prospectively from 6 December 2002.
<i>Civil Liability Amendment Act 2003</i>	Majority commenced 19 December 2003.
<i>Civil Liability Amendment (Mental Illness) Bill 2003</i>	Currently at second reading stage.
<i>Legal Profession Act 2004</i>	Commenced 1 October 2005.

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The patchwork picture: the states' legislation *continued*

<i>Professional Standards Amendment Act</i>	Commenced 1 July 2003.
<i>Civil Liability (Offender Damages) Act 2004</i>	Commenced 15 November 2004.
<i>Civil Liability Amendment (Food Donations) Bill 2004</i>	Second reading 8 December 2004.
<i>Civil Procedure Act 2005</i>	Commenced 15 August 2005.
NT	
<i>Personal Injuries (Liabilities and Damages) Act 2003</i>	Commenced 1 May 2003.
<i>Personal Injuries (Civil Claims) Act 2003</i>	Commenced 1 July 2003.
<i>Personal Injuries (Liabilities and Damages) (Consequential Amendments) Act 2003</i>	Commenced 1 May 2003.
<i>Legal Practitioners Amendment (Cost and Advertising) Act 2003</i>	Commenced 1 June 2003, 1 July 2003.
<i>Professional Standards Act 2004</i>	Not yet proclaimed.
<i>Proportionate Liability Act 2005</i>	Commenced 1 June 2005.
QLD	
<i>Personal Injuries Proceedings Act 2002</i>	Commenced 18 June 2002.
<i>Justice and Other Legislation Amendment Act 2003</i>	Majority commenced 8 December 2003 and final part commenced 1 February 2004.
<i>Civil Liability (Dust Diseases) & Other Legislation Amendment Act</i>	Commenced 14 October 2005.
<i>Civil Liability Act 2003</i>	Applies retrospectively from 2 December 2002, with some exceptions (protection of volunteers, claims made by plaintiffs who engaged in criminal behaviour or were intoxicated and structured settlements) which commenced on 9 April 2003.
<i>Justice and Other Legislation Amendment Act 2004</i>	Majority commenced 3 December 2004.
<i>Professional Standards Act 2004</i>	Majority commenced 1 July 2005.
<i>Justice & Other Legislation Amendment Bill</i>	2nd reading 8 November 2005.
SA	
<i>Volunteers Protection Act 2001</i>	Commenced 15 January 2003.
<i>Recreational Services (Limitation of Liability) Act 2002</i>	Commenced 1 July 2003.
<i>Wrongs (Liability and Damages for Personal injury) Amendment Act 2002</i>	Commenced 1 December 2002.
<i>Wrongs Act 1936 and Law Reform (lpp Recommendations) Act 2004</i>	Commenced 1 May 2004.
<i>Professional Standards Act 2004</i>	Not yet proclaimed.
<i>The Statutes Amendment (Legal Assistance Costs) Act 2004</i>	Commenced 13 January 2004.

The patchwork picture: the states' legislation *continued*

<i>Law Reform (Contributory Negligence & Apportionment of Liability (Proportionate Liability) Amendment Act 2005</i>	Commenced 1 October 2005.
TAS	
<i>Duties Act 2001</i>	Commenced 1 July 2001.
<i>Civil Liability Act 2002</i>	Commenced 1 January 2003.
<i>Civil Liability Amendment Act 2003</i>	Commenced 4 July 2003.
<i>Civil Liability Amendment Act 2004</i>	Commenced 9 June 2004.
<i>Civil Liability Amendment (Proportionate Liability) Act 2005</i>	Commenced 1 June 2005.
<i>Professional Standards Act 2005</i>	Commenced 1 August 2005.
<i>Limitation Amendment Act 2004</i>	Commenced 1 January 2005.
<i>Legal Profession Amendment Bill</i>	Not yet proclaimed.
VIC	
<i>Wrongs and Other Acts (Law of Negligence) Act 2003</i>	Majority commenced on 3 December 2003.
<i>Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002</i>	Majority commenced 23 October 2002 with remainder commencing 1 May 2003.
<i>Wrongs and Limitations of Actions Act (Insurance Reform) Act 2003</i>	Majority commenced on 21 May 2003.
<i>Professional Standards Act 2003</i>	Commenced 8 June 2004.
WA	
<i>Civil Liability Act 2002</i>	Commenced 1 January 2003.
<i>Volunteer's (Protection from Liability) Act 2002</i>	Commenced 1 January 2003.
<i>Insurance Commission of WA Amendment Act 2002</i>	Commenced 20 November 2002.
<i>Civil Liability Amendment Act 2003</i>	Commenced 1 December 2003.
<i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003</i>	Commenced 17 April 2003.
<i>Civil Liability Amendment Act 2004</i>	Majority commenced 9 November 2004.
<i>Professional Standards Amendment Act</i>	Commenced 26 January 2005.

3 Legislative responses to the Ipp Report

The final Ipp Report outlines some 61 recommendations. The following table is a summary of the legislative responses to those recommendations, mainly relevant to the assessment of a medical practitioner's liability and the issue of reducing the amount of compensation to be awarded in a successful claim for compensation arising from personal injury. It includes the more recent introduction of proportionate liability in all jurisdictions, although this does not apply to personal injury in any of the jurisdictions to date.

Obviously, as can be seen from below, the recommendations of the Ipp Report are far from being implemented on a national or even state and territory basis, but it is interesting to note that a certain symmetry is

developing, as some states and territories have followed the lead of others in the way the legislation has developed. To achieve a national uniformity though, the appropriate legislation would need to be drafted and adopted by each of the states and territories of Australia.

The ACCC public liability and professional indemnity insurance reports (see page 18) have indicated that claims costs have reduced, as have insurance premiums, as is noted in the fourth ACCC report. Of course, it is by no means conclusive at this stage that any reductions have related primarily to the reforms, and the rush of claims filed in many of the jurisdictions prior to the legislation being enacted will no doubt mean that a more accurate analysis will take time.

Legislative responses to the Ipp Report	
Ipp recommendations	State responses
<p>Negligence – duty and standard of care</p> <p>A person is not negligent for failing to take precautions against a foreseeable risk unless:</p> <ul style="list-style-type: none"> the risk is 'not insignificant'; and a reasonable person in the same position would have taken precautions (taking into consideration: the probability, likely seriousness, the burden of taking risks and the social utility of the risk-creating activity). 	<p>NSW Followed recommendations.</p> <p>QLD Followed recommendations.</p> <p>VIC Followed recommendations.</p> <p>SA Followed recommendations.</p> <p>WA Followed recommendations.</p> <p>TAS Followed recommendations.</p> <p>NT Not addressed to date.</p> <p>ACT Followed recommendations.</p>
<p>Defence – assumption of risk</p> <p>There may be no finding of negligence where the risk or kind of risk in question was obvious to a reasonable person. An obvious risk includes risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.</p>	<p>NSW Followed recommendations. No pro-active duty to warn of obvious risks.</p> <p>QLD Followed recommendations.</p> <p>VIC Generally followed recommendations. A person is taken to be aware of an obvious risk unless the person proves on the balance of probabilities that the person was not aware of the risk. A person is not liable in negligence for harm suffered by another person as a result of an inherent risk.</p> <p>SA Followed recommendations. A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk. An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.</p> <p>WA Followed recommendations in regard to recreational activities but does not go as far as the recommendations.</p>

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Legislative responses to the Ipp Report <i>continued</i>	
Ipp recommendations	State responses
<p>Defence – assumption of risk <i>continued</i></p>	<p>TAS Followed recommendations. A person does not owe a duty to another person to warn of an obvious risk to the person, subject to certain exceptions such as unless requested, or the defendant is required by written law.</p> <p>NT Not addressed to date.</p> <p>ACT Not specifically addressed but does include a section on precautions against risk.</p>
<p>Standard of care – professionals 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 care should be determined by reference to what could reasonably be expected of a person professing that skill at the date of the alleged negligence. That is, unless the court considers that the opinion is 'irrational'. Professional opinion does not have to be universally accepted to be considered widely accepted.</p>	<p>NSW Followed recommendations.</p> <p>QLD Followed recommendations.</p> <p>VIC Followed recommendations.</p> <p>SA Followed recommendations.</p> <p>WA Not addressed to date.</p> <p>TAS Followed recommendations.</p> <p>NT Not addressed to date.</p> <p>ACT Not specifically addressed but states that the standard of care is that of a reasonable person in the defendant's position who was in possession of all of the information that the defendant had or should have had.</p>
<p>Recreational services Should not be liable for personal injury or death suffered as a result of obvious risk.</p>	<p>NSW Followed recommendations.</p> <p>QLD Followed recommendations.</p> <p>VIC Subject to certain conditions, a recreational service provider is entitled to rely on an exclusion clause. 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 risks.</p> <p>SA Not addressed although providers of recreational services may apply to the Minister to have a code of practice registered governing particular recreational services. Such a code may modify the duty of care owed by the service providers to consumers.</p> <p>WA Followed recommendations.</p> <p>TAS Holds that a person is not liable for a breach of duty for harm suffered by another person (plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. No duty of care for recreational activity where a risk warning is present.</p> <p>NT Not addressed to date.</p> <p>ACT Broadly followed recommendations but does not give specific protection for recreational service providers. Provides protection for inherent risk in providers of equine activities but only in limited circumstances.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Negligence of medical practitioners A medical practitioner will not be negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field (referred to as the 'Bolam principle'), unless the opinion is irrational.</p>	<p>NSW A person practising a profession 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, except where the court considers that opinion to be irrational. Peer professional opinion does not have to be universally accepted to be considered widely accepted. In proceedings that deal with the civil liability for the birth of a child, the recovery of damages for the costs of rearing or maintaining a child, or for lost earnings while rearing or maintaining a child, is precluded. This does not affect the civil liability for any personal injury suffered by a child pre-natally or during birth as the result of conduct by another person.</p> <p>QLD Professionals not negligent if they act in a manner widely accepted at the time by a rational peer professional opinion as competent practice. Peer opinion does not need to be universally accepted. Also provides that a plaintiff would not be able to claim compensation for raising a healthy child that is born as a result of a negligent act or omission by a medical practitioner in performing sterilisation procedures on a patient.</p> <p>VIC Followed for professionals in general.</p> <p>SA Followed recommendation although doesn't extend to failure to give a warning of death or injury associated with the provision of a health care service.</p> <p>WA Followed recommendations.</p> <p>TAS Followed recommendations.</p> <p>NT Not addressed to date.</p> <p>ACT Followed recommendations.</p>
<p>Medical practitioner's duty to inform Medical practitioner's duty to inform: medical practitioners should be subject to a legislatively prescribed duty to inform, both proactively and reactively on the basis that they must take reasonable care to provide such information as to enable the patient to make a decision as to whether or not to undergo treatment.</p>	<p>NSW Widely accepted professional opinion 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.</p> <p>QLD Patients to be informed about risks of medical treatment which a reasonable person would require to make an informed decision about treatment and which the doctor knows, or ought reasonably know, the patient wants to be given.</p> <p>VIC Widely accepted professional opinion does not apply in connection with the giving of (or failure to give) a warning or other information in respect of a risk or other matter to a person.</p> <p>SA Does not specifically state that there is no liability for failure to warn in medical services.</p> <p>WA Not addressed to date.</p>

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Legislative responses to the Ipp Report <i>continued</i>	
Ipp recommendations	State responses
<p>Medical practitioner's duty to inform <i>continued</i></p>	<p>TAS Followed recommendations although exception where medical practitioner has to act promptly to avoid serious risk to the life or health to the patient.</p> <p>NT Not addressed to date.</p> <p>ACT Not addressed to date.</p>
<p>Apologies/Expressions of Regret No recommendation.</p>	<p>NSW An apology does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and is not relevant to the determination of fault or liability in connection with that matter. Evidence of an apology is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.</p> <p>QLD Expressions of regret about an incident that do not admit liability, are not admissible in a court proceeding.</p> <p>VIC An apology is not an admission of liability, unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance and is not admissible in respect of a fact in issue in the proceedings.</p> <p>SA No admission of liability or fault is to be inferred from an expression of regret for the incident out of which the cause of action arose.</p> <p>WA An apology made in connection with any matter alleged to have been caused by the fault of a person does not amount to an admission and is not admissible in any civil proceedings as evidence of fault or liability.</p> <p>TAS Apologies made by a person are inadmissible as evidence of fault or liability, and does not constitute an admission of fault or liability.</p> <p>NT Allows expressions of regret to be made about an incident that is alleged to have caused personal injury and contains an acknowledgment of fault by a person which is not admissible as evidence in proceedings.</p> <p>ACT The Act makes provision for an apology to be made by or on behalf of a person in relation to any civil liability claim without it being construed as an admission of fault or liability. Evidence of an apology is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Contributory negligence</p> <p>The test should be whether a reasonable person in the plaintiff's position would have taken precautions against the risk of harm, having regard to what the plaintiff knew or ought reasonably have known taking into consideration:</p> <ul style="list-style-type: none"> • probability of harm • seriousness of harm • burden of taking precautions • social utility of activity. <p>Under apportionment legislation, a court should be entitled to reduce a plaintiff's damages by 100 percent where it is just and equitable to do so.</p>	<p>NSW Followed recommendations.</p> <p>QLD Followed recommendations.</p> <p>VIC Generally followed recommendations although without as much detail.</p> <p>SA Followed recommendations.</p> <p>WA Apportionment of damages in cases of contributory negligence. Extending the apportionment provisions in the Act so as to extend those provisions to claims for a breach of contractual duty of care.</p> <p>TAS Followed recommendations noting 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.</p> <p>NT Not addressed to date.</p> <p>ACT Doesn't lay down test but categories of presumption of contributory negligence included. The Court is entitled to reduce the plaintiff's damages when it is just and equitable to do so.</p>
<p>Causation</p> <p>Plaintiff bears burden of proof to establish both:</p> <ul style="list-style-type: none"> • factual causation; and • scope of liability – normative issue of the appropriate scope of the negligent person's liability (encompasses legal causation, foreseeability, remoteness, commonsense causation). 	<p>NSW Followed recommendations.</p> <p>QLD Followed recommendations.</p> <p>VIC Followed recommendations with Plaintiff bearing the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.</p> <p>SA Followed recommendations in Bill. Where there are multiple causes and it is not possible to assign responsibility for causing the harm to any one or more of them:</p> <ul style="list-style-type: none"> • the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability • the court may continue to apply the established principle under which responsibility may be assigned to the defendants for causing harm. <p>WA Followed recommendations.</p> <p>TAS Followed recommendations.</p> <p>NT Not addressed to date.</p> <p>ACT Followed recommendations.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Proportionate liability</p> <p>In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability (where multiple wrongdoers are severally liable and can be held liable for the full amount of any damages awarded to the plaintiff) should be retained and not replaced with a system of proportionate liability.</p> <p>The Ipp Report did not consider or assess options for the introduction of a regime of proportionate liability in relation to property damage and pure economic loss and the Report made no comment or recommendation in this respect.</p>	<p>NSW</p> <p>Part 4 of the <i>Civil Liability Act</i> (inserted by the <i>Civil Liability Amendment (Personal Responsibility) Act 2002</i>). It broadly follows the recommendation but only applies to claims for economic loss or property damage. The liability of a defendant who is a concurrent wrongdoer in relation to a claim is to be limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just, having regard to the extent of the defendant's responsibility for the loss or damage. Where judgment is obtained against a defendant in relation to an apportionable claim, that defendant cannot be required to further contribute to the damages recovered or which are recoverable from another concurrent wrongdoer in the same proceeding and cannot be required to indemnify any such wrongdoer.</p> <p>QLD</p> <p>Where the acts/omissions of more than one wrongdoer, either independently or jointly, cause economic loss or damage to property, individual liability is limited to the proportion of damage the courts consider just.</p> <p>VIC</p> <p>Proportionate liability reforms are now in force, in that the liability of a concurrent wrongdoer is limited to the proportion of the damage the court considers just, having regard to the wrongdoer's responsibility. Does not apply to personal injury claims.</p> <p>SA</p> <p>Proportionate liability for claims for economic loss, or loss of or damage to property. Does not apply to personal injury claims.</p> <p>WA</p> <p>Proportionate liability for claims for economic loss or damage to property in an action for damages but not out of personal injury. Duty imposed on defendant to inform plaintiff of concurrent wrongdoers.</p> <p>TAS</p> <p>Introduced for claims for economic loss or damage to property in an action for damages. Imposes a duty on defendants to inform the plaintiff about concurrent wrongdoers.</p> <p>NT</p> <p>Proportionate liability applies for claims for damages other than claims for personal injury or certain claims under the <i>Consumer Affairs and Fair Trading Act</i>. No apportionment of loss where one of the wrongdoers in a negligence claim caused that loss intentionally or fraudulently.</p> <p>ACT</p> <p>Part 2.5 of the <i>Civil Law (Wrongs) Amendment Act 2003</i> holds that a person who is liable for the damage caused by a wrong can recover contribution from someone else who is also liable for the same damage but it is limited to an amount that the court considers just, having regard to the extent of the contributory's responsibility for the damage, with certain exceptions.</p> <p>The <i>Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004</i> allows for apportionment for claims involving purely economic loss or damage to property in an action for damages.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Liability for mental harm</p> <p>No liability if not recognised psychiatric illness.</p> <p>Must have been able to foresee psychiatric harm in person of normal fortitude. Relevant factors include:</p> <ul style="list-style-type: none"> • whether injury arose from plaintiff witnessing a sudden shock or its aftermath • whether there was a pre-existing relationship between the plaintiff and the defendant • nature of relationship between plaintiff and any person killed, injured or put in peril. 	<p>NSW</p> <p>Followed recommendations. Damages will also not be recoverable where a person suffers losses resulting from conduct that would have constituted a serious offence but for the person suffering from mental illness. Also excludes the civil liability of a person who acts in self-defence if it is in response to conduct of another person that would have been unlawful but for the other person suffering mental illness.</p> <p>QLD</p> <p>Not addressed to date.</p> <p>VIC</p> <p>Followed recommendations.</p> <p>SA</p> <p>Followed recommendations.</p> <p>WA</p> <p>Followed recommendations with the circumstances of the case including the personal injury suffered by the plaintiff.</p> <p>TAS</p> <p>Followed recommendations.</p> <p>NT</p> <p>Not addressed to date.</p> <p>ACT</p> <p>Generally followed recommendations. In relation to consequential mental harm, the court must have regard to the nature of the bodily injury out of which such harm arose. The section does not affect the duty of care a person (defendant) has to another person (plaintiff), if the defendant knows or ought reasonably to know, that the plaintiff is a person of less than normal fortitude. Makes special provision for defendant liability for shock to relatives or partners of injured party.</p>
<p>Limitation of actions</p> <p>Recommended national uniformity. 3 years, with 12 year long stop (with discretion to extend and extended for minors) commencing from the 'date of discoverability', ie. when the plaintiff knew or ought to have known injury had occurred, the cause of which is attributable to the defendant and the injury is significant enough to warrant proceedings.</p>	<p>NSW</p> <p>Followed recommendations in Part 6 of the <i>Limitations Act</i>.</p> <p>QLD</p> <p>Special provisions in place for personal injuries arising out of incidents happening before 18 June 2002 where the period of limitation has not ended.</p> <p>VIC</p> <p>The Bill provides for the limitation period for personal injury action to be whichever of the following periods is the first to expire:</p> <ul style="list-style-type: none"> • the period of 3 years from the date on which the cause of action is discoverable by the plaintiff • the period of 12 years from the date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned. <p>This does not apply to the cause of action founded on a personal injury to a person under a disability at the date of the act or omission. The period is 6 years from the date of discoverability and 12 years after the date of the act or omission alleged to have resulted in the personal injury.</p> <p>There is a special limitation period for minors injured by close relatives or close associates, or a person under a legal incapacity such as a minor.</p> <p>SA</p> <p>All actions in which damages claimed including damages in respect of personal injuries to any person have to commence within 3 years after the cause of action accrued.</p> <p>WA</p> <p>3 years for personal injury or death claims. For contribution between tort-feasors is 2 years since cause of action accrued.</p>

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Legislative responses to the Ipp Report <i>continued</i>	
Ipp recommendations	State responses
<p>Limitation of actions <i>continued</i></p>	<p>TAS Followed recommendations although limitation period extended for people with a disability, whether caused by the incident or not.</p> <p>NT Not addressed to date (limitation period remains at 3 years).</p> <p>ACT The limitation period for certain claims for damages for personal injury is reduced from 6 to 3 years after the day the injury happened or after the day the person first knows that he or she has suffered a injury which includes a disease or disorder. The limitation period will only apply to claims arising after the commencement of the legislation. There is detailed provision made for children with guardians having to give the defendant notice of a claim within 6 years of the accident or injury, although the child's right to sue endures until they are 21.</p>
<p>Non-economic loss/general damages – thresholds Minimum threshold for non-economic loss: a threshold for general damages would be based on 15% of a most extreme case (assessed as a percentage of the capped maximum to be awarded)</p>	<p>NSW Nil damages below 15% of 'a most extreme case'. For general damages equalling or above 15% and up to 24%, a fixed percentage of the maximum to be awarded is payable, eg. for 15%, 1% of the maximum amount prescribed for a most extreme case.</p> <p>QLD No thresholds. Injuries to be assessed on a '100 point scale' and by reference to similar injuries in prior proceedings.</p> <p>VIC General damages only recoverable where a claimant has sustained a 'significant injury', which is defined in the Act. Process implemented so plaintiff can determine whether they are entitled to general damages. Threshold doesn't apply to sexual offences.</p> <p>SA Damages are calculated by reference to a scale value reflecting gradations of non-economic loss, the scale value is then multiplied according to a series of multipliers.</p> <p>WA The minimum threshold for general damages for the year commencing 1 July 2004 is A\$13,000.</p> <p>TAS A minimum threshold for general damages for the year ending 30 June 2005 is A\$4,000, and then various phases after that. Courts may refer to earlier decisions in determining tariffs for non-economic loss.</p> <p>NT A minimum threshold for general damages to be payable of A\$15,000.</p> <p>ACT For medical claims, damages must not be awarded for non-economic loss unless the assessed non-economic loss is over A\$12,000. A specific formula is used for those amounts falling between A\$12,000 and A\$20,000.</p>
<p>Non-economic loss – caps Cap on maximum damages for non-economic loss recoverable of A\$250,000.</p>	<p>NSW Capped at A\$416,000.</p> <p>QLD Damages capped at 3 times average weekly earnings.</p> <p>VIC Capped at A\$380,950. In the case of injury (other than psychiatric injury) impairment must be more than 5% and in the case of psychiatric injury, impairment must be more than 10%, otherwise no entitlement. In each case impairment must be permanent to qualify.</p> <p>SA Capped at A\$256,480.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Non-economic loss – caps <i>continued</i></p>	<p>WA For the year ending 30 June 2005, where damages are assessed at less than A\$39,500 but more than A\$13,000, damages to be capped at A\$13,000 and formula limiting damages that are below A\$52,500.</p> <p>TAS Not addressed to date.</p> <p>NT Capped at A\$250,000. No payment of interest to be awarded.</p> <p>ACT Not addressed to date.</p>
<p>Loss of earning capacity Cap on maximum loss of earning capacity at calculations based on twice the average full time adult ordinary earnings.</p>	<p>NSW Capped at three times average weekly earnings.</p> <p>QLD Capped at three times average weekly earnings.</p> <p>VIC Capped at three times average weekly earnings.</p> <p>SA Capped at A\$2.2 million including damages for economic loss brought for the benefit of the dependent of a deceased person.</p> <p>WA Capped at three times average weekly earnings at the time of the award.</p> <p>TAS Capped at 4.25 times adult average weekly earnings.</p> <p>NT Capped at three times average weekly earnings. Court to reduce future loss of income taking into account possibility of adverse events.</p> <p>ACT Capped at three times average weekly earnings.</p>
<p>Discount rate Discount rate for lump sum damages for future economic loss of 3%.</p>	<p>NSW Prescribed by the regulations or 5%.</p> <p>QLD Already 5% in Qld.</p> <p>VIC Prescribed by the regulations or 5%.</p> <p>SA In determining the actuarial multiplier to apply, a prescribed discount rate is to be applied.</p> <p>WA Discount rate fixed by Governor by Order, otherwise at 6%.</p> <p>TAS Existing rate of 7% continues to apply.</p> <p>NT Discount rate for loss of earnings set at 5%.</p> <p>ACT Not addressed to date.</p>

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Legislative responses to the Ipp Report <i>continued</i>	
Ipp recommendations	State responses
<p>Interest on non-economic loss No interest recoverable on past non-economic loss and damages for gratuitous attendant care.</p>	<p>NSW A court cannot order the payment of interest on damages awarded for non-economic loss or gratuitous attendant care services.</p> <p>QLD No award on general damages. Interest on monetary loss based on rate for ten year treasury bonds published by the RBA.</p> <p>VIC No damages for gratuitous care unless a number of factors can be proved. Silent on interest.</p> <p>SA Interest is not to be awarded on damages compensating non-economic or future loss.</p> <p>WA Not addressed to date.</p> <p>TAS No award for pre-judgment interest.</p> <p>NT Interest rate to be prescribed by regulation.</p> <p>ACT Not addressed to date.</p>
<p>Exemplary and punitive damages Exemplary and punitive damages to be abolished for negligence claims.</p>	<p>NSW Abolished in all personal injury claims.</p> <p>QLD Proposal to reinstate for unlawful acts and sexual assault/misconduct.</p> <p>VIC Not addressed to date.</p> <p>SA Not addressed to date.</p> <p>WA Not addressed to date.</p> <p>TAS Not addressed to date.</p> <p>NT Abolished aggravated or exemplary damages in respect of personal injury.</p> <p>ACT Not addressed to date.</p>
<p>Gratuitous services Damages for gratuitous attendant home care services should only be allowed when they are provided for more than 6 hours per week for more than 6 months – at an hourly rate linked to full time adult ordinary time earnings.</p>	<p>NSW Nil damages recoverable for less than six hours care per week. If more than 40 hours care per week is required then capped at average weekly earnings.</p> <p>QLD Threshold is that care required must be six hours + a day for more than six months. Discount rate for future gratuitous services 5%.</p> <p>VIC For such damages to be awarded, the court must be satisfied that there is or was a reasonable need for the services, the need arose solely because of the injury, and the services would not have been provided to the claimant but for the injury. No damages will be awarded where such services are provided for less than 6 hours per week and less than 6 months. If gratuitous attendant care services are provided or are to be provided for not less than 40 hours per week, the amount of damages that may be awarded must not exceed average weekly total earnings. There is also a limit of the per hour claim that can be made where damages are awarded for gratuitous attendant care services that are provided or to be provided for less than 40 hours per week.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Gratuitous services <i>continued</i></p>	<p>SA Limited to the services of a parent, spouse or child of the injured person. Such damages are not to exceed an amount equivalent to four times state average weekly earnings unless the court is satisfied that:</p> <ul style="list-style-type: none"> • the services are reasonably required by the injured person; and • it would be necessary for the injured person to pay for the services if they were not being provided by a family member. <p>WA Not to exceed average weekly earnings if they are to be provided for not less than 40 hours per week. Hourly rate for less than 40 hours to be calculated as one-fortieth of average weekly earnings.</p> <p>TAS No damages awarded.</p> <p>NT Allow award where services provided for more than six hours per week for more than 6 months – where services provided for more than 40 hours per week, damages not to exceed average weekly earnings and hourly rate linked to average weekly earnings. No award of interest.</p> <p>ACT Not addressed to date.</p>
<p>Legal costs Legal costs should be limited – no costs recoverable where the award of damages is less than A\$30,000. Legal costs should be capped to no more than A\$2,500 where an award of damages is between A\$30,000 and A\$50,000.</p>	<p>NSW Part 2 of the <i>Civil Liability Act 2002</i> and the <i>Legal Profession Act 1987</i> (NSW) provides that for claims up to A\$100,000 maximum legal costs are:</p> <ul style="list-style-type: none"> • for services provided to a plaintiff, the greater of 20% of the amount recovered or A\$10,000 • for services provided to a defendant, the greater of 20% of the amount sought, or A\$10,000. <p>QLD Dependent upon the mandatory final offer. Limited recovery where damages are less than A\$30,000. Amount recoverable is limited where damages fall between A\$30,000 and A\$50,000. Over A\$50,000 the normal 'loser pays' rule applies.</p> <p>VIC Not addressed to date.</p> <p>SA Not addressed to date.</p> <p>WA Not addressed to date.</p> <p>TAS Not addressed to date.</p> <p>NT Dependant on award of damages in relation to final offer with a sliding scale applying.</p> <p>ACT For personal injury claims in which the damages are less than A\$50,000, a lawyer is not entitled to be paid more than 20% of the amount recovered. For personal injury claims of up to A\$100,000, a lawyer's costs are limited to the greater of A\$10,000 or 20% of the claim. A court has discretion to allow additional costs.</p>

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Legislative responses to the Ipp Report <i>continued</i>	
Ipp recommendations	State responses
Legal costs continued	A lawyer providing legal services on a claim for damages, or in defence of a claim for damages must file a certificate stating that the lawyer believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success. Contravention of those provisions can be professional misconduct or unsatisfactory professional conduct under the <i>Legal Practitioner Act 1970</i> . A court may order a lawyer to repay the client or pay all or part of the costs that have been ordered to be paid to another party if, in the court's view, the claim or defence does not have reasonable prospects of success. The onus is upon the lawyer to show the facts provided a basis for a view that the claim or defence had reasonable prospects of success.
<p>Protection to rescuers/good samaritans/not for profit organisations</p> <p>A rescuer/good samaritan is a person acting without expectation of payment or other consideration who comes to the aid of a person (and usually includes a medical practitioner).</p> <p>A rescuer/good samaritan should not be liable for assisting in an emergency if the rescuer/good samaritan was exercising all reasonable care and skill.</p> <p>Not for profit organisations should not be liable for personal injury or death of a voluntary participant in recreational activity as a result of an obvious risk.</p> <p>There should be no provision regarding the liability of not-for-profit organisations for personal injury and death caused by negligence in the provision of emergency services.</p>	<p>NSW</p> <p>A good samaritan does not incur any personal civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured except where good samaritan is impaired or not exercising reasonable care and skill. A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work organised by a community organisation, or as an office holder of a community organisation. There are certain exclusions such as impairment, where the volunteer is required to have insurance etc.</p> <p>QLD</p> <p>No personal liability for first aiders if performing duties in an emergency to enhance public safety for a prescribed entity and the act is done in good faith, without reckless disregard for safety.</p> <p>People who provide food in good faith to community organisations may obtain protection from civil proceedings.</p> <p>VIC</p> <p>A good samaritan is not personally liable in any civil proceedings for anything done in good faith to provide assistance, advice or care at an emergency scene or accident. A volunteer is not personally liable in a civil proceeding in connection with anything done to provide a service in relation to community work organised by a community organisation.</p> <p>SA</p> <p>A good samaritan who comes to the aid of another person in need of emergency assistance or a medically qualified person acting without expectation of payment are immune from personal liability if they were acting with care and in good faith at the time the assistance was given.</p> <p>WA</p> <p>No civil action against volunteer or good samaritan or medical good samaritan unless they were affected by drugs or alcohol when rendering assistance.</p> <p>TAS</p> <p>Volunteers of community organisations does not incur civil liability for anything that the volunteer has done in good faith when doing community work, with exceptions including death or personal injury caused by the driving of a motor vehicle or if the volunteer was acting outside the scope of the community work organised or contrary to instructions. The community organisation incurs the liability.</p>

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Legislative responses to the Ipp Report *continued*

Ipp recommendations	State responses
<p>Protection to rescuers/good samaritans/not for profit organisations <i>continued</i></p>	<p>NT Volunteers of community organisations exempt from any threat of public liability action where they are acting with good faith, without recklessness and within the authority of their parent organisation. Protecting good samaritans (including a good samaritan with medical qualifications), who in good faith and without recklessness go to the aid of a person in need of emergency assistance.</p> <p>ACT A good samaritan or medical practitioner is exempt from liability when acting honestly, without recklessness in assisting or giving advice to a person who is apparently injured or at risk of being injured, or in need of emergency medical assistance, with certain exceptions, eg. impairment. A volunteer who carries out community work is exempt when acting honestly and without recklessness during the course of performing community work with certain exceptions, eg. impairment by recreational drug use, defamation, or acting outside the scope of activities authorised by the community organisation. Community organisations may be liable for the conduct of a volunteer and the Territory may assume liability of community organisations.</p>

4 Are the reforms working?

Despite the lack of uniformity between the states and territories, the reforms do appear generally to be working, with specific regard being had to the number of claims now being brought.

In addition, anecdotal evidence speaks of a significant reduction in claims being brought throughout the states and territories. Such anecdotal evidence in NSW, for example, indicates that claims in the District Court may have reduced by 25% to 30% since the introduction of the legislation.

This evidence may be skewed as data provided by the Law Institute of Victoria and Law Society of New South Wales on the number of personal injury writs served and the number of civil claims shows that claimants in both states rushed to file claims with courts before the reforms were introduced and the same could be expected in other states and territories. This meant that many of the claims that would have been filed in 2003 and 2004 were brought forward to 2002, so the net effect of reforms on the number of claims filed with courts will only become clear over the next few years.

This does not necessarily mean that the reforms are working in all intended areas. Indeed, it would seem that we continue to see a somewhat sympathetic court in relation to the award of damages. In this regard, damages are awarded by way of reference to a scale, and it would appear, with respect, that some courts are finding for claimants up into the generous range of the prescribed scale.

In addition, in the author's own experience, we are seeing more and more innovative pleadings. For example, in NSW in an attempt to achieve at least the 15% threshold for the awarding of non-economic loss, lawyers are becoming it could be said 'quite creative' in relation to their pleadings. For example, more claims plead breaches of the *Trade Practices Act* in respect of personal injury actions.

The Commonwealth Government has look to address this aspect of creative pleadings by introducing the *Trade Practices Amendment (Personal Injuries and Death) Bill 2004* aimed to prevent individuals, and the ACCC in a representative capacity, from bringing civil actions for

damages in relation to personal injury or death resulting from contraventions of part 5 division 1. This division includes misleading and deceptive conduct, false and misleading misrepresentations, harassment and coercion.

Another problem with the reforms is that in this early stage, courts are somewhat random in their approach to how the legislation should work.

Despite all of the reforms throughout the country, the big claims will almost certainly still remain, although the shifting of the onus on persons to assume a greater personal responsibility for their own safety, and the introduction of caps to more heads of damage in the majority of jurisdictions, is beginning to limit the instances where large pay outs will be awarded.

The ACCC *public liability and professional indemnity insurance fourth monitoring report* found that insurers noted that the average size of claims settled decreased by 11 per cent between year ending 31 December 2003 and half year ending 30 June 2004. This decrease resulted from a fall in the average size of personal injury and death claims rather than property damage claims, but the recent introduction of proportionate liability in the various jurisdictions in relation to property claims may address this imbalance.

The fourth monitoring report also noted between 31 December 2003 and half year ending 30 June 2004, the average size of professional indemnity insurance claims settled increased by 21 per cent. This indicates that still more needs to be done to address the escalating costs of professional liability insurance.

The second ACCC medical indemnity monitoring report shows that the premiums written in 2004–05 were considered to be actuarially justified for all five medical indemnity providers. The ACCC also found that, in the current market environment, premiums set by all five providers were considered to be commercially justified.

The introduction of proportionate liability and proposed reforms, such as changes to the *Insurance Contracts Act* and the introduction of professional standards legislation should have the desired effect of reducing claims in the professional liability field in the future.

5 Conclusion

The Ipp Committee should be applauded for the considerable amount of work that it did in coming up with a number of significant recommendations to reform the area of the law of negligence in Australia. This reform was needed to ensure that a cap was put on the ever spiralling amount of damages awarded by the courts, with the hoped 'knock on' effect of capping or bringing down insurance premiums.

Unfortunately, the various state and territory governments were unable to agree on a number of the Ipp recommendations and the proposed Federal uniform approach was rejected. The states have instead put in their own patchwork quilt of reform.

But as time has passed, and more legislation has been introduced in each jurisdiction, a symmetry is beginning to develop between the states and territories. As the legislation has developed, some states have enacted legislation strikingly similar to others, so that the ideology propounded in the Ipp Report of a uniform and consistent system may still be realised.

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