TABLE OF CONTENTS

Executive summary

When announcing the Civil Liability Bill to New South Wales Parliament on 7 May 2002, Premier Bob Carr foreshadowed that a second stage of tort law reform would be pursued in the second parliamentary session of 2002. He stated that the Government would be "pursuing a principled approach to restore sense and balance in litigation", and noted the need for "broad and sensible principles that will apply across the full range of claims".

The *Civil Liability Amendment (Personal Responsibility) Bill 2002* will implement the second stage of tort law reform. The first part of this paper discusses the common law principles that relate to the proposals set out in the Bill. The second part of this paper discusses the particular provisions of the bill in more detail.

The **Introduction** to the Discussion Paper outlines the impetus for the present tort law reform agenda in New South Wales, and includes an overview of previous statutory intervention in relation to specific types of negligence claims, and the relationship between modern tort law and insurance.

The first part of this paper focuses on particular aspects of the law of negligence:

- the existence of a duty of care (in particular the relationship of proximity and issues of foreseeability);
- the standard of care required to be exercised (how a breach of duty is measured);
- the issue of causation and remoteness of damage;
- the measure of damages (including apportionment legislation); and
- procedural and evidential matters (in particular apologies).

Chapter 2, The existence of the duty of care, looks at two principal questions that should be considered in determining whether a defendant is liable in negligence for the plaintiff's injury:

1. Whether there exists a sufficient **relationship of proximity** between the parties. Should certain categories of relationship be excluded from the duty of care by being deemed as not involving a relationship of proximity? For example, public and other authorities, "good samaritans", volunteers, people engaged in recreational and other risky activities, intoxicated persons, and persons engaged in criminal activity.

2. If a relationship of proximity is established, whether the risk of injury to the injured person is **reasonably foreseeable**. What might be an appropriate statutory test for "reasonable foreseeability"?

Chapter 3, The standard of care, explores the extent of the duty owed by a defendant. In particular, Chapter 3 investigates the issue of what standard of care should be expected of professionals, not only of medical practitioners but also other professional groups.

Chapter 4, Causation and remoteness of damage, explores the issues relevant to determining whether a defendant is causally liable for the plaintiff's injury. The

uncertainty associated with the concept of remoteness is discussed as well as the inadequacy of reasonable foreseeability as a means of limiting liability in this context. This chapter also explores liability for nervous shock as a special category of claim in negligence.

Chapter 5, The measure of damages, considers ways in which the damages payable by a defendant might be limited. A wider range of options for damages awards is considered, including the availability of proportionate liability (in circumstances where more than one wrongdoer is subject to a claim in negligence) and structured settlements.

Chapter 6, Procedural and evidential matters, looks particularly at the issues of apologies, their relevance to findings of liability and how they might be encouraged in order to prevent recourse to litigation.

The second part of the paper provides a commentary on the particular provisions of the Bill.

Preface

The recent enactment of the *Civil Liability Act 2002* (NSW) represented stage one of a process of reforming civil liability in New South Wales. When the Act was released in the form of an exposure draft Bill for public consultation on 7 May 2002, the Premier foreshadowed that a further stage of tort law reform would be pursued in the Spring Parliamentary Session of 2002. The Premier stated that the Government would be "pursuing a principled approach to restore sense and balance in litigation", and noted the need for "broad and sensible principles that will apply across the full range of claims".

On 11 June 2002 the Premier issued a media release in which he detailed the Government's proposals for reform of civil liability. In summary these proposals were to enact laws to:

- address the concept of reasonable foreseeability in the law of negligence;
- protect good Samaritans who assist in emergencies;
- provide that a risk warning can operate as a good defence for risky entertainment or sporting activities where there is no breach of safety regulations;
- limit the scope of liability of public and other authorities in the exercise of statutory functions;
- change the professional negligence test to peer acceptance, so that conduct widely accepted in Australia by peer professional opinion as competent cannot be held to be negligent;
- abolish reliance by plaintiffs on their own intoxication;
- prevent people from making public liability claims if they are injured while committing a crime, or if the injury arises from self defence;
- create a presumption in favour of structured settlements instead of lump sum damages awards.

The *Civil Liability Amendment (Personal Responsibility) Bill 2002* ("the Bill") will implement the second stage of tort law reform. It introduces new provisions into the *Civil Liability Act 2002* (NSW) ("the principal Act"). This paper discusses the Bill in the framework of the common law principles that relate to the law of negligence in New South Wales.

1. Introduction

The modern law of negligence can be regarded as "the closest that the common law has come to providing a general remedy in respect of injurious conduct".[1] The concept of negligence, or liability for omission or neglect, emerged as a separate basis for tort liability in the first part of the 19th century, coinciding with the Industrial Revolution.[2] What has evolved since that time is a concept of liability founded on three general elements: the existence of circumstances establishing a duty of care, breach of that duty, and damage caused by the breach which is not too remote from it in law.[3]

Negligence does not give rise to liability unless the law exacts a "duty" to observe care. That "duty" can be defined as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others".[4]

The question of whether a duty of care should arise is an inquiry fundamentally concerned with the question of how far the principles of liability for negligence should extend. Yet it is increasingly recognised that many aspects of the law concerned with determining liability for negligence have become nebulous and difficult to evaluate and apply.[5] A legislative response to this problem is, therefore, warranted.

STATUTORY INTERVENTION IN TORT LAW

Statutory schemes have been developed in recent years to limit liability and damages for injuries arising from particular categories of activity. These schemes were developed for areas of activity which engage large sections of the public, where most potential defendants are insured, and where injuries are frequent. Such schemes now apply to liability for motor accidents and workers compensation, and more recently, to health care claims.[6]

Until recently, the broader area of public liability was regarded as an area in which statutory modifications to legal principles or the capacity to recover damages were not warranted. Such liability was thought to be relatively rare in practice, and losses were not perceived as having a broader community impact. However, in recent times, disquiet has been expressed at the cost of premiums for public liability insurance, and at the effects of such costs on the activities of community organisations, small and big

1. *Jaensch v Coffey* (1984) 155 CLR 549 at 578 per Deane J.
2. J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, 1998) at 113.
3. W L Morison and C Sappideen, *Torts - Commentary and Materials* (8th edition, LBC Information Services, 1993) at 272. See also Fleming (1998) at 115.
4. Fleming (1998) at 149.
5. J J Spigelman, "Negligence: the last outpost of the welfare state" (2002) 76 *Australian Law Journal* 432.
6. See also the *Civil Liability Act 2002* (NSW).

business, and government. At the same time, there has been criticism of recent decisions concerning claims for compensation arising from injuries.

There is widespread public concern about the implications of decisions for public activities, and a perception that insurance costs are rising because of such decisions. Moreover, some criticism has been made by judges themselves. For example, last year Thomas JA of the Queensland Court of Appeal observed:[7]

> Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community, both economic and social.

In the same vein, some judges are increasingly conscious of how policy issues are directly relevant to determining liability. The role of the courts is to apply tort principles to individual cases. However, the collective impact of this type of decision making warrants a review (and subsequent legislative action) of the principles which are applied to form the basis of a duty of care, a breach of that duty, and liability. The need for such a review has been recognised by judges and governments alike. As Thomas JA commented in 2001:

> ... authority constrains me to participate in pushing the boundaries further when I think that the time has already been reached when courts should be seriously re-considering a reformulation of firmer control devices than those that currently exist.

A former Chief Justice of Australia, Sir Harry Gibbs, recently observed when commenting on alternatives to a no fault compensation scheme:

> An alternative approach would be to redefine, more narrowly, the principles of the law of negligence, perhaps by providing a more clearly defined duty of care, and a less burdensome standard of care, and by introducing a proportionate relationship between the degree of negligence and the amount of damages. That would, of course, require legislative action.[8]

Although the impact of the Bill on the statutory schemes affecting workers compensation and motor and transport accidents is limited, the Bill complements the approach adopted in those schemes, of modifying the application of the principles of negligence in particular circumstances.

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7. *Lisle v Brice* [2001] QCA 271. See also Spigelman (2002).
8. Edited transcript of H Gibbs, paper present to the *Australian Academy of Technological Sciences and Engineering Symposium* (Sydney, 14 May 2002) reproduced in *Daily Telegraph* (16 May 2002) at 8.

CONTEXT - THE RELATIONSHIP BETWEEN MODERN TORT LAW AND INSURANCE

The law of torts is chiefly concerned with distributing the losses that are an inevitable by-product of modern living. The objectives of punishment, admonition and deterrence play a lesser role.[9] Tort liability exists primarily to compensate a victim by compelling the wrongdoer to pay for the damage done.

If the function of tort liability is to distribute losses, the question which confronts the operation of tort law is how best to allocate these losses. The law must differentiate between the various kinds of interests for which individuals may claim protection against injury by others. To warrant such a result, the law has had to find a compelling reason for subordinating the defendant's interests to those of the plaintiff. This has generally been done by focussing attention on the culpability of the individual participants in the accident.

As Fleming explains, however, the effect of insurance is that an adverse judgment no longer shifts the loss from one individual to another, but tends to be distributed among all policy holders who carry insurance on the relevant type of risk. The presence of insurance in the tort system transfers the focus of compensation from loss *shifting* (from plaintiff to defendant) to loss *spreading* (among all persons insured under the same policy as the defendant). The person cited as defendant is, in reality, only a nominal party to the litigation, or a "mere conduit through whom this process of distribution starts to flow".[10] Moreover, while in theory insurance follows liability, in practice insurance often "paves the way to liability" by acting as a "hidden persuader".[11]

For defendants, insurance offers protection against financial hardship as a result of an adverse judgment, while for plaintiffs, the likelihood that the defendant is insured ensures that they will be compensated for a substantial proportion of their loss. As Fleming notes:

> Tort law and liability insurance enjoy a symbiotic relationship. Neither could exist without the other; without exposure to liability, insurance would not be needed; without insurance, tort liability would be an empty gesture, reducing the tort system to a negligible role of accident compensation and depriving defendants of needed protection against financial catastrophe.[12]

Despite the importance of insurance in the development of tort law, its significance has seldom been expressly acknowledged in judicial decision-making.[13] This has led

9. Fleming (1998) at 4.
10. Fleming (1998) at 12.
11. Fleming (1998) at 13.
12. J G Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988) at 21.
13. See M Mills, "Insurance and Professional Liability: The Trend of Uncertainty; or: Negligence and the High Court: A Practitioner's Perspective" (2000) 12 *Insurance Law Journal* 25 at 29.

to a perception that decisions are often artificial with apparently unexpressed assumptions that do not always lead to just outcomes if applied to contexts or time periods where insurance is unavailable or unaffordable. However, in recent times some judges have been more willing to acknowledge the effect of the extension of liability on the cost of insurance. For example, Chief Justice Spigelman has stated that the judiciary cannot be indifferent to the economic consequences of its decisions, and that pressure on premiums "is a pertinent consideration for judges who are asked to extend the law in some manner or another"[14].

Justice McHugh of the High Court has also noted:

> Courts often assume that insurance against extended tort liability is readily obtainable and that the increased cost of an extension of liability can be spread among clients by the payment of additional premiums for insurance. But insurance... may not be as readily obtainable as courts assume.[15]

SCOPE OF THIS PAPER

This paper outlines proposed amendments to the *Civil Liability Act 2002* (NSW) ("the principal Act") contained in the *Civil Liability Amendment (Personal Responsibility) Bill 2002* ("the Bill"). It also provides background on the current law and the need for reform, and explains the rationale for the reform proposals.

The proposed reforms focus on five particular aspects of the law relating to negligence:

- The existence of a duty of care (which is limited chiefly by proximity and reasonable foreseeability and is ultimately concerned with whether liability can be found in certain circumstances);
- The standard of care required to be exercised (how a breach of duty is measured);
- The question of causation and remoteness of damage (particularly in the context of psychiatric injury);
- The measure of damages (including structured settlements and apportionment legislation); and
- Procedural issues that impact upon the way that negligence claims are litigated (in particular, limitations and apologies).

Liability of defendants with respect to intentional torts (where defences are not available) is specifically excluded from consideration as this requires consideration of different questions of culpability on the part of defendants.[16]

This paper does not address in detail the interaction of consumer protection laws and tort law, including its interaction with Commonwealth laws.[17] Such issues are dealt

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14. Spigelman (2002) at 435; see also comments of Thomas JA, then of the Queensland Court of Appeal in *Lisle v Brice* [2001] QCA 271.
15. *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 282.
16. See proposed s 8 of the *Civil Liability Act 2002* (NSW).
17 However, the Commonwealth Government has recently introduced amendments to the *Trade*

with by the Commonwealth government's expert panel of four eminent persons who have been appointed to examine the law of negligence.[18] The Commonwealth Minister for Revenue and Assistant Treasurer, Senator Coonan (in consultation with the States and Territories) announced the terms of reference for this panel on 2 July 2002. The first report of the panel was released on 2 September 2002. The report makes recommendations with respect to personal injury or death (however arising) in relation to professional negligence, not-for-profit organisations, recreational activities and services, the interaction between the *Trade Practices Act 1974* (Cth) and the law of negligence and the limitation of actions. The sections of the report on professional negligence, not-for-profit organisations and recreational activities and services are directly relevant to proposals in the New South Wales Bill (discussed below).

Practices Act 1974 (Cth) which will remove some of the uncertainty: *Trade Practices Amendment (Liability for Recreational Services) Bill 2002.*

18. The Hon Justice David Ipp, Professor Peter Cane, Associate Professor Donald Sheldon and Councillor Ian Macintosh.

2. The existence of the duty of care

In negligence, liability does not arise unless the law recognises a duty to observe care. This duty can be defined as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others".[19]

The modern concept of duty of care derives from the landmark House of Lords judgment in *Donoghue v Stevenson*,[20] which opened the way for replacing an array of categories for tortious liability with the single comprehensive principle of negligence. In that case, Lord Atkin suggested that owing a duty of care towards another requires one to take "reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". One's "neighbours" were described as "those persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".[21]

The process of identifying the duty of care is concerned with the question of how far liability for negligence should extend. A challenge for the law of negligence is the question of how to demarcate those situations which should give rise in law to a duty of care from those which, for a range of legal and policy reasons, should not.

There are some procedural benefits to using the duty of care as a control device for establishing liability in negligence, because the duty of care provides a threshold test (as a question of law) so that other factual elements need not be considered if the duty of care is found not to exist in a particular case.[22]

Two aspects that the Courts must consider when determining whether there is a duty of care or not are:

- the relationship of proximity; and
- reasonable foreseeability.

THE RELATIONSHIP OF PROXIMITY

It has been acknowledged since *Donoghue v Stevenson* that a duty of care must arise out of some "relation" or "proximity" between the parties, but Australian law remains relatively unclear as to the content of that relationship. Something more than reasonable foreseeability of harm - that is, some form of relationship between the plaintiff and defendant - must exist to establish liability in negligence.

19. Fleming (1998) at 149.
20. [1932] AC 562.
21. [1932] AC 562 at 580.
22. See Fleming (1998) at 150. See also R P Balkin and J L R Davis, *Law of Torts* (Butterworths, 1991) at 205.

The High Court of Australia explained this principle of proximity in *Jaensch v Coffey*.[23] Justice Deane stated:

> The requirement of a "relationship of proximity" is a touchstone and control of the categories of case in which the common law will admit the existence of a duty of care ... a question of law to be resolved by the processes of legal reasoning by induction and deduction. The identification of the content of the criteria or of rules which reflect that requirement in developing areas of the law should not, however, be either ostensibly or actually divorced from the considerations of public policy which underlie and enlighten them.[24]

However, a series of High Court decisions in the late 1990s suggest a loss of enthusiasm for the idea of proximity, because no unifying element has emerged from successive decisions which adequately captures the meaning or operation of the concept of proximity.[25]

Nevertheless, the authorities suggest that while proximity is no longer a "unifying criterion" of duty of care, some form of relationship between the parties, informed by policy considerations relevant to the context, is necessary to establish a duty of care.[26]

Limiting liability by excluding categories of duty relationship

One way of limiting the pool of people to whom a duty of care is owed is to identify categories which are excluded from the relationship of proximity.[27]

There is some recognition in the case law of the use of categories to help determine the existence of a relationship of proximity. These include cases involving regulatory agencies as against consumers, arbitrators against disappointed litigants, examiners against students and lawyers against clients with respect to the conduct of litigation.[28] The categories (whether including or excluding relationships) are developed by analogy with some reference to policy considerations.

The Bill provides that there is no duty of care in relation to particular categories of relationship, to clarify the law in this area. Excluding particular categories of relationship from a finding of liability will address community concerns about the

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23. (1984) 155 CLR 549.
24. (1984) 155 CLR 549 at 585.
25. See, for example: *Hill v Van Erp* (1997) 188 CLR 159; *Perre v Apand* [1999] HCA 36.
26. See C Phegan, "The Tort of Negligence into the New Millennium" (1999) 73 *Australian Law Journal* 885. Policy considerations are raised at numerous stages in relation to negligence not only in relation to proximity but also as an additional factor in establishing the duty of care and also in determining the content of the standard of care.
27. See Balkin and Davis at 210-211. See also *McLoughlin v O'Brian* [1983] 1 AC 410 at 430.
28. See Fleming (1998) at 155.

scope of liability in negligence. The excluded categories dealt with in the Bill fall into two broad groups. The first group excludes the duty of care where particular *defendants* are performing a socially valuable activity:

- public and other authorities, particularly those which provide or manage services for the benefit of the community or perform regulatory functions (proposed Part 8);
- "good samaritans" who come to the assistance of others in emergencies (proposed Part 11); and
- volunteers involved in activities carried out by community organisations (proposed Part 12).

The second group excludes the duty of care in instances where particular *plaintiffs* are involved in activities where the plaintiffs themselves should bear the risks they take on:

- activities involving inherent and/or obvious risk (proposed Part 4)
- recreational activities (proposed Part 5);
- intoxication (proposed Part 9); and
- criminal activity (proposed Part 10), including where the defendant acts in self defence .

These categories are discussed in the commentary on the Bill.

FORESEEABILITY

Once a relationship of proximity has been established, it is necessary to determine whether the risk of injury was reasonably foreseeable. The test of reasonable foreseeability, which essentially determines whether a duty of care applies to a particular relationship, is one area of negligence in need of some stricter guidance in order to work effectively as a limitation on the duty of care.

The test for reasonable foreseeability in Australian common law flows from the reasoning of Lord Reid for the Privy Council in *Wagon Mound No 2*, a unanimous decision of the Privy Council which overturned a judgment of the Supreme Court of New South Wales.[29] The *Wagon Mound No 1*[30] had established the principle that, to give rise to a breach of duty, injury to the plaintiff must have been foreseeable. In *Wagon Mound No 2*, Lord Reid set out a test to determine how foreseeable that risk of injury needed to be:

29. [1967] 1 AC 617.
30. [1961] AC 388.

> If a real risk is one which would occur in the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.[31]

The principle set out by Lord Reid was endorsed by the High Court (per Mason J) in *Wyong Shire Council v Shirt*.[32] The test is an undemanding one: it requires only that a risk of harm was foreseeable. It does not, for example, require that the harm was likely to happen, or not unlikely to happen. Since *Wyong Council v Shirt*, the High Court has reaffirmed the "undemanding" test of foreseeability as the guide for determining breach of duty.

This test of reasonable foreseeability has been criticised as failing to act as any sort of limiting factor in determining liability for negligence.[33] Critics argue that the current formulation has removed a practical consideration of likelihood from the assessment of relevant risk. Yet considerations of likelihood should have a place if liability in negligence is to be informed by a sense of "reasonableness".

The Chief Justice of New South Wales has recently said of the test:

> I cannot see that "reasonableness" has anything to do with a test which only excludes that which is "far fetched or fanciful". The test appears to be one of "conceivable foreseeability" rather than "reasonable foreseeability".[34]

The Chief Justice discussed the possibility of legislative reform of the current test of reasonable foreseeability and referred to formulations provided by Justice Walsh and Chief Justice Barwick. These formulations of the test of "reasonable foreseeability" require a balance to be struck between a test that would involve the event or damage being more likely than not to occur (that is, a better than 50% chance of occurring) and a test that would include cases that are extremely unlikely to occur but that are still considered "foreseeable".

Justice Walsh stated that the criterion should be one of "practical foreseeability" but added that this criterion was one "to which no precise formulae can be applied".[35] Chief Justice Barwick stated that the requirement should be that the event and resulting damage be of such a kind as the defendant "ought to have realised were not

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31. [1967] 1 AC 617 at 643-644.
32. (1980) 146 CLR 40.
33. *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268 at 278-279; *Lisle v Brice* [2001] QCA 271; Fleming (1998) at 128;
34. Spigelman (2002) at 441.
35. *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd (Wagon Mound (No 2))* (1963) 63 SR(NSW) 948 at 958-959.

unlikely to occur".[36] Chief Justice Barwick's choice of "not unlikely to occur" is a version of the stricter test of remoteness in contract.[37]

Proposed Part 3 proposes a limitation to the concept of reasonable foreseeability, and states some general principles which will apply when determining liability or assessing the remoteness of a risk.

Effect of alternative responses to risk on foreseeability

The question of reasonable foreseeability is related to considerations of what a reasonable defendant ought to do to eliminate or reduce a foreseeable risk to a plaintiff.

The Privy Council in *Overseas Tankship (UK) Ltd v Miller Steamship Co Ltd (The Wagon Mound (No 1))* made the following statements which have subsequently been adopted by Australian courts:

> If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense. ... The most that can be said to justify inaction is that he would have known that [the occurrence] could only happen in very exceptional circumstances. But that does not mean that a reasonable man would dismiss such a risk from his mind and do nothing when it was so easy to prevent it. If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the [defendant] is liable in damages.[38]

However, the law arising from these statements has been judicially criticised. For example, Justice Fitzgerald of the New South Wales Court of Appeal has observed:

> An infinite variety of circumstances produce a foreseeable risk of injury which could often be eliminated or reduced. The current tendency to consider only individual circumstances which produce injury and the means by which those circumstances could have been changed and the injury avoided is redefining the foundation of the law of negligence by impermissibly expanding the content of the duty of care from a duty to take

36. *Caterson v Commissioner for Railways* (1973) 128 CLR 99 at 101-102. Other alternative formulations are suggested at 101. See also *C Czarnikow Ltd v Koufos* [1969] 2 AC 350 and *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 QB 791 at 801-802 per Lord Denning MR.

37. *C Czarnikow Ltd v Koufos* [1969] 2 AC 350 at 383 where Lord Reid says: "I use the words "not unlikely" as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable."

38. [1967] 1 AC 617 at 643-644.

> reasonable care to a duty to avoid any risk by all reasonably affordable means.[39]

The Chief Justice of New South Wales has also recently observed:

> Very serious consequences can be occasioned by extremely unlikely events which could have been prevented by slight expenditure. By reason of *hindsight bias*, all too often the focus of attention is only on the expenditure that would have been required to avoid the particular incident that actually occurred, without consideration of what would have been required to avert a myriad of other conceivable but equally remote contingencies.[40]

The general principles which are incorporated in proposed Part 3 of the principal Act provide a means of clarifying the effect of action taken by defendants to avoid risks, on the determination of foreseeability and remoteness.

39. *Rasic v Cruz* [2000] NSWCA 66 at para 43.

40. Spigelman (2002) at 443.

3. Standard of care

Once a duty of care has been established, the next question is the extent or content of the duty owed. This is referred to as the "standard of care". The standard of care is used to determine whether a defendant has breached the duty owed to the plaintiff.

The standard required is classically stated to be measured by what the "reasonable person of ordinary prudence would do in the circumstances".[41]

Discussing the standard in general terms, Fleming has said:

> Almost any activity is fraught with some degree of danger but, if the remotest chance of mishap were sufficient to attract the stigma of negligence, most human action would be inhibited. Inevitably, therefore, one is only required to guard against those risks which society recognises as sufficiently great to demand precaution. The risk must be unreasonable before [the reasonable person] can be expected to subordinate [his or her] own interests to those of others. Whether the act or omission in question is one which a reasonable person would recognise as posing an unreasonable risk must be determined by balancing the magnitude of the risk, in light of the likelihood of an accident happening and the possible seriousness of its consequences, against the difficulty, expense or any other disadvantage of desisting from the venture or taking a particular precaution.[42]

The standard of care has, however, become unreasonable in setting too high a standard, just as the test of reasonable foreseeability has become undemanding in determining whether there is a duty of care. So, in assessing the magnitude of risk, it would appear now that even if the risk of damage is small:

> it must not be neglected unless there is some valid reason for doing so. In Australia, notwithstanding some judicial misgivings, the standard has been described as "having moved close to the border of strict liability". In the result, foreseeability has in practice lost its dominance as a limiting factor, with emphasis shifted to the means available for guarding against the risk.[43]

One way of dealing with this problem is to provide guidance to the courts in determining the appropriate standard of care in certain circumstances. Proposed Part 8 of the principal Act does this with respect to the activities of public authorities.

PROFESSIONAL STANDARDS

Another particular problem has arisen in the context of the standard of care applied to the provision of professional services.

41. Fleming (1998) at 117.
42 Fleming (1998) at 127.
43. Fleming (1998) at 128.

The common law position for the standard of care to be exercised by a professional in Australia was set out by the High Court in *Rogers v Whitaker*,[44] where it was stated that the "standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade" but rather, "it is for the courts to adjudicate on what is the appropriate standard of care", based on professional opinion, evidence of community standards and other relevant considerations.

Rogers v Whitaker expressly rejected the *Bolam* peer acceptance test that is applied in England in relation to medical professionals.[45] The "peer acceptance" test involves a standard that is based on what a "responsible body of medical opinion" would accept as proper.

The principle in *Rogers v Whitaker* allows for the possibility that a practice that is unanimously accepted by a particular profession may nevertheless be held to be negligent.[46] Conversely, it also allows for the possibility that a novel or alternative practice not generally accepted by the profession may be held not to be negligent, provided that a reasonable practitioner could have departed from the established practice if he or she had been exercising ordinary care.[47]

Although *Rogers v Whitaker* was a medical negligence case, the decision can be applied to other professions as well.[48] It should be noted that the case made a distinction specific to medical cases between diagnosis and treatment (where medical opinion is unlikely to be overturned by a court) and advice and information about the risks of proposed treatments (where medical opinion will be less persuasive, as it involves a patient's ability to make an informed decision about undergoing medical treatment). The report of the Commonwealth's expert panel, in framing its recommendations in relation to medical professional negligence, has also recognised the dichotomy between treatment of patients and the provision of information about treatment.[49] However, the New South Wales Court of Appeal has held that the principle in *Rogers v Whitaker* is a general principle that could be applied to treatment as well as advice.[50]

Some members of professional groups, especially health professionals, have expressed concern that the method set by the courts to determine the standard of care of a professional is unrealistically high. Proposed Part 7 of the principal Act addresses this

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44. (1992) 175 CLR 479.
45. *Bolam v Friars Hospital Management Committee* [1957] 1 WLR 582.
46. See also *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.
47. Compare *Hunter v Hanley* [1955] SC 200. The *Bolam* test also allows for this possibility, including situations where there may be several acceptable standards of care: *Bolam* at 586 per McNair J.
48. The Commonwealth's expert report made recommendations only with regard to the negligence of medical professionals but left it open to the courts to extend the rule to other occupational groups: Australia, *Review of the Law of Negligence* (Report, August 2002) at para 3.29.
49. Australia, *Review of the Law of Negligence* (Report, August 2002) Chapter 3.
50. *Lowns v Woods* (NSW CA, No 40097/1995, 5 February 1996, unreported).

issue, by providing a defence to a professional against a negligence claim in certain circumstances.

4. Causation and remoteness of damage

One of the three general elements that goes to establishing a claim in negligence is that the damage must be caused by the defendant's fault. However, even if there is a causal link between the defendant's action and the injury, this does not necessarily mean that the defendant will be held liable for all the ensuing damage. The chain of causation continues indefinitely into the future, and since it would be unjust to hold the defendant liable for every aspect of damage caused by the negligence of the defendant, it is necessary to retain control devices to limit the scope of liability.[51]

Luntz provides a useful framework for considering causation.[52] The questions to be asked before determining liability for damage are:

1. Is there a causal link between the harm and the wrongful act?
2. Has the causal link been broken by any later act?
3. Are there any limitations based on policy considerations or the scope of the negligence rule that has been breached which limit recovery for the harm?

Policy considerations enter into the determining the answers to each of the questions identified by Luntz[53]. However, such considerations are most decisive in determining the third question. Consequently, the question of whether there are any limitations based on policy considerations or the scope of the negligence rule which limit recovery for the harm, has proved to be a greater source of uncertainty.

REMOTENESS OF DAMAGE

The most common description for this stage of inquiry is remoteness of damage[54]; a defendant will only be held liable for damage that is not too remote from the defendant's act. Remoteness of damage arises particularly in contexts where it is necessary to determine whether the defendant is liable for a subsequent condition that has stemmed from a previous injury. In determining whether damage was too remote, a test of reasonable foreseeability (similar to that used in initially establishing a duty of care) is applied. The defendant will not be held liable for the damage unless that damage was of "such a kind as the reasonable [person] should have foreseen".[55] The discussion of reasonable foreseeability in relation to determining the duty of care is equally relevant to the discussion of reasonable foreseeability in the context of remoteness of damage. The provisions in proposed Part 3 will limit the unreasonably wide scope of reasonable foreseeability in relation to both determining the duty of care

51. Luntz (2002) at 151.
52. Luntz (2002) at 156.
53. *March v E & M Stramare Pty Ltd* (1991) 171 CLR 506 at 515-17, per Mason CJ.
54. See Luntz (2002) at 154-1555.
55. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388 (Privy Council) at 426.

and measuring remoteness of damage.

More specific concerns arise in relation to nervous shock. Proposed Part 13 of the principal Act will limit claims for nervous shock to people who are victims of or present at an accident, or in some circumstances, their family members, provided the primarily injured person was not engaged in criminal activity in the circumstances set out in proposed Part 10 of the principal Act.

5. The measure of damages

Damages may be limited for some or all defendants by a number of means, including the imposition of caps and the use of apportionment legislation. As noted above, the principal Act included reforms to reduce the size of damages awards by providing for:

- limits on damages for economic loss, by restricting claims for loss of income to three times average weekly earnings;[56]
- limits on damages for non-economic loss (damages for pain and suffering), for example, by limiting them to $350,000 for the most extreme cases;[57] and
- other miscellaneous provisions, including those relating to interest on damages and the exclusion of exemplary, punitive and aggravated damages.[58]

The amendments proposed in the Bill advance the reform of damages awards, by providing for :

- a wider range of options for damages awards; and
- the apportionment of damages between parties.

A WIDER RANGE OF OPTIONS FOR DAMAGES AWARDS

Current legal position

The "lump sum" or "once for all" rule, which currently governs the awarding of damages in New South Wales, is a common law rule which requires that plaintiffs be compensated by means of a single lump sum at the time that damages are assessed. Lord Halsbury explained the rule in 1886 as follows:

> No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever.[59]

A very small proportion of those who receive damages for personal injury each year have future losses taken into account, but the amounts awarded for future loss of earning capacity and future care constitute a very large proportion of all the damages paid.[60]

56. *Civil Liability Act 2002* (NSW) Part 2 Div 2.
57. *Civil Liability Act 2002* (NSW) Part 2 Div 3.
58. *Civil Liability Act 2002* (NSW) Part 2 Div 4.
59. *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132.
60. Cth Health Dept, 1995 in Luntz (2002) at 1.2.8.

Problems with the current position

The main criticism aimed at the current "lump sum" rule is that a once-and-for-all award is certain to be either too high or too low. This can be due to a number of factors including the unpredictable effect of inflation and changes in interest rates. The end result is often that when the award is exhausted the State and Commonwealth Governments must make up the shortfall. Another problem is that delays in reaching a result in the current system exacerbate the economic burden on plaintiffs, and pressure them to accept inadequate settlements.

Structured settlements can address some of the concerns surrounding the award of damages. The amendments proposed in the Bill will encourage the use of structured settlements particularly in light of recent amendments to Commonwealth laws that are intended to remove the disincentives to structured settlements in the taxation system and to encourage their greater use by insurers (proposed Part 14 of the principal Act).[61]

PROPORTIONATE LIABILITY

Under the general law, an injured person could choose which defendant or defendants to sue for compensation: any one defendant could be required to pay the entire sum of damages owing to the plaintiff, and a person who was jointly or severally liable could not seek contribution from another defendant. The potential liability of any one defendant for the full loss is often referred to as "joint and several liability".

In New South Wales joint and several liability was retained as an underlying principle, but the *Law Reform (Miscellaneous Provisions) Act 1946* allows one defendant to recover proportionate amounts as contribution from other defendants who are liable for the same damage, as well as from persons who were not a party to the action but would have been held liable if they had been a party.[62] If contribution is not possible (for example, because the other defendant is insolvent), the defendant must still pay the full extent of the plaintiff's loss.

Under proportionate liability, when more than one defendant is responsible for the loss, the loss is divided among all defendants according to their share of responsibility and no defendant is required to pay more than their proportionate share. In New South Wales proportionate liability is available in the area of building and subdivision work, where all defendants are generally insured.

A report commissioned by the New South Wales and Commonwealth Attorneys General and prepared by Professor J L R Davis of the Australian National University in 1995 supported the introduction of proportionate liability in cases involving property damage or economic loss (the terms of reference excluded personal injury,

61. *Taxation Laws Amendment (Structured Settlements) Bill 2002* (Cth).

62. See s 5(1)(c).

but the report acknowledged that proportionate liability was less desirable in cases of personal injury, given the higher regard of the common law for bodily integrity over financial stability).

Other States and Territories have a proportionate liability regime for building disputes (Victoria, South Australia and the Northern Territory). The Republic of Ireland and British Columbia have a limited system of proportionate liability (which takes effect only where the plaintiff is also contributorily negligent), as do numerous States in the USA to varying extents. England, New Zealand, and other Australian States and Territories have substantially the same system as that operating in New South Wales. Damages available under the trade practices legislation of New South Wales and the Commonwealth are subject to pure joint and several liability untempered by either contribution or proportionate liability.

Problems with the current position

Critics of the current general system of joint and several liability, tempered by rights of contribution, argue that:

- it places a disproportionate burden on some defendants where others are unable to pay;
- it leads to plaintiffs targeting "deep pocket" defendants, such as professional service providers and public authorities, leading to increased liability insurance premiums for these potential defendants;
- it places procedural burdens on defendants who must identify other potential defendants for the purposes of contribution.

Proposed Part 6 of the principal Act will introduce a scheme of proportionate liability for claims for economic loss, to ensure that the damages that must be paid by a defendant in a case not involving personal injury fairly reflect the defendant's contribution to the plaintiff's loss.

6. Procedural and evidential matters

APOLOGIES

A plaintiff may use a defendant's apology as evidence of the defendant's fault. This position discourages defendants from making apologies or other expressions of sympathy or compassion, because an apology may be equated with an admission of liability. This impedes communication between the parties by preventing professional service providers (such as doctors and surgeons) from explaining misadventure and encourages plaintiffs to seek to obtain information about what really happened through civil litigation. The current position also discourages early settlements.

In 2001, the New South Wales Ombudsman proposed that legislation be enacted to allow public officers to resolve complaints by making apologies without exposing themselves or their agencies to civil liability.[63]

The Californian *Evidence Code* has recently been amended to provide that expressions of sympathy or benevolence are not admissible as evidence in civil proceedings.

Part 2 of the *Personal Injuries Proceedings Act* 2002 (Qld) includes what appears to be the first enactment in Australian legislation in this area. It provides that "expressions of regret" are inadmissible. Section 45 provides that: "an 'expression of regret' made by an individual in relation to an incident alleged to give rise to a claim is any oral or written statement expressing regret for the incident that does not contain an acknowledgment of fault on the part of the individual."

Proposed Part 14 of the principal Act will permit apologies to be made in some circumstances, while ensuring that such apologies do not amount to an admission of liability.

63. NSW Ombudsman, *Annual Report 2000/2001* at 115.

7. Coverage of the Bill

The reforms in the Bill will, in general, cover claims for personal injury damages, economic loss, and claims in contract. However, the Bill does not generally affect a claim for liability for an intentional act which is intended to cause injury or death (including sexual assault and other sexual misconduct) unless there is a defence available.[64] The Bill also does not affect claims for loss arising from dust diseases, victims compensation, or compensation for unlawful discrimination under the *Anti-Discrimination Act 1977* (NSW). With some exceptions, for example, where the Bill states general principles,[65] the provisions will not apply to claims for motor or transport accidents or workers compensation.[66] In order to ensure that both service providers and consumers are free to set agreed service standards, the Bill allows parties to contract out of its provisions.[67]

There are limits on the ability of State governments to enact enforceable public liability and negligence laws, for example, in areas that are covered by Commonwealth law. In particular, the *Trade Practices Act 1974* (Cth) makes provision for certain terms to be implied in contracts that are governed by the Act.[68] The terms of reference for the Commonwealth's expert panel of four eminent persons appointed to examine the law of negligence include a requirement that the panel "review the interaction of the *Trade Practices Act 1974* ... with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk). The first report of the panel was released on 2 September 2002 and includes a recommendation that the panel's recommendations relating to limitation of actions and quantum of damages (yet to be announced) apply to any claim for negligently-caused personal injury or death that is brought under Part 4A of the *Trade Practices Act 1974* (Cth) in the form of an unconscionable conduct claim.[69]

64. See, for example, *Crimes Act 1900* (NSW) Part 11 Div 3.
65. For example, Part 3 which deals with foreseeability and risk avoidance.
66. Proposed s 3B: *Civil Liability Amendment (Personal Responsibility) Bill 2002* (NSW) Sch 2[2].
67. Proposed s 3A(3): *Civil Liability Amendment (Personal Responsibility) Bill 2002* (NSW) Sch 2[2].
68. See, however, *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* (Cth).
69. Australia, *Review of the Law of Negligence* (Report, August 2002) Recommendation 17.

PART 2: Commentary on the Bill

FORESEEABILITY AND RISK AVOIDANCE (proposed Part 3)

Civil Liability Act 2002, proposed Part 3

Part 3 deals with the issue of foreseeability by limiting the range of circumstances potentially giving rise to liability that will be considered to be reasonably foreseeable. Part 3 applies to most claims in tort and contract including motor accidents and workers compensation claims. This approach will ensure that, in general, the same negligence principles apply regardless of how an injury occurs, and will promote the consistent development of the law of negligence and the application of legal principles.

Reasonable foreseeability

Clarify reasonable foreseeability as it applies to the existence of the duty of care so that a possibility does not have to be far-fetched or fanciful before it can be considered not reasonably foreseeable.

Clause 24 provides that the occurrence of an event potentially giving rise to liability does not have to be far-fetched or fanciful before it can be considered not reasonably foreseeable.

The clause has been drafted to address concerns that the current test of reasonable foreseeability (in relation to both the duty of care and proximity) is too wide, in that it only excludes events that could be considered "far-fetched or fanciful".

It is possible that uncertainty of interpretation would arise from fundamentally changing the test of reasonable foreseeability by adopting such alternative phrases as "practical foreseeability" and "not unlikely to occur". The Bill has, therefore, adopted the approach of retaining the phrase reasonable foreseeability but also makes it clear that in applying the test of reasonable foreseeability it is no longer sufficient that the occurrence in contemplation be something that is merely "not far fetched or fanciful" (cl 24).

Effect of alternative responses to risk on foreseeability

Liability for the way in which something was done is not affected by the fact that:

*** the risk could have been avoided by doing something in a different way;**

*** the risk could have been avoided with little or no difficulty, disadvantage or expense; and**

*** the defendant subsequently took action that would have prevented the risk.**

Clause 25 does three things to deal with the problems of "hindsight bias" with respect to civil liability for death or injury by providing that liability for the way in which something was done is not affected by the fact that:

- the risk could have been avoided by doing something in a different way;
- the risk could have been avoided with little or no difficulty, disadvantage or expense; and
- the defendant subsequently took action that would have prevented the risk .

So, for example, the fact that the defendant could have avoided the risk by doing things differently (cl 25(a)) does not mean that what the defendant in fact did was unreasonable. For example, assume that a person is injured by walking into a bollard installed by the defendant and the injury could have been avoided if the defendant had installed a bollard of a different shape. This should not of itself mean that the defendant was unreasonable in installing the bollard actually installed.[70]

The provision dealing with situations where risk may have been avoided with little or no difficulty, disadvantage or expense (cl 25(b)), will deal with the problem that there are an infinite variety of circumstances where a foreseeable risk of injury could be reduced or eliminated by actions involving, in isolation, little or no apparent expenditure. This approach is gaining judicial support, as is illustrated by the comments of the New South Wales Court of Appeal last year with respect to a claim against a council by a bather who slipped on rocks near a rock pool:

> What is under consideration is not so simple as what a reasonable person in the appellant's position would have decided to do about erecting a sign at that one spot; the same considerations present themselves wherever there is ready access from the beach or the promenade to rocks which may be covered by the tide and on which persons may walk. A decision to erect signs would lead to consideration of how many signs were to be erected and their spacing; to be effectual the exercise would have to be complete and the erection of one sign could not be enough. Little would

70. Example based on *Harridge v University of Western Sydney* [2002] NSWCA 70.

> be achieved by erecting signs in one place or in a few places, which would equip persons who slipped at other places or at earlier times with material with which to garnish a complaint about the lack of signage. It is not in my judgment correct to adopt a speedy conclusion based on the view that a sign near the place where the respondent fell would have cost little. It should not be readily concluded that it would be easy or cheap to erect signs; that judgment could only come as part of an appraisal which could show how many signs should be erected and where, and what they should say; and of the projected costs; including costs of maintenance and repair. Other considerations besides cost present themselves. A decision appraising the difficulty or facility of erecting signs requires administrative ability which courts do not have readily available, especially when not assisted by any relevant evidence.[71]

Clause 25(c), which deals with the taking of subsequent action to reduce a risk, will cover situations where, for example, a person trips and falls on a council footpath and, following advice of the injury, the council mends the footpath. The council's action cannot then be used to suggest that the council was negligent in respect of the state of the footpath before it was mended.

INHERENT OR OBVIOUS RISK (proposed Part 4)

Civil Liability Act 2002, proposed Part 4

A person is not owed a duty to take reasonable care in respect of a risk, or to warn of a risk, that a reasonable person would consider to be an inherent or obvious risk.

There is widespread concern about liability for failure to avoid or warn of what might be considered an inherent or obvious risk. This is particularly the case with respect to operators and occupiers of recreational facilities, although similar concerns can also be raised in relation to those engaged in non-recreational activities, for example, community service providers. There is community concern that the cost of claims in relation to this sort of liability is not sustainable.

The Bill provides that there will be no duty of care owed to people to avoid or warn of risks that are an inherent or obvious risk of an activity (whether the risk is naturally occurring or not).

A risk is an inherent risk only if the exercise of reasonable care by the defendant could not have prevented it occurring (cl 27(2)).

An obvious risk is a risk that would have been obvious to a reasonable person in the plaintiff's position. An obvious risk is one that is patent or a matter of common

71. *Waverley Council v Lodge* [2001] NSWCA 439 at para 35.

knowledge and can still be an obvious risk even though there is a low probability of it occurring (cl 27(3)). However, the Bill only applies to obvious risks that the reasonable person injured in the circumstances could have avoided by exercising reasonable care (cl 27(4)). This provision ensures that immunity is not granted in relation to risks that could be considered obvious - such as a car hitting a pedestrian on a footpath.

Risks may be considered inherent or obvious:

- whether or not they or the conditions or circumstances that give rise to them are prominent, conspicuous or physically observable (cl 27(5)); and
- without the need for the injured person to be aware (or capable of being aware) of the risk (cl 27(6)).

Proposed Part 4 applies to all forms of civil liability, and will, therefore provide the necessary protection for people and organisations that manage services or facilities which include inherent or obvious risks.[72] The Part aims to ensure, for example, that beach inspectors will not be liable for damage arising from failing adequately to warn of the specific possibility of sand bars, operators of parks will not be liable for failure to warn swimmers of shallow water in pools or submerged rocks, and local councils should not be liable for failure to fence off cliff faces.

The provision will also cover recreational facilities such as amusement parks, horse-riding schools and swimming pools. For example, a horse riding school should not be liable for injuries sustained in a fall from a horse where a saddle strap broke unless the breakage was attributable to a deliberate or wilful failure wrong by the riding school operators.

One exception to the provision is that a duty of care may still be established where there has been a breach of any specific personal safety requirements under State or Commonwealth law (cl 28). This is a circumstance where the retention of liability is justified.

Background

An obvious risk needs to be distinguished from an inherent risk. As the law currently stands defendants are already immune from liability when damage is incurred as the result of an inherent risk (which may or may not be an obvious risk). However, obvious risks that are not inherent are currently not covered by the law. The provisions

72. Note that the recommendations in the Commonwealth expert panel's report regarding liability for failure to warn of an obvious risk of personal injury or death extend beyond recreational activities and services. The panel saw this as involving principles of more general relevance: Australia, *Review of the Law of Negligence* (Report, August 2002) at para 4.24.

of proposed Part 4 aim to remedy this situation. The need to make provision for obvious risks was discussed in the report of the Commonwealth's expert panel:

> An inherent risk of a situation or activity is a risk that could not be removed or avoided by the exercise of reasonable care. An inherent risk may be obvious, but equally it may not be. ... Conversely, an obvious risk may be inherent, but equally it may not be. It may be a risk that could be avoided or removed by the exercise of reasonable care. This means that an obvious risk may be a risk that a person will be negligent.
>
> ... under current law, failure to guard against an obvious risk may be negligent if the risk is not an inherent one.[73]

Even though inherent risk is currently recognised at common law, it has been included in proposed Part 4 by way of restatement and clarification. The High Court in *Rootes v Shelton* stated that by engaging in a sport or pastime, those taking part are held to have accepted the risks that are inherent in that sport or pastime.[74] The operation of the concept of inherent risk (as set out in *Rootes v Shelton*) has recently been confirmed by the High Court in *Woods v Multi-Sport Holdings Pty Ltd*,[75] where a company operating indoor cricket facilities was held not to be liable for an eye injury sustained by a participant who had been struck by a ball while batting. The plaintiff had argued that the company breached its duty of care because it failed to provide full-face helmets or to warn players of the danger of eye injury. Justice Callinan stated: "promoters and organisers of sport will rarely, if ever, be obliged to warn prospective participants that they might be hurt if they choose to play the game".[76]

Although the High Court has sought to clarify the issue of inherent risk in *Woods v Multi-Sport Holdings,* the narrow majority (3-2) suggests that uncertainty remains about the operation of the principle. In Canada, for example, some concern has been expressed that the narrow interpretation of voluntary assumption of risk may be applied to the defence of inherent risk because of the tendency of case law to blur the distinctions between the two defences.[77] The defence of voluntary assumption of risk, however, has been narrowly interpreted as requiring that a plaintiff must have clearly accepted the risks rather than been merely aware of them.[78] The fact that the defence is a complete defence to a claim (as opposed to the partial defence of contributory negligence) means that pleas of voluntary assumption of risk are now rarely successful in Australia.[79]

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73. Australia, *Review of the Law of Negligence* (Report, August 2002) at para 4.14.
74. *Rootes v Shelton* (1967) 116 CLR 383 at 385, 391. See also *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9.
75. [2002] HCA 9.
76. [2002] HCA 9 at para 159.
77. See Law Reform Commission of British Columbia, *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (Report, 1994) at 15-18. The Commission's recommendations were in the context of occupier's liability.
78. Fleming (1998) at 333.
79. Fleming (1998) at 328. See also Australia, *Review of the Law of Negligence* (Report, August 2002) at para 4.15.

The restatement and clarification of the defence of inherent risk has, therefore, been included in Part 4 to confirm the existence of the defence and to encourage its continued use.

RECREATIONAL ACTIVITIES (proposed Part 5)

Civil Liability Act 2002, proposed Part 5.

Proposed Part 5 of the principal Act limits liability arising from participation in recreational activities in two ways:

- risk warnings; and
- contractual waivers and disclaimers.

There is an overlap and interaction between these two methods and inherent and/or obvious risk (discussed above), for example:

- the proposed protection from liability arising from inherent and/or obvious risk will mean that there is no need for risk warnings in situations where injury might arise as the result of inherent and/or obvious risks; and
- risk warnings may also operate as contractual waivers or disclaimers.

Risk warnings

A person who engages in a recreational activity is not owed a duty of care by another person to take reasonable care to avoid a risk that has been the subject of a risk warning.

A defendant is, however, not entitled to rely on a risk warning if the injury resulted from the contravention of any statutory safety standards.

The Bill provides that, where a duty of care might otherwise be owed (for example, where is no inherent and/or obvious risk), no duty of care is owed to a person who engages in recreational activity if the risk was the subject of a risk warning (either oral or in writing) (cl 31(1) and 31(4)). Risk warnings are taken to be warnings that are reasonably likely to result in persons being warned of risks before engaging in a recreational activity (cl 31(3)). It will not be necessary for the defendant to show that the injured person was aware of the warning or understood it (cl 31(3)).

It will not be necessary for the warning to specify precisely every risk involved, but only to give a general warning of risks that include the particular risk concerned

(cl 31(5)), as long as people engaging in the activity would be reasonably likely to be aware of the general nature of the particular risk. For example, it should be sufficient to warn spectators coming onto the pitch after a football game that there are dangers associated with the presence of a large number of spectators on the field without specifying the particular risks of injury from flying objects such as bottles or footballs or from other people being in an intoxicated state.

When a person who is incapable of understanding a risk warning (because they are a child or their ability to understand is impaired) is injured a defendant will only be able to rely on the warning if:

- the injured person when undertaking the recreational activity was, at the time, under the control of, or accompanied by a person to whom the risk warning was given and who was capable of understanding the risk warning ; or
- the injured person is a child, and the risk warning was given to a parent of the incapable person (whether or not the person was under the control of or accompanied by the parent while engaged in the recreational activity) (cl 31(2)).

A defendant will not be entitled to rely on a risk warning to the extent that the warning was contradicted by any representation concerning risk made to the injured person by or on behalf of the defendant (cl 31(7)).

While risk warnings may play an important role in limiting liability, it is important to ensure that no unwarranted inferences are made from the presence or absence of a warning. The Bill provides that the fact that a warning has been issued is not of itself evidence that the risk involved is not an inherent or obvious risk of the recreational activity (cl 31(8)(a)); or evidence that a person who engages in recreational activity is owed a duty of care (cl 31(8)(b)).

Background

The issue of risk warnings may arise when determining whether the defendant has breached the relevant duty of care. In order to determine whether there was a breach, the existence of a warning (in a variety of forms) may be relevant[80]

In *Nagle v Rottnest Island Authority*,[81] a majority of the High Court found that a public authority had a duty to warn people of submerged rocks in an area where people commonly dived. The Court held that there was a duty to take reasonable care to avoid

80. While some judges have argued that this question could go either to the existence *or* breach of duty (see eg *Rootes v Shelton* (1967) 116 CLR 383 at 389 per Kitto J), other commentators have pointed out that it is preferable to deal with the duty to warn as a breach issue: see eg S Yeo, "Accepted Inherent Risks among Sporting Participants" (2001) 9 *Tort Law Review* 114 at 116.

81. (1993) 177 CLR 423.

foreseeable risks of injury to visitors to the reserve, including warning them of foreseeable risks of injury associated with activities encouraged in the area. The Court concluded that the risk of someone diving as the plaintiff did was reasonably foreseeable notwithstanding it may have been foolhardy or unlikely. Failure to warn that the ledge was unsafe for diving was therefore held to be a breach of the duty of care. However, this case left open the question of the content required for an "appropriate" warning.[82] The problem of identifying the risk (aside from the issue of inherent and/or obvious risk) was highlighted by Justice Brennan in his minority judgment:

> The danger of diving into one of the rocks adjacent to the wave platform on the eastern perimeter was not the only foreseeable danger of diving into the Basin. In other parts of the Basin, a diver might hit other rocks - there are several standing on the floor of the Basin - or might dive into shallow water and hit the sandy floor. Or a diver who does not look before diving might dive on top of another swimmer. All of these possibilities are foreseeable and are fraught with the risk of serious consequences but it is not suggested that the Board should have erected a sign forbidding all diving. To have erected a sign forbidding diving from the wave platform on the eastern perimeter or warning of the danger of diving from there might have conveyed the false impression that diving from or into other parts of the Basin was safe. Diving is safe only if the diver takes reasonable care.[83]

While it is currently possible that in such situations some courts might find some warnings to be inadequate to discharge a duty of care,[84] the Bill, as already noted, addresses this problem by allowing for general warnings of risk (that encompass more specific risks) to be made. Such provisions can be justified on the grounds that they only apply to recreational activities and participation in them is voluntary.[85]

Contractual waivers and disclaimers

A contract for the supply of recreation services may exclude, restrict or modify any liability that results from breach of an express or implied warranty that the services will be rendered with due care and skill.

A defendant is, however, not entitled to rely on a waiver if the injury resulted from the contravention of any statutory safety standards.

The Bill provides that a contractual waiver will displace any implied condition or warranty that recreational services will be provided with due care and skill (cl 32(1)).

82. See at 432 per Mason CJ, Deane, Dawson and Gaudron JJ; at 442-444 per Brennan J.

83. (1993) 177 CLR 423 at 442 per Brennan J.

84. See *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 482-483 per Kirby J; and *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268.

85. See also the Commonwealth expert panel's observations on the voluntary nature of recreational activities: Australia, *Review of the Law of Negligence* (Report, August 2002) at para 4.13 and 4.29.

A term to the effect that the person engages in a recreational activity at his or her own risk will be sufficient to exclude liability for the purposes of these provisions (cl 32(3)).

Contractual waivers in relation to recreational activities may be imposed in a number of ways, including by signed liability release forms, or by a risk warning. Exclusion of liability by such means is particularly relevant to hazardous activities such as extreme sports and adventure tourism.[86] Because these activities are voluntary, it is reasonable for people who participate in them to be able to choose to waive their rights in the manner contemplated by the Bill.

Clause 32(2) is expressed to override the operation of any other written State law. This means that provisions such as those in the *Contracts Review Act 1980* (NSW),[87] the *Fair Trading Act 1987* (NSW), the *Sale of Goods Act 1923* (NSW)[88] and the *Minors (Property and Contracts) Act 1970* (NSW),[89] which affect contractual undertakings, will be displaced by the provisions.

As noted above, the *Trade Practices Act 1974* (Cth) also provides for contracts to include an implied warranty for services to be "rendered with due care and skill".[90] State law cannot affect this provision. However, the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* (Cth), which was introduced into the House of Representatives on 27 June 2002, provides for the insertion of a new s 68B:

> (1) A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
>
> (a) the application of section 74 to the supply of the recreational services under the contract; or
>
> (b) the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or
>
> (c) any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract;
>
> so long as:
>
> (d) the exclusion, restriction or modification is limited to liability for death or personal injury; and
>
> (e) the contract was entered into after the commencement of this section.

86. See, for example, D Healey, "Disclaimers, Exclusion Clauses, Waivers and Liability Release Forms in Sport: Can They Succeed in Limiting Liability?" in M Frewell (ed), *Sports Law: A Practical Guide* (LBC Information Services, Sydney, 1995).

87. See, for example, *Gowan v Hardie* (NSW CA, No 40531/1989, 8 November 1991, unreported).

88. Section 19.

89. Part 3.

90. Section 74.

Retention of liability where safety standards are breached

Although it is appropriate to limit the scope of liability where people voluntarily engage in risky activities, this should not relieve operators and occupiers from their responsibility to observe safety requirements. Consequently, as in the case of inherent and/or obvious risk, the Bill will ensure that people will continue to be protected where the occupier or operator has breached safety requirements imposed by or under a written law of the State (cl 31(6) and 32(6)).

PROPORTIONATE LIABILITY (proposed Part 6)

Civil Liability Act 2002, proposed Part 6

A defendant in an action for damages for a wrong (either in tort, contract, or under statute, but excluding personal injury claims) is liable only to the extent of his or her contribution to the damage.

Part 6 provides that a defendant in an action for damages for economic loss or damage to property (either in tort, contract, or under statute, but excluding personal injury claims) is liable only to the extent of his or her contribution to the damage (see cl 34(1)). Joint and several liability will continue to apply to personal injury claims and to claims involving an intentional tort.

It is proposed that proportionate liability be limited to cases of property damage or economic loss, because the principle that a plaintiff should be fully compensated for losses (to the extent the law allows) is paramount in personal injury claims and militates against placing an onus on the plaintiff to correctly identify all possible defendants (cl 33(1)(a)).

The proposed amendments extend to cases brought under the *Fair Trading Act 1987*, (NSW) and to actions brought in contract, to ensure that consistent rules apply in all areas of civil liability (cl 33(1)(a) and (b)).

In apportioning responsibility the court must exclude the proportion of the damage (if any) for which the plaintiff is contributorily negligent (cl 34(3)(a)). However, the court may also take into account the comparative responsibility of wrongdoers who are not parties to the proceedings (cl 34(3)(b)).

Proportionate liability has the advantage of providing greater fairness and certainty for defendants, in that they will only be liable to the extent of their proportionate responsibility for the damage suffered by the plaintiff and they will also know that their ultimate liability for damages will not depend on the solvency and availability of other defendants.

PROFESSIONAL NEGLIGENCE (proposed Part 7)

Civil Liability Act 2002, proposed Part 7

A professional does not incur a liability for a service if the professional acted in a manner that, at the time that the service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice.

An exception will apply to the duty to advise and warn in connection with risks associated with the provision of a professional service that would otherwise constitute a trespass to the person.

The effect of cl 40(1) will be that the standard of care for a professional negligence claim will be a standard widely accepted in Australia at the time as competent professional practice by peer professional opinion, notwithstanding that there may be differing peer professional opinion (see also cl 40(2)). Peer professional opinion would not have to be universally accepted to be considered widely accepted (cl 40(3)).

Exception: duty to warn or advise

An exception to the general test is proposed for situations where professionals are advising of the risks associated with the provision of a professional service that would otherwise constitute a trespass to the person. This exception is principally aimed at the provision of health services by health professionals[91] and takes account of the importance of the rights of patients to make informed decisions about health care, a concern underlying the decision in *Rogers v Whitaker*.[92] In such cases, it is proposed that the duty to inform of risks associated with the provision of health care will continue to apply, even if the advice departs from what peer professional opinion would consider to be an adequate level of information (cl 41(1)).

The effect of cl 41 is that the professional will still be required to advise the client of all material risks involved. A risk could be considered material if "a reasonable person in the [client's] position, if warned of the risk, would be likely to attach significance to it".[93]

Background

Some members of professional groups, especially health professionals, have expressed concern that the method set by the courts to determine the standard of care of a professional is unrealistically high, that is, that the appropriate standard of care is based on professional opinion, evidence of community standards and other relevant considerations. As a result, the exposure of professionals to liability for professional

91. The recommendations of the Commonwealth's expert panel, in dealing with the provision of information, relate only to medical practitioners partly on the basis that the obligation on medical practitioners to provide information "derives originally from the law relating to trespass to the person": Australia, *Review of the Law of Negligence* (Report, August 2002) at para 3.37-3.39.

92. (1992) 175 CLR 479.

93. See *Rogers v Whitaker* (1992) 175 CLR 479 at para 16.

negligence is very wide, and this exposure contributes to the cost of professional indemnity insurance.

There are concerns that the present law allows the courts to intrude into matters that they do not have sufficient expertise to decide, and that, for example, overly high standards are encouraging the practice of defensive medicine, where doctors order unnecessary treatments for the purpose of deflecting potential liability. However, the often proposed alternative, the *Bolam* peer acceptance test (that is based on what a "responsible body of medical opinion" would accept as proper) might be considered undesirable, because it gives too much weight to professional opinion, even if that opinion is not widely accepted.[94] Proposed Part 7 will have the effect of ensuring that a practice based on professional opinion is acceptable to the courts, provided that the practice conforms to widely held standards.

LIABILITY OF PUBLIC AND OTHER AUTHORITIES (proposed Part 8)

Civil Liability Act 2002, proposed Part 8.

The wide scope of liability for public authorities has threatened the provision of public services in a number of areas. Public authorities – and other bodies carrying out public functions – are often targeted in personal injury claims because they are seen as "deep pocket" defendants.

The Bill deals with the liability of public and other authorities in a number of ways:

- by providing that courts must consider the resources and responsibilities of public authorities (in determining the existence of a duty of care and the standard of care to be applied);
- by restricting the ambit of breach of statutory duty;
- by removing liability for failure of public authorities to exercise regulatory functions in certain circumstances; and
- by providing that the exercise of (or a decision to exercise) a function does not of itself create a duty.

In recognition of the fact that some "public" functions are not only carried out by government authorities such as local councils but also by private bodies such as community welfare organisations and non Government schools, "public or other authority" is defined to include a public authority and also any person or body prescribed as a an authority to which the Part applies (see cl 43). Proposed Part 8 applies only to liability in tort (cl 42).

94. See also Australia, *Review of the Law of Negligence* (Report, August 2002) at para 3.4, 3.7-3.19.

Consideration of resources and responsibilities of public authorities

In determining whether a public authority has a duty of care or has breached a duty of care, the following principles apply:

- **the functions required to be exercised by the authority are limited by financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;**
- **the general allocation of those resources by the authority cannot be challenged;**
- **the functions required to be exercised by the authority must be determined by reference to the broad range of its activities; and**
- **the authority may rely on evidence of its compliance with general procedures and applicable standards as evidence of the proper exercise of its functions.**

Clause 44 provides for the principles to be considered when a court considers whether a public authority has a duty of care or has breached a duty of care. These principles require a consideration of all of the functions that are exercised by the authority and the resources that are available to the authority in determining how to carry out its functions. The clause also provides that the authority may rely on evidence of its compliance with general procedures and applicable standards in the exercise of its functions as evidence of the proper exercise of its functions.

Background

By their nature, public authorities perform a wide range of functions for the benefit of the community. The corollary of the functions of public authorities is that the class of people who may be affected by an act or omission of a public authority is similarly wide. However, public authorities are bound by decisions made by Parliament and the executive in applying resources. The executive in turn allocates resources as part of a decision-making process based on priorities identified across the whole community. The constraints imposed by the executive necessarily affect the nature of services that public authorities provide to the community as a whole and to individuals. The provision of services by public authorities provides important benefits to the community. Litigation concerning service delivery by public authorities can deter authorities from service delivery, and diminish the resources available to the rest of the community.

A tension can arise between the role of the courts, in determining the liability of a defendant for injury to an individual plaintiff, and the role of an authority, which is responsible for the provision of services to the community as a whole, applying limited resources. Examples of such activities are the provision of community infrastructure by local councils (such as local parks and swimming pools).

The object of clause 44 is to ensure that the courts take into account the allocation of resources by public authorities, when determining questions of liability in tort.

Traditionally the courts have been unwilling to make allowance for the limited resources of the defendant when it comes to determining the appropriate standard of care.[95] However, there has been some movement in recent years. For example, in *Brodie v Singleton Shire Council* Chief Justice Gleeson made the following observations:

> A legal regime which denies the existence of a duty to keep all roads in such a condition that they expose no user to any real and avoidable risk of injury may be subject to valid criticism, but it cannot fairly be described as irrational. The most obvious justification is the cost of complying with such a duty. Road maintenance and improvement involves, amongst other things, establishing priorities for the expenditure of scarce resources. Accountability for decisions about such priorities is usually regarded as a matter for the political, rather than the legal, process. Road safety involves issues of upgrading, and improving, as well as repairing, roads. As Mahoney AP pointed out in *Hughes v Hunters Hill Municipal Council*, the appropriate response to dissatisfaction with the rule may be, not its abolition, but some modification "so that that which the council must do is more closely and directly accommodated to, for example, its financial resources, the exigencies of time and the competing demands of other works".[96]

Fleming has also noted the suggestion in relation to the activities of public authorities that some allowance should be made for budgetary constraints.[97]

Proceedings against public authorities based on breach of statutory duty

For the purposes of proceedings based on alleged breach of a statutory duty by a public or other authority in connection with the exercise of or failure to exercise a function of the authority:

- **the acts or omissions of the authority do not constitute a breach of statutory duty unless they were in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions; and**
- **there is no right to damages for the acts or omissions of the authority unless the relevant statute makes it clear that damages are payable for any such injury or loss.**

Clause 45 provides that, for the purposes of proceedings based on alleged breach of a statutory duty by a public or other authority in connection with the exercise of or failure to exercise a function of the authority:

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95. Fleming (1998) at 132. Some limited attention has, however, been given to the "competing or conflicting responsibilities" of road building authorities: see *Brodie v Singleton Shire Council* [2001] HCA 29 at para 162.

96. *Brodie v Singleton Shire Council* [2001] HCA 29 at para 16.

97. Fleming (1998) at 132.

- the acts or omissions of the authority do not constitute a breach of statutory duty unless they were in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions;
- there is no right to damages for the acts or omissions of the authority unless the relevant statute makes it clear that damages are payable for any such injury or loss.

Background

A public authority's failure to comply with a statutory duty may give rise either to a claim under the general law of negligence, or a specific action for breach of statutory duty.[98] At common law, the question of whether a claim for breach of statutory duty is actionable has generally been decided by using broad principles of statutory interpretation.[99]

The law in relation to the liability of public authorities has developed over time so that the powers given by statute to public authorities has given them "such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care".[100] This situation has most recently been highlighted in the case of *Brodie v Singleton Shire Council*[101] where the High Court extended the principles of negligence to replace the former common law immunity of highway authorities for non-repair. The decision of the Full Federal Court in *Graham Barclay Oysters Pty Ltd v Ryan*[102] (a case dealing with the liability of the Great Lakes Council, the State of New South Wales and others for an outbreak of Hepatitis A following consumption of contaminated oysters from Wallis Lake) also imposed a broad duty on public authorities for failure to exercise a statutory power.

A continued expansion of this form of liability that could give rise to damages is unsustainable. It would allow for compensation to be awarded to new and undefined classes of plaintiffs, whose relationship with the public authority may be tenuous, in circumstances where the authority might be considered to have acted reasonably, having regard to its other functions and to its resources.

There are public policy reasons why a public authority should not be held liable to pay compensation, solely on the basis that the authority has not exercised a function

98. F Trindade and P Cane, *The Law of Torts in Australia* (3rd edition, Oxford University Press, Melbourne, 1999) at 676.

99. See *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J.

100. *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at para 102.

101. (2001) 75 ALJR 992.

102. [2000] FCA 1099 (appeal to the High Court pending); following as it does cases like *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, *Pyrenees Shire Council v Day* (1998) 192 CLR 329 and *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

conferred on it by a statute. It is a matter for Parliament to state clearly if an enactment is to give rise to private law rights. As noted above in connection with tort liability generally, public authorities are subject to decisions made by Parliament and the Executive as to their resources and functions, and resources must be allocated according to the needs of the community as a whole.[103] The prospect of large awards being made to single plaintiffs is a diversion of these resources.

Clause 45 deals with the issue of the duty of public authorities with respect to statutory powers by adopting the approach of the House of Lords in *Stovin v Wise*[104] where Lord Hoffman stated:

> the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.[105]

The first pre-condition is analogous to the public law doctrine of *Wednesbury* unreasonableness.[106]

Justice Lindgren in his judgment in *Graham Barclay Oysters Pty Ltd v Ryan* relied on the judgment of Lord Hoffman in *Stovin v Wise* in concluding that the Council did not owe an actionable duty of care to the oyster-consuming public in the circumstances of the case.[107]

Liability for failure to exercise regulatory functions

A public or other authority that has functions to prohibit or regulate an activity will not be liable in tort in connection with a failure to exercise the function (or consider exercising the function) if the public authority could not have been required to exercise the function in proceedings instituted by the claimant.

Clause 46(1) of the Bill provides that a public authority that has functions to prohibit or regulate an activity will not be liable in tort in connection with a failure to exercise the function (or consider exercising the function) if the public authority could not have been required to exercise the function in proceedings instituted by the claimant. Clause 46(2) elaborates on the range of functions that may be considered as a function to regulate an activity, including a function to issue a licence, permit or other authority

103. See Trindade and Cane (1999) at 684-85.

104. [1996] 3 All ER 801.

105. *Stovin v Wise* [1996] 3 All ER 801 at 828.

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

107. See *Graham Barclay Oysters Pty Ltd v Ryan* [2000] FCA 1099 at para 314-315 and 374-379.

in respect of the activity, or to register or otherwise authorise a person in connection with an activity.

Background

This clause confines the liability of a public authority which has failed to exercise regulatory functions, by providing that the authority will only be liable if the plaintiff could have required the authority to exercise the power through court proceedings. That is, the function must be a duty of the kind enforceable by public law remedy, such as mandamus. Mandamus, for example, can be invoked to compel the performance of duties by public bodies or officials when the performance of a clear, positive statutory duty has been requested and refused.

Such a formulation arises from the need, felt by some judges, to restrict the duty of care that is expected of public authorities, as explained by Justice Kirby:

> From time to time judges have expressed concern that the imposition of a duty of care upon a public authority might cut across discretions which that body enjoys by statute, or impose upon it economic and other imperatives which judges and juries might be ill-equipped to evaluate. Importation of a common law duty could distort the performance of the functions of the statutory body in the attempt to avoid private actions. Judges have therefore sought to devise formulae to restrict the supplementation by the common law of the enforcement machinery provided in a statute. Some have resorted to the fiction of what Parliament "intended" to be the mechanism of enforcement. Others have applied public law criteria to evaluate whether a right of action at common law can co-exist with the statute.[108]

In *Pyrenees Shire Council v Day* Chief Justice Brennan was critical of the position that community expectations that a statutory power will be exercised would be adopted as the touchstone of liability.[109] In recognising that a "duty to exercise a power may arise from particular circumstances, and may be enforceable by a public law remedy" Chief Justice Brennan observed:

> No duty breach of which sounds in damages can be imposed when the power is intended to be exercised for the benefit of the public generally and not for the protection of the person or property of members of a particular class.... The care and diligence needed to discharge the duty vary according to the circumstances that are known. The measure of the duty owed to members of the relevant class is no greater than the measure of the public law duty to exercise the power.[110]

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108. *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at para 216.
109. *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at para 19.
110. *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at para 26-27.

Duty not created by exercise of function

The fact that a public or other authority exercises or decides to exercise a function should not of itself mean that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Clause 47 provides that the fact that an authority exercises or decides to exercise a function does not of itself mean that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Background

Clause 47 deals with situations where expectations are generated that public authorities will always act or act in particular ways, for example, where a motor vehicle is damaged because a road has not been maintained in such a way as to prevent the damage. In such cases the courts may find reliance on the part of a plaintiff sufficient to establish that the public authority owed a duty of care.[111] Fleming has observed that "reliance has... become recognised as a fertile source of duty".[112]

Clause 47 operates in this context to ensure that the mere fact that an authority exercises or decides to exercise a function does not of itself mean that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way. This would be in addition to the need to take account of the principles outlined in cl 44 with respect to powers.[113] It should be noted that these provisions do not affect the ordinary duty of care that authorities owe to members of the public in carrying out their activities. Actions in negligence (as affected by this Bill) will still be possible when authorities cause damage as the result of their activities.

111. See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

112. Fleming (1998) at 211.

113. See *Stovin v Wise* [1996] 3 All ER 801 at 828-829.

INTOXICATION (proposed Part 9)

Civil Liability Act 2002, proposed Part 9

The fact that a person is or may be under the influence of alcohol or drugs does not create or alter the duty of care owed to that person or increase or otherwise affect the standard of care owed to that person.

A court is not to award personal injury damages unless the death or injury is likely to have occurred even if the person had not been intoxicated and that the court is to presume that the plaintiff was contributorily negligent.

When determining the existence and scope of the duty of care, it is unduly onerous for defendants to consider the possibility that the plaintiff may be intoxicated: plaintiffs are responsible for their own intoxication, and should be held to the standard of sober persons. Proposed Part 9 defines "intoxication" as being under the influence of alcohol or a drug, whether or not taken for a medicinal purpose and whether or not it has been lawfully taken (cl 49). Thus in determining whether a duty of care arises, it will not be relevant to consider the possibility that a person may be intoxicated and thereby exposed to increased risk (cl 50(1)(a)); the person's intoxication will not of itself give rise to a duty of care (cl 50(1)(b)); and neither will it increase or otherwise affect the standard of care required (cl 50(1)(c)).

The Bill provides protection for injured persons in cases where the person's intoxication was not self-induced (cl 51(5)), or where it played no role in causing the injury. A court cannot award personal injury damages unless satisfied that the death or injury would have occurred even if the person had not been intoxicated (cl 51(2)). Clause 50 prevails over the motor accidents provisions that deal with contributory negligence in circumstances where the injured party was under the influence of alcohol or drugs.[114] However, if the court is satisfied that the injury would have occurred even if the person had not been intoxicated, a presumption of contributory negligence arises (amounting to a 25% or greater reduction in damages), which can be rebutted if the court is satisfied that the person's intoxication did not contribute in any way to the cause of death or injury (cl 51(3) and 51(4)).

Background

Intoxication may prevent plaintiffs from taking due care for their own safety. This inability of an intoxicated plaintiff to take due care may currently increase the standard of care that a defendant owes to an intoxicated plaintiff. The community as a whole should not have to bear the cost of injuries, where the plaintiff's intoxication contributed. This is recognised by the fact that in some circumstances a plaintiff's intoxication may lead to a finding of contributory negligence, provided the plaintiff's intoxication played a role in causing the injury.[115]

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114. *Motor Accidents Act 1988* (NSW) s 74; *Motor Accidents Compensation Act 1999* (NSW) s 138.

115. See F Trindade and P Cane, *The Law of Torts in Australia* (3rd edition, Oxford University Press,

There are precedents in the motor accidents scheme for making it clear that intoxication is relevant to reducing a defendant's liability. The *Motor Accidents Compensation Act 1999* (NSW), for example, provides for a finding of contributory negligence if a plaintiff has been convicted of an alcohol or other drug-related offence.[116]

Other jurisdictions have also introduced provisions dealing with injured persons who are intoxicated. For example, proposed amendments to the *Wrongs Act 1936* (SA) include a presumption of contributory negligence where the injured person is intoxicated or relies on the care and skill of a person who is known to be intoxicated.[117] The *Civil Law (Wrongs) Bill 2002* (ACT) also proposes a presumption of contributory negligence where an injured person is intoxicated. The presumption can be rebutted only if the injured person establishes on the balance of probabilities, that the intoxication did not contribute to the accident or that the intoxication was not self-induced.[118] The ACT proposals also deal with situations where the injured person relies on the care and skill of a person who is known to be intoxicated.[119]

SELF DEFENCE AND RECOVERY BY CRIMINALS (proposed Part 10)

Civil Liability Act 2002, proposed Part 10

Self defence

A person does not incur civil liability for any conduct carried out in self defence against unlawful conduct, except if:

*** the person used excessive force, and**

*** the court is satisfied that:**

*** the circumstances of the case are exceptional; and**

*** that in the circumstances of the case, a failure to award damages would be harsh and unjust.**

Clause 53 provides that a person is not civilly liable for any conduct that is carried out in self defence, if the conduct to which the person was responding was unlawful.

Conduct in self defence is conduct which the person believes is necessary to defend

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Melbourne, 1999) at 566-567.

116. See *Motor Accidents Compensation Act 1999* (NSW) s 138.

117. Proposed s 24J-24L: *Wrongs (Liability and Damages for Personal Injury) Amendment Bill 2002* (SA).

118. *Civil Law (Wrongs) Bill 2002* (ACT) cl 35.

119. *Civil Law (Wrongs) Bill 2002* (ACT) cl 36.

himself or herself or another person; to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; to protect property in some circumstances; or to prevent criminal trespass to land or premises or to remove a person committing a criminal trespass.

However, the provision will not apply if the person uses force that involves the intentional or reckless infliction of death, where the action took place solely to protect property or in relation to criminal trespass.

The exclusion from liability in clause 51 does not apply if the self defence is not a reasonable response to the risk; for example, if excessive force is used.

Clause 54 provides that no award can be made for damages where the defendant acted in self defence, even if the self defence was not a reasonable response to the circumstances as the person perceived them. The only exception to this is where the court is satisfied that the circumstances of the case are exceptional and in the circumstances of the case, a failure to award damages would be harsh and unjust. Even in this case, no general damages, or damages for pain and suffering, will be available (cl 54(2)(b)).

If damages are awarded in such a case, the limitations on damages and other restrictions provided for by Part 2 of the *Civil Liability Act 2002* will apply. This provision is necessary to ensure that plaintiffs engaged in criminal conduct who are intentionally injured (rather than negligently injured) are not treated more favourably than victims of negligence.

Background

The criminal law defence of self-defence was partially codified in New South Wales in 1998 by the *Home Invasion (Occupants Protection) Act 1998* (NSW). This Act also provided civil immunity for occupants of dwelling houses who acted in self-defence in accordance with the provisions of the Act.[120] The Act was repealed in 2001 and the provisions relating to the criminal defence were relocated to the *Crimes Act 1900* (NSW).[121] The provisions relating to civil immunity were dropped because such provisions were inappropriate in an Act that otherwise dealt solely with criminal offences. At the time the Government undertook to introduce a bill to provide for civil immunity in appropriate cases during the course of 2002.[122]

120. *Home Invasion (Occupants Protection) Act 1998* (NSW) s 12. See also *Workplace (Occupants Protection) Act 2001* (NSW).

121. *Crimes Amendment (Self-defence) Act 2001* (NSW).

122. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 6 December 2001, the Hon R J Debus at 19803.

Recovery by criminals

An award of personal injury damages for death or personal injury to a person cannot be made if the court is satisfied that the person was engaged in conduct constituting a serious offence, unless the defendant's conduct itself constituted an offence.

The Bill prohibits a court from awarding personal injury damages where the injured person was, at the time of the conduct that resulted in the death or injury, engaged in conduct that (on the balance of probabilities) constitutes a serious offence, provided that the conduct materially contributed to the risk of injury or death (cl 55(1)). The provisions will apply irrespective of whether there have been or will be criminal proceedings in relation to the conduct (cl 55(5)).

However, the provision does not affect liability if the illegal conduct has little or no causal nexus with the injury, since there is no justification for preventing the plaintiff from recovering in such cases (see cl 55(1)(b)).[123] The provision also does not affect liability where the defendant was also acting illegally (for example, a property owner who attacks a person who is breaking and entering premises) (cl 55(2)) unless the defendant, as an occupier of premises, was acting in self defence.[124]

Many offences are minor and technical in nature. For this reason, minor offences are excluded from the proposal, which only covers serious offences, which are punishable by imprisonment for six months or more (cl 55(3)).

Background

Illegal conduct by the plaintiff may limit the plaintiff's ability to claim in a number of ways. It may be:

- a complete defence (both in its own right and in the context of the defence of voluntary assumption of risk);
- a factor in determining whether the plaintiff was contributorily negligent;[125] and
- relevant to determining the standard of care owed by the defendant.[126]

123. Compare the exemption relating to intoxication (above).
124. See *Crimes Act 1900* (NSW) Part 11 Div 3.
125. See, for example, *Hackshaw v Shaw* (1984) 155 CLR 614 at 629, 641, 667.
126. Trindale and Cane (1999) at 577-579.

When considering illegal acts by a plaintiff, it is important that the courts should not enable criminals to profit from their conduct.

The common law position is that tortfeasors should not be able to found a cause of action on their own wrongdoing.[127] The proposed provision also allows the civil law to reinforce criminal law aims such as deterrence from criminal activity and punishment for wrongdoing.

While the common law principle applies relatively clearly in contexts where the plaintiff's illegal conduct was causally related to the alleged negligence (for example where the plaintiff claims that the defendant negligently failed to prevent him or her from committing a crime[128]), the situation is less clear where the illegal conduct and the alleged negligence are causally independent (for example where the plaintiff is injured while driving without a licence).[129] The mere fact that a plaintiff is engaged in an illegal activity at the time of his or her injury does not necessarily preclude a finding of liability.[130]

If the plaintiff's illegal act consisted of a breach of a statutory duty or regulation, the question is whether the relevant provision, as a matter of statutory interpretation, was intended to deprive a party in breach of a civil remedy.[131] In the absence of explicit wording to that effect in the provision, the question would be answered by a value judgment on the part of the court as to whether the plaintiff should be denied damages. Proposed Part 10 removes any doubt that criminal conduct by a plaintiff can be a bar to recovery against an innocent defendant.

An equivalent provision has been proposed in South Australia as an amendment to the *Wrongs Act 1936* (SA). The South Australian provision proposes the exclusion of liability for damages if the court is "satisfied beyond reasonable doubt that the accident occurred while the injured person was engaged in conduct constituting an indictable offence" and is "satisfied on the balance of probabilities that the injured person's conduct contributed materially to the risk of injury". However, a discretion to award damages is preserved for exceptional cases.[132]

127. See, for example, *Merryweather v Nixan* (1799) 7 TR 186; 101 ER 1337.

128. See, for example, *Clunis v Camden & Islington Health Authority* [1998] 3 All ER 180.

129. Trindale and Cane (1999) at 577.

130. See Fleming (1998) at 342.

131. *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 at 460. See also *Gala v Preston* (1991) 172 CLR 243 at 247.

132. *Wrongs (Liability and Damages for Personal Injury) Amendment Bill 2002* (SA).

GOOD SAMARITANS (proposed Part 11)

Civil Liability Act 2002, proposed Part 11

A person who, in good faith and without expectation of payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured, is protected from civil liability

It is important for people who happen to be at the scene of accidents and other emergencies to be free to render assistance to people who are injured or apparently injured without fear of a claim in negligence being brought against them at a later date. The Bill provides immunity in these circumstances.

In order to benefit from the immunity from liability, people must act in good faith and on a voluntary basis, that is, without expectation of payment or other reward (cl 57). The Bill includes further safeguards for injured persons by making it clear that certain situations lie beyond the protection of the good samaritan provisions:

- where the injured person was injured – or put at risk of injury – by an intentional or negligent act or omission of the good samaritan (cl 59(1));
- where the good samaritan is under the influence of alcohol or a drug that was voluntarily consumed, and as a result failed to exercise due care or skill (cl 59(2)); and
- where the good samaritan impersonates a health care or emergency services worker or a police officer or otherwise falsely represents that he or she has skills or expertise in connection with the rendering of emergency assistance (cl 59(3)).

Background

An example of a provision that already protects a particular group of "good Samaritans" is s 27 of the *Health Care Liability Act 2001* (NSW), which offers protection for doctors and nurses who happen to be at the scene of an emergency and render some professional assistance in good faith. The second reading speech for the *Health Care Liability Act 2001* (NSW) makes it clear that the good faith requirement is intended to protect the community:

> [section 27] provides protection from liability for doctors and nurses who voluntarily render medical assistance at the scene of an accident or other emergency. These good Samaritans, acting in good faith, can render assistance safe in the knowledge that at some

point in the future they will not become the victims of their own good deeds through medical negligence.[133]

South Australia and the Australian Capital Territory have also introduced Bills providing for the protection for good Samaritans of the type dealt with in proposed Part 11.[134]

VOLUNTEERS (proposed Part 12)

Civil Liability Act 2002, proposed Part 12

Volunteers doing work for community organisations will be protected from liability for acts or omissions in good faith

Individual members of community organisations who perform community work on a voluntary basis should be immune from civil liability for any act or omission done in good faith in the course of that work.

The provisions aim to alleviate any concerns that volunteers may have with respect to personal liability and thereby not impede volunteer work in the community.

The immunity set out in the Bill reflects the provisions in the *Volunteer Protection Act 2001* (SA). It provides that a volunteer will 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 that was either organised by a community organisation, or in the exercise of the person's functions as an office holder of a community organisation (cl 62).

In order to provide safeguards for injured persons, the general protection will not apply in certain situations, in particular where:

- at the time of the act or omission the volunteer was engaged in conduct that, on the balance of probabilities, constitutes an offence (cl 63);
- the volunteer was under the influence of alcohol or a drug that was voluntarily consumed, and as a result failed to exercise due care or skill (cl 64);[135] and

133. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 June 2001, 2nd reading, the Hon C Knowles at 14785.

134. *Wrongs (Liability and Damages for Personal Injury) Amendment Bill 2002* (SA) cl 38(1); *Civil Law (Wrongs) Bill 2002* (ACT) cl 5.

135. Compare the exclusion for good samaritans, and *Volunteer Protection Act 2001* (SA) s 4(2).

- the volunteer knew (or ought reasonably to have known) that he or she was acting outside the scope of the activities authorised by the community organisation or acting contrary to instructions given by the organisation (cl 65).[136]

In addition, the protection for volunteers will not apply where the organisation or volunteer is required by legislation to have insurance (cl 66), or in the case of motor accidents (cl 67), where a compulsory insurance scheme operates.

NERVOUS SHOCK (proposed Part 13)

Civil Liability Act 2002, proposed Part 13.

Limit the class of claimants who can recover damages for psychiatric injury so that claims can only be made by the victim, a person who was present at the accident, or a close relative (parent, spouse, sibling or child) who suffered a demonstrable psychiatric or psychological injury.

The Bill introduces a statutory formulation to limit the class of claimants who can recover damages for psychiatric injury, with particular restrictions placed on the eligibility of third parties. Proposed Part 13 provides for a limitation of the class of claimants who can recover damages for psychiatric injury so that claims can only be made by the victim, a person who was present at the accident, or a close relative (parent, spouse, sibling or child) who suffered a demonstrable psychiatric or psychological injury.

Clause 69(2) also makes it clear that a close relative of the victim cannot recover for nervous shock if the victim of the death or injury would have been prevented from recovering damages under the other provisions of the Bill, such as, for example, if the victim was a criminal or was intoxicated. Clause 69(3) provides that if the damages to the victim would have been reduced because of his or her intoxication, damages for nervous shock are to be reduced on the same basis.

Background

Liability for "nervous shock" at common law (better described as "recognisable psychiatric injury") requires two main conditions to be met:

1. the psychiatric injury must itself have been reasonably foreseeable (that is, liability for shock requires foreseeability of injury by shock); and

136. Compare *Volunteer Protection Act 2001* (SA) s 4(3).

2. in the absence of negligently inflicted physical damage, the psychiatric injury must result from a sudden impact to the sensory system (for which the defendant is responsible), rather than from a gradual deterioration in mental health.[137]

Recognition by statute of nervous shock as an actionable injury in tort occurred with the enactment of the *Law Reform (Miscellaneous Provisions) Act 1944*. That Act provides that liability for nervous shock will extend to the parent or spouse of an injured or killed person, or certain other family members who witnessed (that is, were within the sight or hearing of) the accident.[138]

Some commentators have criticised as too broad the courts' approach to claims by third parties who witnessed or were otherwise affected by an accident. Although these claims have frequently been treated with reserve, the law which governs this area of liability has been cited as being "short on principle and predictability".[139] For example, it remains unclear whether, in the absence of such statutory provisions, a "secondary" victim who has not witnessed any part of the accident or its aftermath directly, but is later told of it, may recover damages for psychiatric illness at common law.[140]

Recent legislative developments which have addressed nervous shock in the areas of motor accidents and workers compensation impose high thresholds on recovery for psychiatric injury. The *Motor Accidents Compensation Act 1999* (NSW), for example, explicitly limits the class of plaintiffs who can claim damages for psychiatric injury in respect of a motor accident:

> No damages for psychological or psychiatric injury are to be awarded in respect of a motor accident except in favour of:
> (a) a person who suffered injury in the accident and who:
> (i) was the driver of or a passenger in or on a motor vehicle involved in the accident, or
> (ii) was, when the accident occurred, present at the scene of the accident, or
> (b) a parent, spouse, brother, sister or child of the injured person or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric injury and not merely a normal emotional or cultural grief reaction.[141]

There is a similar restriction in the case of industrial accidents under s 151P of the *Workers Compensation Act 1987* (NSW).[142]

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137. See also the judgment of Spigelman CJ in *Morgan v Tame* (2000) 49 NSWLR 21 at para 11, which refers the seven conditions governing a claim in negligence for pure psychiatric injury set out by Hoffman LJ in *Page v Smith* [1994] 4 All ER 522 at 549-550.

138. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4.

139. Fleming (1998) at 178.

140. See discussion in Luntz (2002) at 180-181.

141. *Motor Accidents Compensation Act* 1999 (NSW), s 141 (compare a virtually equivalent provision in the *Workers Compensation Act* 1987 (NSW), s 151P).

142. These statutory formulations are similar to the approach to liability for psychiatric injury recommended by the Law Commission of the United Kingdom in the late 1990s. The Law Commission's approach was captured in the *Negligence (Psychiatric Illness) Bill 1998* (UK), which proposed to recognise a duty of care to avoid psychiatric injury to third parties only in

The provisions in the Bill which limit or prevent recovery by close relatives of the victim, if the victim would have been prevented from recovering or had any damages reduced because of the other provisions of the Act, are intended to ensure that the protection given to defendants in the Bill, including provisions dealing with inherent and obvious risk, risk warnings, and plaintiffs who are intoxicated or who are engaging in criminal conduct at the time of the injury, extend to protect defendants from nervous shock claims made by close relatives.

APOLOGIES (proposed Part 14)

Civil Liability Act 2002, proposed Part 14.

Provide that apologies in connection with the death or injury of a person:

*** do not amount to an express or implied admission of fault or liability; and**

*** are not admissible as evidence of fault or liability in any civil proceedings.**

The Bill provides that apologies do not amount to an express or implied admission of fault or liability and are not admissible as evidence of fault or liability in any civil proceedings (cl 72(1) and (2)). Apologies are defined broadly to cover expressions of sympathy or regret, or of a general sense of benevolence or compassion, whether or not the apology admits or implies an admission of fault (cl 71).

Background

There is considerable evidence that many people who bring some form of formal complaint or proceedings would have been satisfied with an apology which, for reasons of the respondent's fear of admitting liability, has not been forthcoming.[143] This is exemplified by the response of patients to the practice of medical practitioners, acting under the requirements of their professional indemnity policies, of not communicating with patients after providing a service if there is a possibility of litigation.

In some circumstances, an apology may increase the likelihood of a claim or the success of a claim. However, it might be argued that the potential for apologies to generate claims is outweighed by the benefits to service providers and clients of an ability to make apologies which are protected from liability.

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restricted circumstances. See N J Mullany and P R Handford, "Moving the Boundary Stone by Statute - The Law Commission on Psychiatric Illness" (1999) 22(2) *UNSW Law Journal* 350.

143. See NSW Ombudsman, *Annual Report 2000/2001* at 115.

STRUCTURED SETTLEMENTS (proposed Part 15)

Civil Liability Act 2002, proposed Part 15.

The negotiation and ordering of structured settlements should be facilitated, and parties should be given a reasonable opportunity to negotiate a structured settlement.

A structured settlement is an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means (cl 74). Structured settlements are encouraged and facilitated in three ways by the Bill:

- by changes to procedure;
- by requiring legal practitioners to provide advice certificates;
- by providing for costs incentives.

Procedural rules

A court will not be able to make an order for compensation in a personal injury case that includes $100,000 or more for future loss without first informing all the parties of the terms of the order it proposes to make (cl 75(2)). At that time, the court should notify the parties of the component parts of its proposed award, for example, future earnings and medical expenses. After giving notice of its proposed award, the court should allow a reasonable time for the parties to negotiate terms for a structured settlement. Clause 76 permits a court, on the application of the parties, to make an order in the form of, or approving, a structured settlement.

Advance notice from the trial judge should ensure that fewer litigants are deterred from entering into structured settlements in the hope that more or less compensation could be ordered by the trial judge. Prior knowledge also gives both parties more equal negotiating power to arrive at a structured settlement that conforms to the conditions in the *Taxation Laws Amendment (Structured Settlements) Bill 2002* (Cth). This Commonwealth Bill is aimed at removing the disincentives to structured settlements in the taxation system and to encourage their greater use by insurers.

The tax exemptions under the Commonwealth's Bill are not available if the court imposes the structured award, other than by consent order or by the Court approving a settlement put forward by the parties.

Lawyer's advice certificate

A lawyer must, before his or her client negotiates settlement of a personal injury claim, advise the client in writing about:

- the availability of structured settlements; and

- the desirability of and availability of independent financial advice in relation to structured settlements and alternative options. (cl 77(1)).

A court will not be able to make an order for a structured settlement unless the application for the order states that such advice has been given to the plaintiff (cl 77(2)). This will encourage practitioners to bring the availability of structured settlements to the attention of their clients and thereby also encourage early settlements of claims with the consequent saving in legal costs and court time to all parties and the community.

Costs incentives

Recent amendments made to the *Legal Profession Act 1987* (NSW) allow costs to be awarded on an indemnity basis if a party to a claim for personal injury damages makes a reasonable offer of compromise on the claim and that offer is not accepted. This provision was enacted to encourage settlement without recourse to full litigation of a matter. Clause 78(1) states that the provisions in the *Legal Profession Act* extend to an offer of compromise by way of a structured settlement. In determining whether an offer of compromise is reasonable the court must consider the cost of the proposed structured settlement to the defendant as opposed to a lump sum payment and also the value of the proposed structured settlement to the plaintiff, taking into account any tax exemption that might apply (cl 78(2)).

Background

The *Taxation Laws Amendment (Structured Settlements) Bill 2002* (Cth), currently before the Federal Parliament, offers tax exemptions for structured settlement annuities in certain circumstances. The Bill will remove the taxation disincentives which apply to structured settlements at present[144]. The *Civil Liability Act* includes a provision that makes it clear that, where a structured settlement has been agreed between the parties, the Court may make an order approving the terms of the settlement even though the payment of damages is not in the form of a lump sum award of damages.[145] Proposed Part 14 will strengthen the scheme for structured settlements, by supporting the taxation incentives introduced by the Commonwealth.

144. See, for example, NSW Law Reform Commission, *Provisional Damages* (Report 78, 1996) at para 2.13-2.15.

145. *Civil Liability Act 2002* (NSW) s 22.