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Articles

Duty of care under the 'Civil Liability Acts'

Joachim Dietrich*

The legislative changes to the law of torts effected by the 'Civil Liability Acts' in all jurisdictions are wide-ranging. One aspect of these changes is the creation of new 'no-duty' situations: particular classes of defendants have been exempted from liability and particular classes of plaintiffs have been disentitled from bringing claims for some or all of the damage incurred by them as a result of defendants' negligent conduct. This article considers the general effect of the relevant provisions in each jurisdiction and highlights the considerable and often legally significant differences that exist between the various jurisdictions in relation to these 'no-duty' categories. Some of these differences are as a result of deliberate policy decisions; others, it appears, are the result of poor legal drafting. The article concludes that many of the legislative changes may have far-reaching and potentially unforeseen and harsh consequences.

Introduction

Now that the dust has settled on the flurry of legislative activity aimed at the 'reform' of tort law (particularly the law of negligence and personal injury damages) it is possible to survey (1) the potential impact of the different legislation on the pre-existing (mostly common) law, as well as (2) the significant differences between the legislation in each jurisdiction. The events leading up to the perceived torts and insurance 'crisis' and the governmental responses to it, have been well-documented elsewhere.¹ It suffices to say for present purposes that the *Final Report* of the Negligence Review Panel, chaired by Justice Ipp,² recommended numerous and significant changes to negligence law. Many of these suggested changes (or similar ones) have become law in all jurisdictions. Importantly, however, the Ipp Report's plea for uniformity was not heeded.³ There are significant differences between the relevant Acts in each jurisdiction: some legislatures have gone further than the

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1 See, eg, the Honourable J J Spigelman, 'Negligence and insurance premiums: Recent changes in Australian law' (2003) 11 *TLJ* 291; the Honourable Justice P Underwood, 'Is Ms Donoghue's snail in mortal peril?' (2004) 12 *TLJ* 39; and, with a particular focus on NSW, D Villa, *Annotated Civil Liability Act 2002 (NSW)*, Lawbook Co, Sydney, 2004, 'Introduction'.

2 Commonwealth of Australia, *Review of the Law of Negligence Report*, Canberra, 2002, <<http://revofneg.treasury.gov.au/content/review.asp>> (accessed 2 October 2002) (the Ipp Report).

3 Recommendation 1 of the Ipp Report was that its recommendations be incorporated 'in a single statute . . . to be enacted in each jurisdiction' (p 1). This recommendation was based on the Report's 'unqualified' support for the aspiration of developing a 'consistent national approach' 'to bring the law in all the Australian jurisdictions as far as possible into conformity' (p 26). The enactment of the recommended provisions was aimed at achieving 'uniformity' and 'consistency' (p 35).

Ipp Report's recommendations — indeed, passing laws contrary to some of the recommendations⁴ — whereas others have been more restrained.

Though the title of this article refers to the 'Civil Liability Acts', the titles of the various Acts, like their content, are not uniform. The relevant acts in each jurisdiction are as follows: Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA);⁵ Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic);⁶ and Civil Liability Act 2002 (WA). For convenience, each of these Acts will be referred to in shorthand form as the NSW Act, Qld Act etc.

A number of commentaries have already been published on the Acts, including two books annotating the NSW Act and the Qld Act respectively.⁷ Few court decisions have yet arisen other than on damages assessment,⁸ however, and there is an element of guesswork as to the meaning and effect of some of the legislative changes. Although many of the Acts are wide-ranging in their scope, they are not codes; they exist on a substratum of common law (though only the Tas Act s 3A(5), Qld Act s 7(5) and the Vic Act (in various sections)⁹ expressly make this point). The question thus arises, what precisely is the interaction between the common law and the Acts, and how much of the common law survives. This article focuses merely on one aspect of the law of negligence, namely the issue of duty of care. Two questions need to be addressed. The first is general and able to be dealt with fairly shortly, that is, the impact (if any) that the changes have upon the general law concept of 'duty of care', and that concept's ongoing relevance to the law of negligence. It will be seen that the need to establish a duty of care will continue to be required in all jurisdictions and will be determined according to common law principles (in an area where, admittedly, such principles are uncertain). The one exception may be Western Australia, where poor drafting creates the possibility of an argument that it is no longer a necessary requirement for a claim in negligence to establish a 'duty of care'.

The second issue is more specific and that is to consider the various

4 Eg, Civil Liability Act 2002 (NSW) s 50 (no recovery where person intoxicated; contrast Ipp Report, pp 125–6). Indeed, some legislative changes were introduced and passed even before the release of the initial report of the Ipp Committee on 2 September 2002 (eg, the Civil Liability Act 2002 (NSW) was assented to on 18 June 2002).

5 This is a renamed version of the Wrongs Act 1936 (SA), substantially amended by the Law Reform (Ipp Recommendations) Act 2004 (SA).

6 This was substantially amended in particular by the Wrongs and Other Acts (Law of Negligence) Act 2003 (Vic) and the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic).

7 See Villa, above n 1, and R J Douglas, G R Mullins and S R Grant, *The annotated Civil Liability Act 2003 (Qld)*, LexisNexis, Sydney, 2004.

8 In relation to the NSW Act, see, however, *Burke v New South Wales* [2004] NSWSC 725 (unreported, Master Malpass, 3 September 2004, BC200405701) (dealing with 'mental harm'); *Casey v Robinson* [2003] NSWSC 1155 (unreported, Cripps AJ, 9 December 2003, BC200307652) (on damages); *Finch v Rogers* [2004] NSWSC 39 (unreported, David Kirby J, 13 February 2004, BC200400351) (on causation); *Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone* (2004) 41 MVR 235; (NSW CA) (on damages). See also *Ruddock v Taylor* (2003) 58 NSWLR 268 (CA) at 286–7 per Ipp J (common law causation principles in accord with s 5D of NSW Act).

9 See, eg, ss 14F, 47, 71 and 82.

'no-duty' situations created by the Acts: particular classes of defendants have been exempted from liability and particular classes of plaintiffs have been disentitled from bringing claims for some or all of the damage incurred by them as a result of defendants' negligent conduct. Apart from the utility of considering the general effect of these new 'no-duty' situations, it is also useful to highlight the considerable and often legally significant differences that exist between the various jurisdictions in relation to these 'no-duty' categories. Some of these differences are as a result of deliberate policy decisions; others, it appears, are the result of poor legal drafting.

I will discuss the reforms in all six States and the ACT but, for convenience, and to keep this piece manageably short, propose not to consider the Northern Territory's Personal Injuries (Liabilities and Damages) Act 2003. In part, this is justified because that Act has not introduced many of the extensive changes to the common law contained in the other jurisdictions' Acts.¹⁰ Unless otherwise indicated, any general statements made in the course of this article thus do not necessarily apply to the Northern Territory. Before considering the ongoing role of duty of care under the Acts and the specific 'no-duty' situations, it is necessary to survey the general scope of operation of the Acts.

The scope of the Acts

All of the 'Civil Liability Acts' are broad in their potential operation, generally applying to civil claims for recovery of damages for harm (including personal injury (physical or mental), damage to property and economic loss). All the Acts introduce broadly three types of reforms. First, the Acts set out general principles governing liability arising from a failure to take reasonable care, irrespective of whether such claims are brought in tort, contract or under statute,¹¹ subject to certain general exclusions to the operation of each Act. Secondly, the Acts introduce principles governing (and generally limiting) the award of personal injury damages. Such principles apply generally to civil liability, that is, they are not limited to claims in negligence,¹² but again, are subject to the general exclusions to the operation of each Act. Finally, there are

¹⁰ The Personal Injuries (Civil Claims) Act 2003 (NT) is largely procedural and does not cover issues of concern to this article.

¹¹ ACT Act: see Ch 4, s 41 ('negligence claims'). NSW Act: see s 5A (Part applies to claims for harm resulting from negligence, regardless of the precise cause of action pleaded to sustain such a claim). Qld Act: see Ch 2 Pt 1 (most sections apply to 'breach of duty of care', defined to include claims in contract or under statute, though Div 4 (dangerous recreational activities) applies only to 'negligence' suggesting that breaches of contractual duties of care are not within the scope of the Div: see Douglas, Mullins and Grant, above n 7, p 37 [19.3]). SA Act: see Pt 6 (which is limited to claims in negligence, defined as a 'failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care'). Tas Act: see s 10 (claims for breach of duty of care); Vic Act: see s 44 (negligence claims); WA Act, see paragraph ending with n 19 below.

¹² See ACT Act s 92 and s 93; NSW s 11A; Qld Act s 4(1); Vic Act s 28C(3); WA Act s 6(2). In these States, leaving aside the general exclusions noted below, such as the exclusion of intentional torts and sexual assault (other than in the ACT and Qld), this means damages awards for personal injury for breach of contract, or in nuisance, or under statute, for example, even where negligence is not an element of the cause of action, would be governed by the relevant parts of the Acts. In Tasmania, the damages part (Pt 7) only applies to civil liability for damages for personal injury from a 'breach of duty' (s 24), defined as a 'duty of care' (s 3). In SA, s 51 applies the damages part of the Act to damages for personal injuries

certain exemptions from 'civil liability' of certain classes of defendants, as well as provisions disentitling certain classes of plaintiff from claiming for damages. These exemptions and disentitlements (the 'no-duty' situations, as I have labelled them), generally apply not just to negligence actions, but to any forms of 'civil liability'. Some examples include the protection from civil liability of 'good Samaritans' and 'volunteers', and limitations upon the rights to recover imposed on criminals.¹³ Again, these 'no-duty' situations are subject to the general exclusions contained in each Act.

To simplify somewhat, the general exclusions to the operation of (the whole or parts of) each Act include¹⁴ claims covered by motor vehicle accident and workers' compensation legislation;¹⁵ claims arising from dust-related conditions,¹⁶ tobacco use or exposure to tobacco smoke; or claims that result from intentional torts or sexual assaults.¹⁷ The ACT Act has no general exclusions, but specific sections and parts contain exclusions. These tend to be more limited than those listed above.¹⁸ The SA Act does not make any of these

arising from breaches of duty of care (including in contract or under statute), other *unintentional* torts, but also *intentional* 'motor vehicle' accidents.

13 These are discussed further below. Eg, Pt 7 of the NSW Act, dealing with 'Self-defence and recovery by criminals', applies to 'civil liability of any kind for personal injury damages . . . or damage to property'. Part 8 'Good samaritans' and Pt 9 'Volunteers' apply to 'civil liability of any kind' (other than, in the latter case only, liability for defamation). 'Civil liability' is not defined in the Act, however. The application of similar provisions in other jurisdictions is similarly wide, with the following exceptions. Under the SA Act, the limitations applicable to persons engaged in criminal activity apply to claims for damages for personal injuries for breaches of a duty of care (including in contract or under statute), other unintentional torts, but also intentional motor accidents: s 43(4). SA has a separate Act providing immunity for volunteers: Volunteers Protection Act 2001 (SA). The Tas Act does not deal with 'good Samaritans'. Under the Vic Act, Pt IIB dealing with intoxication and illegal activity is limited to negligence claims, and in any case preserves the common law (s 14F), merely requiring the courts to consider a plaintiff's intoxication or illegal conduct when determining whether a defendant has breached a duty of care (s 14G). The WA Act does not have provisions dealing with criminal activity and there is a separate Volunteers (Protection from Liability) Act 2002 (WA).

The scope of the operation of the exemptions contained in some of the Acts, such as those dealing with the liability of public authorities, are confusing and problematically worded, as discussed below. See, eg, NSW Act s 40 (and similarly ACT Act s 108).

14 The Vic Act in particular has more wide ranging exclusions: see s 45. The general sections setting out the various exclusions from the scope of the other Acts are as follows: NSW Act s 3B; Qld Act s 5; Tas Act s 3B; WA Act s 3A.

15 The Qld Act, s 5, however, does not exclude motor vehicle accidents from the Act's general operation.

16 In WA, these exclusions only apply to asbestos-related diseases. The Tas Act does not exclude dust-related conditions. Vic Act s 45(1)(b) excludes claims covered by the Accident Compensation Act 1985 (Vic) which also applies to dust-related illnesses.

17 The Qld Act does not expressly exclude intentional torts or sexual assaults from the operation of the Act. However, many of the substantive provisions are only applicable to breaches of 'duty' (meaning a duty to take reasonable care or exercise reasonable skill in tort or a concurrent or coextensive duty in contract or under statute: Sch 2). Interestingly, the personal injury damages chapter (Ch 3) does extend to intentional torts and sexual assaults, but the section restricting exemplary, punitive or aggravated damages (s 52) does not. The Vic Act s 45 does not expressly exclude intentional torts, but relevant parts only apply to 'negligence' claims.

18 There are no exclusions from the operation of the ACT Act for intentional torts, dust-related conditions and tobacco smoke, and only limited exclusions for motor vehicle accidents (eg, in relation to 'good Samaritans', s 5(2), and 'volunteers', s 8(2)(a)).

exclusions, though it indirectly excludes intentional torts since most of the relevant provisions are limited to negligence claims; and the personal injury damages sections, though not so framed, expressly exclude liability for intentional torts (but not intentionally caused motor vehicle accidents (s 51)).

These generalisations do not, of course, give a completely accurate picture. In some jurisdictions the precise scope of each Act (or parts thereof) is problematic. For example, Pt 1A of the WA Act purports to apply to all claims for damages for harm (including damage to property and economic loss: s 3) caused by the fault of another (s 5A(1)). Subsection 5A(2) extends the application of the Act even if the claim is brought for breach of contract or any other action. The term 'fault' is not, however, defined, and therefore presumably is not limited to breaches of a duty to take reasonable care. Although some specific sections by their wording clearly are so limited (for example, s 5B, failing to take precautions against a risk of harm), many are not. For example, this could mean that s 5C, general principles on causation, could equally be said to apply to a claim for damages arising from breach of contract or for breach of an equitable duty, or under the Fair Trading Act 1987 (WA) (despite the consequent oddness of such a wrongdoer being labelled a tortfeasor by s 5C(1)). Alternatively, a plaintiff may be precluded from suing for harm resulting from an obvious risk of a dangerous recreational activity (s 5H), despite the fact that such harm was the result of a breach of an express term of a contract (for example, where a tour provider includes in its contractual itinerary a provision for 'safe' swimming in northern Australian; is the risk of crocodile attack an 'obvious risk' such that despite the breach of contract, the plaintiff cannot sue?). It must be noted that s 4A allows only for a contracting out of parts of the Act by means of express provisions excluding, modifying or restricting provisions of the Act, unlike the NSW Act which allows parties' contracts to determine their respective rights (s 3A).¹⁹

The role of duty of care under the Acts

The first element of any negligence claim is that a duty of care is owed by a defendant to the particular plaintiff. It is 'duty of care' which is the key mechanism by which courts have limited the scope of negligence liability; where, despite a defendant's carelessness having caused a plaintiff's loss, general principles, policies, or countervailing considerations, that is, 'relevant systemic factors going to the issue of liability',²⁰ none the less suggest against such liability. Hence, it is the duty concept that is of most relevance to problematic questions confronting all legal systems, such as the scope of liability for purely economic loss, for psychiatric injuries, for harms caused by omissions, including failures to exercise statutory powers, and the like.

¹⁹ This means that express rights in contracts in NSW are enforced and the NSW Act does not impact on them, whereas in WA express rights under contracts are subject to the operation of the WA Act unless express clauses excluding the operation of parts of the Act have been included. These differences may raise conflicts of laws difficulties, such as the question of which contracts are referred to: those governed by the law of the respective State, those entered into in the respective State, or those to be performed in the respective State?

²⁰ See *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; 176 ALR 411 at [98] per Hayne J, quoting J Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *LQR* 301 at 303.

Conversely, the duty concept is not usually of much relevance in ordinary negligence claims involving physical damage caused by the positive negligent acts (as opposed to omissions) of a defendant. In such cases, an 'undemanding'²¹ determination that a plaintiff was of a 'reasonably foreseeable' class of persons at risk of injury from the defendant's careless conduct will ordinarily establish a duty of care.²²

In cases of non-physical damage or physical damage resulting from omissions,²³ however, it is an accepted requirement of Australian law that something more than reasonable foreseeability is required to establish a duty of care and, hence (if the other elements of negligence are made out), liability.²⁴ There has been ongoing controversy, however, as to what is this further requirement and the principles that at present govern the establishment of a duty of care in Australia are in a state of some uncertainty.²⁵ I propose only briefly to outline the current law.

Support has been expressed by some for an 'incremental' approach to duty of care. Indeed, five members of the High Court appeared to endorse such an approach to duty in *Sullivan v Moody*.²⁶ The incremental approach requires the courts to reason by way of analogy from established categories of cases, in order to identify material facts and the guiding principles of specific classes of case in order to determine whether a duty of care can legitimately and incrementally be extended to apply to new factual situations.²⁷ Such an approach rejects the expansion of negligence by applying either (i) generally stated tests or touchstones of duty such as 'proximity'²⁸ or (ii) reasonable foreseeability alone constrained only by considerations of policy negating a

21 See M Davies and I Malkin, *Butterworths Tutorial Series: Torts*, 4th ed, Butterworths, Sydney, 2003, pp 109, 116.

22 See H Luntz and D Hambly, *Torts: Cases and Commentary*, 5th ed, Butterworths, Sydney, 2002, p 131, and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495 per Deane J; 60 ALR 1.

23 Luntz and Hambly, above n 22, p 131.

24 See, eg, Hayne J in *Tame v Morgan*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 191 ALR 449 at [250], citing *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404 at [42].

25 Compare Douglas, Mullins and Grant, above n 7, p 13 [9.2].

26 (2001) 207 CLR 562; 183 ALR 404 at [51]–[52].

27 See, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606 at [94] per McHugh J; contrast [199] per Gummow J:

The making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. . . . The emergence of a coherent body of precedents will be impeded, not assisted, by the imposition of a fixed system of categories.

28 The concept of 'proximity', championed in particular by Deane J in the 1980s and early 1990s (eg, in *Jaensch v Coffey* (1985) 155 CLR 549; 54 ALR 417) has been criticised by a majority of the members of the High Court as a vague and imprecise concept (eg, in *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404). This has led Kirby J to conclude that 'it is tolerably clear that proximity's reign in this court, at least as a universal identifier of the existence of a duty of care at common law, has come to an end' (*Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147 at [238]; and see also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337 at [99] per McHugh J and [236] per Kirby J).

duty.²⁹ With respect, apart from suggesting a conservative, perhaps even sceptical, attitude towards expanding the law into novel cases, 'incrementalism' provides few guidelines for determining whether a novel case is or is not sufficiently analogous to existing cases to justify the expansion of liability.

It could be argued that one consequence of the twin developments of the rejection of proximity and adoption of incrementalism is that decisions have the appearance of being 'single instances' in which judgments merely list a range of factors precluding or favouring a duty of care in the given case.³⁰ It becomes difficult to discern any relevant principles at all. Where attempts are made to identify applicable principles, such principles appear to be narrowly confined to specific types of cases.³¹

Although all the Civil Liability Acts other than those of Queensland and Tasmania have divisions or parts headed 'duty of care', none of the Acts in fact expressly deals with the issue of when a duty of care arises. It is implicit in the Acts that the existing common law requirement of duty of care as a prerequisite to a claim in negligence continues to apply and that the principles according to which the existence of such a duty is established are those found at common law. To take one example, Pt 1 of the Qld Act is headed 'Breach of Duty', but s 9 of that part commences by setting out the circumstances in which a person 'does not breach a duty'. 'Duty' is defined as a 'duty to take reasonable care or to exercise reasonable skill (or both duties)' (in tort or otherwise: see Sch 2, 'duty' and 'duty of care'). This clearly presupposes that the common law has determined that such a duty of care exists in the first place. Merely demonstrating that a person has acted carelessly under s 9 does not of itself give rise to any liability. The NSW Act is not so clearly drafted but the same conclusion must be reached. Section 5B states a 'person is not negligent' unless certain requirements are satisfied, and suggests that hence, a person is negligent if they are satisfied. The term 'negligence' here, however, does not mean liability in the tort of negligence (suggesting nothing further, such as a 'duty of care', needs to be shown to exist), but rather means a 'failure to exercise reasonable care and skill' (s 5). A failure to exercise reasonable care of itself does not mean a person is liable for such failure: a duty of care must still exist. Hence, despite the slightly misleading headings, the Acts do not explicitly have anything to say about the duty of care issue and the common law principles continue to govern.

The position in Western Australia is different to the (relatively) certain ongoing role for the duty of care concept in other jurisdictions. The WA Act Pt 1A has a general heading: 'Liability for harm caused by the fault of a person'. That part purports to apply to any claims for 'damages for harm caused by the fault of a person' (s 5A) that are to be governed by the provisions contained in that part. Division 2 is headed 'Duty of Care', but

²⁹ See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481 per Brennan J; 60 ALR 1.

³⁰ Indeed, Gummow J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606 at [201] seems to endorse a 'list-like' approach by emphasising the need to find the 'salient' features of a case.

³¹ Some recent decisions illustrate the point, eg, *Agar v Hyde* (2000) 201 CLR 552; 173 ALR 665 and *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404.

proceeds with s 5B which essentially, as with equivalent sections in other jurisdictions, deals with the classic ‘calculus of negligence’ considerations used in determining a breach of a duty of care. Unlike, for example, the Qld Act s 9, however, which states expressly that a person will not be in ‘breach’ of a duty of care unless the elements set out are satisfied, or the NSW Act s 5B,³² which states that a person is not negligent unless those elements are satisfied, the WA provision provides that a ‘person is not *liable* for harm caused by that person’s fault *unless* those conditions are satisfied.’³³ (The conditions are set out in paras (a), (b) and (c) of subs (1).)³⁴ This raises the obvious question: if a defendant does not take reasonable precautions against a risk of harm, is the effect of the section such that they are then ‘liable for harm caused’ as a result. The fact that the carelessness arises in what, previously, might have been a ‘no duty’ situation seems by the way. For example, if defendants in circumstances such as *Modbury Triangle Shopping Centre Pty Ltd v Anzil*³⁵ (omissions to prevent criminal behaviour) or one of established immunity (such as a careless barrister)³⁶ failed to respond to a foreseeable risk, then s 5B suggests that they are liable. This conclusion is further supported by the general heading to Pt 1A. Unlike the position in the NSW Act (s 3A),³⁷ there are no general provisions suggesting that the WA Act is not intended to extend liability where none previously arose. Of course, clearly it was not the intention of the drafters to extend liability by obviating the need to establish a duty of care, but s 5B states that a person is not liable *unless* paras (a), (b) and (c) are satisfied, sustaining an argument that a person is liable if they have engaged in risky conduct as defined by paras (a), (b) and (c).³⁸

32 The Vic Act s 48 is similar to the NSW Act.

33 Section 5B(1) (emphasis added).

34 These are that the risk was foreseeable, not insignificant and such that a reasonable person would have taken relevant precautions against it.

35 (2000) 205 CLR 254; 176 ALR 411.

36 The presently existing immunity from suit in negligence on the part of legal advocates, reaffirmed by the High Court in *Giannarelli v Wraith* (1988) 165 CLR 543; 81 ALR 417, may be set aside when the High Court hands down its decision in the appeal from the Victorian Court of Appeal in *D’Orta-Ekenaike v Victoria Legal Aid* (unreported, 14 March 2003, BC200308659), which the High Court heard on the 20–21 April 2004 ([2004] HCATrans 118 and 119).

37 The Tas Act s 3A is even clearer:

(1) This Act does not create or confer any cause of civil action for the recovery of damages.

(2) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.

38 Contrast s 5P, eg, which is differently drafted. It states that a defendant is *not* liable for harm caused *if* the harm is the result of an inherent risk that cannot be avoided by the exercise of reasonable skill and care. This slightly different wording does not suggest that liability follows if the harm could have been avoided by the exercise of reasonable skill and care; one would still need to show that such steps ought to have been taken. The use of the word ‘unless’ in s 5B appears to leave less scope for such a conclusion.

No duty situations

Introduction

At least since *Donoghue v Stevenson*,³⁹ the trend in the development of the common law of negligence has been towards the abolition of special immunities of defendants and the expansion of the capacity of previously disintitled plaintiffs to sue. In relation to the former, one can consider the abolition of highway authorities' immunity in *Brodie v Singleton Shire Council*⁴⁰ (noted below, alongside the legislative response to it) and advocates' immunity in England⁴¹ (with, perhaps, Australia to follow).⁴² On the latter point, examples include the retreat from no liability rules in relation to purely economic loss⁴³ and pure mental harm.⁴⁴

In part, I suggest this trend is a result of the view that no-duty situations are contrary to the development of a principled, general law of negligence; 'special cases' cannot readily be justified. Privileged defendants or disintitled plaintiffs tend to undermine the application of, and underlying moral precepts for, general principles of fault-based liability (where such fault causing harm to a plaintiff can be established). Further, the existence of absolute 'no-duty' rules prevents courts from weighing up competing values, such as the (potential) plaintiff's obligation to take responsibility for his or her own safety, and the (potential) defendant's obligation to consider the wellbeing of others when going about his or her day to day conduct. If some classes of defendants can irresponsibly disregard others' welfare and yet escape liability, the law may fall into disrepute. Similarly, when a brief lapse in 'personal responsibility', such as a minor failing to regard one's own safety, precludes any recovery on the part of a plaintiff, then the punishment this imposes (and the corresponding protection of the 'fortuitous' defendants, irrespective of their moral culpability) suggests a very one-sided, black and white view of 'personal responsibility'. Unfortunately, however, the effect of the Civil Liability Acts has been to reverse the trend towards only limited exceptions to the application of general principles and instead, new wide-ranging no-duty situations have been established (or old ones reinstated).

There are broadly two categories of no-duty situations created by the Civil Liability Acts. First, there are particular classes of defendants who are immune from liability for harm caused by their negligent conduct. Much like advocates' immunity, the immunity rests on the status of defendants as engaged in certain conduct or having a particular function ('good Samaritans', 'volunteers' and 'road authorities'). Secondly, there are particular classes of plaintiffs who are disintitled from pursuing a claim for harm caused by

39 [1932] AC 562.

40 (2001) 206 CLR 512; 180 ALR 145.

41 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615; [2000] 3 All ER 673.

42 See above n 36.

43 See, eg, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575; *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529; 11 ALR 227; and *Perre v Apand* (1999) 198 CLR 180; 164 ALR 606.

44 See, eg, comments of Windeyer J in *Mount Isa Mines v Pusey* (1970) 125 CLR 383 at 395; [1971] ALR 253; and *Tame v New South Wales; Annetts v Australian Stations* (2002) 211 CLR 317; 191 ALR 449.

another's negligence (or at least in relation to some types of harm),⁴⁵ either as a result of their status or as a result of particular conduct in which they have engaged (parents of 'unplanned' children, criminals, intoxicated plaintiffs, plaintiffs engaging in dangerous recreational activities).⁴⁶ The existence of these no-duty situations varies from State to State, as do the precise limits of the immunities and disentitling factors. I will consider each of the specific no-duty cases within the two categories described above. I will only briefly consider 'recreational' activities and associated issues, as this topic has been the subject of a previously published article.⁴⁷ One could argue that the parts of the various Acts dealing with 'mental harm' also create circumstances of no-duty of care for those plaintiffs who fall outside the scope of those provisions' reach. The issue of liability for mental harm under both common law and the Acts has also received extensive coverage in a recent article and I propose to say no more about it.⁴⁸

Apart from these two categories of no-duty situation, there are circumstances in which the content of existing duties may be significantly modified or reduced, in relation to particular types of risks. These situations are not generally based on the particular status or conduct of the defendants or plaintiffs. They apply to any potential plaintiffs, but only in relation to some risks associated with their activities (for example, the absence of a duty of care in relation to obvious risks of which a plaintiff is aware or has voluntarily assumed, or risks in the context of recreational activities about which a risk warning has been given). I will not consider these topics, in part because they inter-relate with 'dangerous recreational activities' and some of the relevant issues have been touched on previously, and in part because the operation of these provisions is dependent on the precise factual circumstances in which they operate. They are less in the nature of general immunities, but instead provide rules (albeit ones tending to restrict liability) guiding courts in determining whether a breach of duty has occurred or whether a defence may be made out.⁴⁹

45 For example, parents of unplanned children are not absolutely disentitled from bringing claims in negligence, but are disentitled from recovering the economic costs of raising children that flow from that negligence. See text after n 107 below.

46 I have included participants in dangerous recreational services in this category because there is a blanket immunity from liability for any harms arising from the materialisation of obvious risks. Further, the immunity takes the form of a disentitlement based on the plaintiff's participation in dangerous recreational activities, the benefit of which disentitlement does not just flow to recreational service providers, but presumably to other potential defendants.

47 J Dietrich, 'Liability for personal injuries arising from recreational services: The interaction of contract, tort, State legislation and the Trade Practices Act and the resultant mess' (2003) 11 *TLJ* 244.

48 See D Butler, '*Gifford v Strang* and the new landscape for recovery for psychiatric injury in Australia' (2004) 12 *TLJ* 108.

49 Outside the context of dangerous recreational activities, the precise consequences of describing a risk as obvious are not so clear; further, those sections dealing with warnings given in the context of recreational services are complex and their precise consequences depend on the precise nature of what has been warned against and a range of factual circumstances. See, eg, NSW Act s 5M (with 12 subsections) and WA Act s 5I (with 16 subsections). Some of the relevant issues required to be considered under those sections

Immune defendants

'Good Samaritans'

All jurisdictions except Tasmania grant immunity from liability to persons engaged in acts of assistance to persons in need as a result of an emergency. Why it was perceived that such immunity was necessary is unclear, given the lack of any cases in Australia in which liability for personal injury damages⁵⁰ has been imposed on negligent 'good Samaritans',⁵¹ especially since the Ipp Report⁵² concluded such an immunity was unnecessary.⁵³ Given the lack of any previous case law, the impact of this immunity is likely to be very limited. None the less, there are some significant differences in the operation of the various provisions.

Apart from the immunity granted in Queensland, which is limited to persons who are engaged in acts to 'enhance public safety' while acting for a 'prescribed entity', as well as the prescribed entities themselves,⁵⁴ all other jurisdictions provide immunity from civil liability to 'good Samaritans'. 'Good Samaritans' are those who voluntarily (that is, without expectation of payment) act or omit to act in 'good faith'⁵⁵ while assisting persons in circumstances of emergency. Other than in New South Wales⁵⁶ and Victoria,⁵⁷ such acts must be done without 'recklessness' in order to be protected.⁵⁸ The immunity is lost if the 'good Samaritan' acted while intoxicated or under the influence of drugs, though not in Victoria or Queensland.⁵⁹ The width of the Victorian immunity is particularly startling, since it arises 'even if the emergency or accident was caused by an act or omission of the good samaritan' (s 31B(3)), but not in relation to 'any act or omission . . . that occurs before the assistance, advice or care is provided by the good samaritan' (subs (4)).⁶⁰

Drawing distinctions between negligent conduct as opposed to reckless conduct, always creates difficulties in the application of such distinctions to facts. None the less, it seems undesirable that in New South Wales and Victoria, defendant 'good Samaritans' are exempt from liability no matter how

include where and by whom a risk warning was given, the content of the warning, what other representations were made, whether the plaintiff is an 'incapable' person, etc.

50 Outside the context of personal injuries, however, liability was imposed in *Zadow v Scanlon* (1984) 2 MVR 43 (SA SC) (and compare *Cowell v Madden* (1991) 15 MVR 114 (Vic AD)).

51 This is the description given to such class of persons in most of the Acts.

52 Above n 2, pp 107–8.

53 See Villa, above n 1, pp 276–7.

54 See Qld Act s 26. The protected entities are prescribed by regulation, and essentially are rescue and emergency services organisations. Medical personnel providing emergency care without fee or reward are protected under s 15 of the Law Reform Act 1995 (Qld).

55 Contrast the ACT Act s 5: 'honestly'.

56 NSW Act s 56.

57 Vic Act s 31B.

58 ACT Act s 5; Qld Act s 26; SA Act s 74(2); WA Act s 5AD.

59 In Qld, one could argue that an intoxicated or drug affected rescuer may be taken to have behaved recklessly in such circumstances, though being intoxicated and behaving recklessly are not, of course, the same thing. In some jurisdictions, the term 'drugs' is given a limited definition of 'recreational drugs', in others the term is more widely defined.

60 The NSW Act expressly denies the immunity in such circumstances: s 58(1). Other jurisdictions do not deal with the point.

grossly negligent their conduct. This could mean that in Victoria, a seriously intoxicated person who causes an accident, causing minor injury to another (say, by pushing them into a plate glass window), but who then recklessly 'assists' the injured person in a way that causes serious injury, is exempt from any liability in relation to the further injuries.

'Volunteers'⁶¹

All jurisdictions provide protections for persons who act in 'good faith'⁶² while performing community work for community organisations on a voluntary basis, that is, without remuneration. In South Australia and Western Australia, this protection is contained in separate legislation, the Volunteers Protection Act 2001 (SA) and the Volunteers (Protection from Liability) Act 2002 (WA).⁶³ The terms 'community work' and 'community organisations' are broadly defined to encompass a wide range of charitable, sporting, cultural, political and conservation activities. However, the immunity is restricted to volunteers working for *incorporated* community organisations, as well as statutory authorities, local councils and like bodies. This is a significant limitation on the immunity. Further, the scope of the immunity is largely uniform throughout the jurisdictions in relation to a range of other matters. All jurisdictions do not extend the immunity to motor vehicle accidents (covered by compulsory third party insurance),⁶⁴ or where the volunteer has acted outside the scope of the authorised community activities or contrary to instructions,⁶⁵ or was impaired by drugs or alcohol.⁶⁶ All jurisdictions other than Queensland do not extend the immunity to liability for defamation.⁶⁷ It is odd that the Qld Act potentially provides immunity to volunteers who defame others in the course of their community work, especially since such work includes political activities. One might argue that the Qld Act as a whole is not intended to apply to defamation, but this argument is unlikely to succeed. Section 4(1) states that the Act applies to any civil claim for damages for harm. Harm is defined broadly as 'any kind' of harm, including economic loss. Even if harm to reputation does not lead to

61 See M McGregor-Lowndes and L Nguyen, 'Volunteers and the new tort law reform' (2005) 13 *TLJ* 41 — Ed.

62 Under the ACT Act s 8(1): 'honestly'.

63 In other jurisdictions, the relevant provisions are found as follows: ACT Act Pt 2.2; NSW Act Pt 9; NT Act s 7; Qld Act Ch 2 Pt 3 Div 2; Tas Act Pt X; Vic Act Pt IX.

64 See ACT Act s 8(2)(a); NSW Act s 66; Qld Act s 44; Volunteers Protection Act 2001 (SA) s 4(1)(a); Tas Act s 47(2); Vic Act s 38(2)(b); Volunteers (Protection from Liability) Act 2002 (WA) s 6(2).

65 ACT Act s 8(2)(d); NSW Act s 64; NT Act s 7(2)(a); Qld Act s 42; Volunteers Protection Act 2001 (SA) s 4(3); Tas Act s 47(3); Vic Act s 38(1)(a); Volunteers (Protection from Liability) Act 2002 (WA) s 6(3)(a).

66 There are differences among the jurisdictions as to whether the term 'drugs' is defined as only recreational drugs or any drugs. Recreational drugs: ACT Act s 8(2)(c); Volunteers Protection Act 2001 (SA) s 4(2); Tas Act s 47(3); Volunteers (Protection from Liability) Act 2002 (WA) s 6(3)(b). Any drugs voluntarily consumed: NSW Act s 63; NT Act s 7(2)(b); Qld Act s 41; Vic Act s 38(1)(b).

67 ACT Act s 8(2)(b); NSW Act s 59(1); NT Act only applies to personal injuries; Volunteers Protection Act 2001 (SA) s 4(1)(b); Tas Act s 47(2); Vic Act s 38(2)(a); Volunteers (Protection from Liability) Act 2002 (WA) s 6(2).

economic loss, the inclusive nature of the definition makes it difficult to argue that harm to reputation is not encompassed by the definition.

One difference among the various jurisdictions is that New South Wales and Queensland have express provisions denying volunteers' immunity if their act or omission occurred while they were engaged in criminal activities.⁶⁸ This may not prove to be a significant difference, however, since in most cases one would assume that acts or omissions occurring in the context of committing an offence would not be seen to have been carried out in 'good faith'.

There are, however, some significant differences among the Acts. The first significant difference is that in the ACT and South Australia, the immunity extends only to acts or omissions done in good faith and without recklessness.⁶⁹ The other jurisdictions require merely 'good faith' conduct.⁷⁰ Oddly, this means that in Queensland and Western Australia, there is divergence between the protection of 'good Samaritans' and 'volunteers', the latter being entitled to act recklessly in the course of performing their community work, whereas the former (who, one should note, are acting in a state of emergency), are not.

Perhaps the most significant difference arises from the divergent policy choices made by the legislatures in each jurisdiction as to vicarious liability. In all jurisdictions other than New South Wales and Queensland, the liability that would attach to the volunteer were it not for the immunity, instead attaches to the community organisation itself.⁷¹ Obviously, the intention is that community organisations should obtain insurance when organising public functions. This would appear to be an expansion of common law principles of vicarious liability, which does not normally extend to volunteers,⁷² unless perhaps they are agents who have been authorised or directed to perform an act that is tortious⁷³ or else have been held out as having such authority.⁷⁴ Alternatively, such community organisations would only be liable if they were subject to a non-delegable duty, the performance of which had been delegated to volunteers.

The approach adopted in the NSW Act and Qld Act is different. They contain no such shifting of liability to community organisations. Indeed, the NSW Act expressly provides in s 3C that: 'Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.' The Qld Act leaves the whole issue of vicarious liability open; presumably, common

68 See NSW Act s 62; Qld Act s 40. These sections are headed 'criminal acts', though the sections themselves refer merely to conduct that constitutes an 'offence'.

69 ACT Act s 8(1) ('honestly'); Volunteers Protection Act 2001 (SA) s 4; see also the NT Act s 7(1).

70 NSW Act s 61; Qld Act s 39; Tas Act s 47(1); Vic Act s 37; Volunteers (Protection from Liability) Act 2002 (WA) s 6(1).

71 ACT Act s 9; NT Act s 7(3); Volunteers Protection Act 2001 (SA) s 5(1); Tas Act s 48; Vic Act s 37(2); Volunteers (Protection from Liability) Act 2002 (WA) s 7(1).

72 Compare *Scott v Davis* (2000) 204 CLR 333; 175 ALR 217, and *Gutman v McFall* [2004] NSWCA 378 (unreported, 22 October 2004, BC200407028).

73 See generally P S Atiyah, *Vicarious Liability in the Law of Torts*, Butterworths, London, 1967, Ch 27.

74 Compare R P Balkin and J L R Davis, *Law of Torts*, 3rd ed, LexisNexis Butterworths, Sydney, 2004, at [26.11]–[26.14].

law principles would determine whether a community organisation is or is not vicariously liable for a volunteer's conduct, and common law principles would also need to be applied to determine whether such vicarious liability survives an express immunity granted to the principal actor.⁷⁵ Both the NSW Act and Qld Act do, however, exclude any immunity in circumstances in which the volunteers' liability is one required by law to be insured against.⁷⁶

'Road authorities'

In 2001 in *Brodie v Singleton Shire Council*,⁷⁷ the High Court by a four to three majority overturned well-established authority exempting public authorities from liability arising from omissions in failing to perform their roles as highway authorities, to repair and maintain roads. The High Court reversed this position, deciding that whether a highway authority owed a duty to take positive steps to maintain and repair roads should be determined according to ordinary negligence principles. Legislatures in all jurisdictions other than the Northern Territory⁷⁸ have reinstated the immunity. (This immunity sits alongside complex and difficult provisions dealing with liability of public authorities generally, the effect and meaning of which is briefly discussed below.) Section 45 of the NSW Act is indicative of this immunity:

Special non-feasance protection for roads authorities

- (1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

Roads and road work are generally widely defined. Provisions to similar effect are found in the ACT Act s 113, Qld Act s 37, Tas Act s 42, Road Management Act 2004 (Vic) s 102⁷⁹ and WA Act s 5Z.

The position in South Australia is different. Under s 42 of the SA Act, a road authority is not liable in tort for failure to maintain, repair or renew roads or for other acts to reduce the risks of harm that result from a failure to maintain, repair or renew roads, even if the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm. This sweeping immunity has potentially appalling consequences. For example, a road authority that becomes aware of the fact that a bridge is about to collapse is not answerable for the harm caused by such a collapse, even if there were reasonable, cheap and effective methods available to the authority to prevent the harm, which any reasonable authority would have taken (such as by closing the bridge, making emergency repairs, etc).

Apart from definitional difficulties in relation to the various terms used,

⁷⁵ See also Douglas, Mullins and Grant, above n 7, p 69 [39.2].

⁷⁶ See NSW Act s 65; Qld Act s 43.

⁷⁷ (2001) 206 CLR 512; 180 ALR 145.

⁷⁸ Presumably, this is the result of the no-fault motor vehicle accident compensation scheme in that jurisdiction, which means that there is no real incentive for persons involved, say, in a single vehicle accident, to seek to find a potentially blameworthy defendant such as a road authority.

⁷⁹ More generally, see Pt 6. This Part replaces provisions contained in the Transport (Highway Rule) Act 2002 (Vic).

which will no doubt plague the operation of all these provisions, there is one other difficulty in relation to the immunity. This arises from the scope of the operation of the relevant parts of at least some of the Acts. In the ACT Act and NSW Act,⁸⁰ the road authority immunity provisions are contained in chapters or parts that are said to apply as follows (taking the NSW Act s 40):

Application of Part

- (1) This Part applies to civil liability in tort.
- (2) This Part extends to any such liability even if the damages are sought in an action for breach of contract or any other action.⁸¹

This is a meaningless section. If liability is in tort, what can subs (2) possibly mean when it states that the part extends to 'any *such* liability' even if damages are sought in contract etc? If a claim is made for breach of contract, then such damages are not being sought in tort, and there is not necessarily 'any such' tort liability at all. (Indeed, a plaintiff would presumably avoid pleading tort as an alternative so as to avoid the possible assertion that the contract claim is in fact a tort claim.) If subs (1) is intended to mean liability in negligence (for failure to take care), and subs (2) extends the immunity to liability for such careless conduct even if brought in contract, the legislature could have readily said so (as indeed has been done in other provisions, for example, s 5A of the NSW Act). Is s 40 intended to apply even to claims for breach of express terms of a contract (where, for example, an authority has contracted to maintain a particular (say, private) road)? Logic would suggest not, because there is no 'such tort' liability to which the contract claim can be related back. But this argument suggests that subs (2) is meaningless and does not even prevent a claim in contract for breach of an implied duty of care. Alternatively, however, 'such liability' refers to 'civil liability', in which case subs (2) clearly does extend to contract claims irrespective of whether any liability in tort arises at all. If so, it may have surprisingly wide consequences, so that a plaintiff suing for breach of contract may have to rely on s 3A(2) of the NSW Act to save his or her claim (that section allows for parties to enter contracts in relation to matters to which the Act applies). Significantly, the ACT Act contains no similar provision.

The Queensland and Western Australian provisions are not as nonsensically drafted, but seemingly apply the immunity even to claims for breach of express terms of a contract (where, for example, an authority has contracted to maintain a particular (say, private) road). The Qld Act s 37(1) states that the immunity relates to liability 'in any legal proceeding'. One could argue, since the section only applies to an authority's functions 'as a road authority', that perhaps it does not apply to such authority when acting, say, as a private contractor. In any case, s 7(3) of the Act allows for parties to enter contracts in relation to matters to which the Act applies so that the express terms govern the issue. In Western Australia, however, s 5V(2) provides that Pt 1C of the Act applies to a 'claim for harm caused by the fault of a person even if the

⁸⁰ The problem does not arise in South Australia (the relevant part of the Act applies only to liability in tort: s 42), Tasmania (the relevant part of the Act applies only to 'breaches of duty' of care: s 36) or Victoria (Road Management Act 2004: s 99 applies to damages for negligence in tort, contract, under statute or otherwise).

⁸¹ See also ACT Act s 108.

damages are sought to be recovered in an action for breach of contract or any other action'. Unlike the position in Queensland and New South Wales (where any express contractual provisions governing the parties' rights and obligations are enforceable and the Acts simply do not apply), in Western Australia parties may only contract around the effect of provisions in the Act by expressly excluding the operation of parts of the Act. Consequently, parties contracting with road authorities to perform road maintenance work should, as a matter of caution, include in their contracts clauses expressly excluding the operation of the WA Act.

Liability of public authorities

All jurisdictions, other than South Australia and the Northern Territory, have passed complex provisions dealing with the liability of public authorities.⁸² Strictly speaking, these provisions do not generally provide immunity from suit to public authorities (mostly widely defined in each Act)⁸³ and a detailed consideration thereof is thus outside the scope of this article. Instead of providing immunity from liability, the Acts set out guidelines relevant to a determination of whether or not a public authority has breached a duty of care. For example, s 42 of the NSW Act provides:

Principles concerning resources, responsibilities etc of public or other authorities

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

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

Similar sections are contained in ACT Act s 110, Qld Act s 35, Tas Act s 38, Vic Act s 83 (not containing para (b)) and WA Act s 5W. In some jurisdictions, however, some limited immunities have been granted to public authorities. In the NSW Act s 43A and Qld Act s 36, liability cannot arise for the exercise of, or failure to exercise, 'special' statutory powers unless such exercise or failure to exercise was 'so unreasonable' that no authority could properly consider it reasonable. The ACT Act s 112, NSW Act s 44 and Tas Act s 43 also provide that no liability arises for failure to exercise regulatory powers (to prohibit,

⁸² As to the difficulties arising from the scope of the relevant parts in the ACT Act and NSW Act, see the discussion of 'Road Authorities' above.

⁸³ The NSW Act s 40 and WA Act s 5U contain perhaps the widest definitions, eg, in s 40 of the NSW Act 'public authority' means the Crown, government departments, local councils, public authorities constituted under Acts of parliament, public officials and the like. Compare the ACT Act s 109; Qld Act s 34; Tas Act s 37; Vic Act s 79.

regulate or license conduct, for example) if the 'authority could not have been required to exercise the function in proceedings instituted by the plaintiff'. Obviously the precise meaning and operation of sections such as these, and how they interact with the other public authority provisions, is difficult to predict.

Disentitled plaintiffs

'Criminals'

All jurisdictions other than Victoria and Western Australia have passed specific no-duty provisions in relation to plaintiffs suffering harm while engaged in an 'indictable offence' (in most jurisdictions).⁸⁴ Perhaps surprisingly, the WA Act does not deal with the issue (thereby preserving the common law position). The Vic Act expressly preserves the common law (s 14F), but adds that courts should consider the plaintiff's illegal activity when determining whether a defendant has breached a duty of care. This probably does not add anything to the existing common law, under which courts would be required to consider whether a defendant's conduct was reasonable in the circumstances and such circumstances would include the plaintiff's conduct and whether a defendant owed a duty to safeguard the plaintiff against the dangers associated with any illegal conduct.⁸⁵

With the exception of New South Wales, discussed below, the burden of the disentitling provisions in each of the jurisdictions is similar. The person engaged in the illegal conduct is not to be awarded damages for harm where the conduct 'contributed materially to the risk of the harm suffered'.⁸⁶ In the ACT, Queensland and South Australia, a court may ignore the disentitling provision and award damages where failure to award damages would operate 'harshly and unjustly'.⁸⁷ In Tasmania, no such 'opt-out' provision exists.

In providing for a complete disentitlement (in Tasmania and New South Wales, discussed below) or else in the ACT, Queensland and South Australia in all circumstances other than in which such disentitlement would operate harshly and unjustly, the legislatures have significantly modified the existing common law. At common law, the courts consider the nature of a plaintiff's illegal activity as a factor in determining whether a duty of care exists at all and, if so, what standard of care is owed.⁸⁸ In circumstances of serious illegal activity, particularly where a plaintiff and defendant are engaged in a joint illegal enterprise, or where a criminal may be an unforeseeable plaintiff, no duty of care may thus arise at all.⁸⁹ Alternatively, a failure to take steps to safeguard against risks to a person engaged in serious criminal activity may

84 ACT Act s 94; NSW Act s 54 ('serious offence', being one punishable by six or more months' imprisonment); Qld Act s 45; SA Act s 43; Tas Act s 6 ('serious offence', being one punishable by more than six months' imprisonment).

85 Compare Davies and Malkin, above n 21, p 57. As the authors note, alternatively, such conduct might lead to a contributory negligence finding.

86 Qld Act s 45(1)(b). There are some differences among the jurisdictions as to precisely what types of 'harm' or 'damages' a plaintiff is precluded from recovering.

87 Qld Act s 45(2). Under the ACT Act s 94(2) and SA Act s 43(2), the circumstances must also be 'exceptional'.

88 See *Gala v Preston* (1991) 172 CLR 243; 100 ALR 29.

89 *Ibid.*

not be a breach of duty.⁹⁰ But there is no absolute bar against recovery on the part of plaintiffs engaged in criminal acts.⁹¹

The NSW provisions are more complex and more wide-ranging. Like the Tas Act, the NSW Act also fails to contain an 'opt-out' clause and, given the potential width of the immunity's operation, this could cause serious injustice. Further, the NSW Act also deals with 'offences' committed by mentally ill persons, disentitling such plaintiffs from recovering if their conduct would have constituted a serious offence but for their mental illness (s 54A). Finally, the NSW Act contains detailed sections dealing with acts of 'self-defence' on the part of defendants. A detailed consideration of these provisions is outside the scope of this article, but these involve significant changes to the common law: for example, a plaintiff is precluded from recovering from a defendant acting in self-defence⁹² or in defence of property⁹³ even where such defendant's response was 'not reasonable' (s 53).⁹⁴ Sections 54A and 53 appear to have been introduced as a direct response to public outcry over the decision in *Presland v Hunter Area Health Service*⁹⁵ and the trial court's decision in *Peakhurst Inn Pty Ltd v Fox*⁹⁶ respectively. In the former case, the plaintiff successfully sued for damages arising from his incarceration for killing a person while mentally ill, on the basis that the defendant should not have released the plaintiff from a psychiatric institution shortly prior to the killing. In the latter case, the trial judge awarded damages to a trespasser on the defendant's premises, who was seriously beaten by the defendant. (The Court of Appeal remitted the matter for retrial on the basis of evidentiary doubts about some of the findings of fact. At the new trial, the plaintiff was again successful.)⁹⁷ Undeniably, there are legitimate criticisms one can make about the merits of decisions such as *Presland* (but not, I would suggest, in relation to *Peakhurst*, on the facts as found by the trial judge). None the less, the legislative response has been to enact provisions that establish general immunities that go beyond merely addressing the 'mischief' that motivated those provisions, potentially applying far more broadly.

Interestingly, in one respect, the NSW Act may have expanded a criminal plaintiff's capacity to sue and a defendant's corresponding liability. Section 54(2) provides that the section (precluding criminals from recovering damages) does not apply to a defendant whose conduct that caused the harm 'constitutes an offence (whether or not a serious offence)'. It could be argued

90 The content of an occupier's duty to a trespasser, for example, may be very limited, requiring only minimal regard for the safety of the trespasser.

91 *Henwood v Municipal Tramways Trusts* (1938) 60 CLR 438 at 446 per Latham CJ.

92 Contrast the position at common law, eg, in *Fontin v Katapodis* (1962) 108 CLR 177; [1963] ALR 582.

93 Contrast the position at common law, eg, in *Reville v Newbery* [1996] QB 567; [1996] 1 All ER 291 and *Hackshaw v Shaw* (1984) 155 CLR 614; 56 ALR 417.

94 The justification for such a wide-ranging defence is dubious. Section 53 goes on to state that this will not be the case where a court is satisfied that the circumstances are exceptional and a failure to award damages would be harsh and unjust. Since clearly, however, unreasonable acts of a defendant are prima facie protected, a plaintiff seeking to rely on this proviso must show something more than just 'unreasonable' conduct.

95 [2003] NSWSC 754 (unreported, Adams J, 19 August 2003, BC200304853).

96 [2004] NSWCA 74 (unreported, 8 April 2004 BC200401821).

97 M Pelly, 'Teenage intruder wins damages', *Sydney Morning Herald*, 18 December 2004.

that this may modify the common law no-duty position applying in circumstances of joint illegal enterprises. In *Gala v Preston*,⁹⁸ the High Court held that where plaintiff and defendant were engaged in serious and high risk joint illegal enterprise, no duty of care could arise. Under s 54(2) the defendant's own illegal conduct causing the harm precludes such defendant from relying on the disentitling provision, at least supporting an argument that liability should thus be imposed.⁹⁹

'Intoxicated plaintiffs'

Unlike the position in relation to criminal conduct, only two jurisdictions, New South Wales and Queensland,¹⁰⁰ have introduced 'no-duty' disentitling provisions in relation to intoxicated plaintiffs. (All jurisdictions except Victoria, however, have introduced (rebuttable) presumptions of contributory negligence that arise in circumstances where a plaintiff is intoxicated at the time of an accident.)¹⁰¹ Both the NSW Act s 49 and Qld Act s 46 are similarly worded as to the effect of intoxication on duty of care (s 49 and s 46 respectively), but the NSW Act contains additional provisions going much further, adding to the potential for harsh outcomes.

Section 49 of the NSW Act provides:

Effect of intoxication on duty and standard of care

- (1) The following principles apply in connection with the effect that a person's intoxication has on the duty and standard of care that the person is owed:
 - (a) in determining whether a duty of care arises, it is not relevant to consider the possibility or likelihood that a person may be intoxicated or that a person who is intoxicated may be exposed to increased risk because the person's capacity to exercise reasonable care and skill is impaired as a result of being intoxicated,
 - (b) a person is not owed a duty of care merely because the person is intoxicated,
 - (c) the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person.¹⁰²

This section appears to be an attempt to reinforce the common law position

⁹⁸ (1991) 172 CLR 243; 100 ALR 29.

⁹⁹ Compare the SA Act s 43(4)(c), which expressly preserves the common law position as to joint illegal enterprises.

¹⁰⁰ Douglas, Mullins and Grant, above n 7, p 78 [46.2], perceive the Qld Act s 46 as a 'political response to community concerns' about awards of damages to persons who are grossly intoxicated at the time of an incident, citing the jury's decision at the trial of *Borland v Makauskas* [2000] QCA 521 (unreported, 22 December 2000, BC200008025), SLR B6/2001 (12 October 2001) as an example; one wonders, since that decision was overturned on appeal, why the law is perceived to be in need of reform?

¹⁰¹ ACT Act s 95 (and see also s 96, relating to reliance by the plaintiff on an intoxicated defendant); SA Act ss 46, 48 (and see also s 47); Tas Act Pt 2; WA Act s 5L. The Vic Act merely requires courts to consider the issue of a plaintiff's intoxication when considering a defendant's breach of duty (s 14G), and common law principles on contributory negligence apply.

¹⁰² Compare the very similarly worded Qld Act s 46, subs (2) of which, however, states that 'subsection (1) does not affect liability arising out of conduct happening on licensed premises'.

as established by cases such as *Romeo v Conservation Commission (NT)*,¹⁰³ in which the High Court held that a defendant did not need to take special protective measures to safeguard visitors to a recreational park from an obvious risk of falling off a cliff, even if some of the visitors to the park may foreseeably have been intoxicated and thus unable to perceive the risk. This section does not, strictly speaking, create an absolute no-duty rule. Instead, it merely modifies the standard of care owed by defendants in a way that makes it more difficult for intoxicated plaintiffs to plead that regard was to be had for their (presumably foreseeable) state of intoxication by the defendants when determining how they should act.

Unlike the Qld Act, however, the NSW Act also contains the following section:

50 No recovery where person intoxicated

- (1) This section applies when it is established that the person whose death, injury or damage is the subject of proceedings for the recovery of damages was at the time of the act or omission that caused the death, injury or damage intoxicated to the extent that the person's capacity to exercise reasonable care and skill was impaired.
- (2) A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.
- (3) If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.
- (4) When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.
- (5) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.

This is one of the most problematic and potentially unjust provisions of all the tort 'reform' legislation. Underlying it is a harsh and misconceived notion of self-responsibility that suggests that once someone has decided to consume alcohol or some other intoxicant, they must bear all the causally connected consequences of such intoxication irrespective of how negligent and outrageous a defendant's conduct towards the plaintiff. Subsection (2) appears to mandate that, provided the intoxication is a 'but for' causative event, such that if the plaintiff had not been intoxicated the accident would not have happened, the defendant is absolved from all responsibility for his or her conduct, even if such conduct is also a causative factor contributing to the accident. To take an example: a mildly intoxicated plaintiff falls off a boat and into the water. The seriously intoxicated defendant driver of the boat runs over the plaintiff causing serious injury. Such a defendant will not be liable, even

103 (1998) 192 CLR 431; 151 ALR 263.

if driving with gross negligence, if it can be shown that the intoxication caused the plaintiff to stumble (eg, by fooling around on the side of the boat). For in that case, the death or injury would not have occurred, had the plaintiff not been intoxicated. Such a conclusion would presumably follow even if the drunk defendant weaved the boat around the water for 10 minutes in a vain attempt to rescue the plaintiff before running over him or her.

Further, subs (2) is problematic in that it requires a plaintiff to show that the injury was 'likely' to have occurred if the plaintiff had not been intoxicated. Does this replace a 'more probable than not' onus of proof with some higher, more difficult test of probability (such as 'highly probable')? Finally, subs (3) raises a presumption of contributory negligence wherever a plaintiff was intoxicated, unless such intoxication 'did not contribute in any way to the . . . injury'. The effect of this section is to reverse the onus of proof (the defendant need not raise the defence of contributory negligence, but merely needs to prove the plaintiff's intoxication) and sets it at such a high standard that it will be difficult to discharge.¹⁰⁴

Dangerous recreational activities

Plaintiffs engaged in 'dangerous recreational activities' are disentitled from bringing actions for harm caused by the materialisation of an obvious risk of that activity in four States: NSW Act s 5L, Qld Act s 19, Tas Act s 20, WA Act s 5H. The definitions of 'dangerous recreational activity' differ only slightly from State to State, but are very wide with potentially unforeseen consequences: essentially, any sport or leisure activity involving a significant risk of physical harm is included. The term 'obvious risk' is also widely defined, as any risks obvious to a 'reasonable person in the position of' the plaintiff.¹⁰⁵ Only the Qld Act s 13 has sought to clarify precisely what is included within this term. Subsection (5) provides that:

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

There are a number of difficulties with the precise meaning of 'obvious risk',¹⁰⁶ one of which is whether the concept includes risks that arise because of negligent conduct of potential defendants of which persons engaged in recreational activities are well aware. For example, assuming that cycling is a 'dangerous recreational activity', one risk of which cyclists are well aware is that of inattentive drivers of parked vehicles opening the car door without looking to see whether cyclists are passing to their right. Does the fact that cyclists are generally attentive to this risk make it an 'obvious' one? (The example may be hypothetical, since the Civil Liability Acts generally do not apply to motor vehicle accidents covered by third party insurance, which such an incident may be.) The potential consequences of these disentitling sections are startling; and the legal position is complicated by the interaction of these provisions with sections of the various Acts dealing with 'obvious risks' more

¹⁰⁴ Compare Davies and Malkin, above n 21, p 137.

¹⁰⁵ NSW Act s 5F, Tas Act s 15, WA Act s 5F.

¹⁰⁶ See Dietrich, above n 47, at 258.

generally, risk warnings and contractual waivers of liability by service providers, matters the subject of a previous article.¹⁰⁷

Parents of 'unplanned' children

After the High Court's decision in *Cattanach v Melchior*,¹⁰⁸ deciding that the parents of a child born as a result of the negligent provision of sterilisation services and advice by a medical practitioner were entitled to damages to cover the cost of raising such a child, three legislatures quickly proceeded to introduce legislation to overturn the effect of that decision. Such a knee-jerk response was undesirable; the majority's decision in *Cattanach*, though controversial, seems to be nothing other than a straightforward application of general negligence principles.¹⁰⁹ The conclusion that raising children involves significant economic burdens (even if the non-economic benefits may be substantial) is difficult to refute. Indeed, I venture the view that the minority judgments' appeal to vaguely articulated assumptions about family and moral values¹¹⁰ and the undesirability of measuring the cost of raising children in economic terms (and that this amounts to a 'commodification' of children)¹¹¹ is nothing other than 'judicial activism' subverting basic tort principles.¹¹² Leaving aside, however, differences of opinion as to the merits of the need to overturn *Cattanach v Melchior*, there are significant differences between the three States' responses.

The Qld Act s 49A is very specifically drafted to deal with the narrow issue raised by *Cattanach*. It applies to 'procedures to effect . . . sterilisation' and breaches of duty (to take reasonable care) in advising about, or performing, such procedures. In such case, 'a court cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child' (subs (2)). Section 49B is to the same effect in relation to 'contraceptive' procedures. One would assume that these sections do not apply to a claim for damages arising from a failed abortion or from a failure to detect a pregnancy at an early stage.¹¹³ The SA Act s 67, though drafted very differently from the Qld Act, is similarly limited in its focus on negligent conduct causing the conception of a child. It does, however, expressly apply to negligent acts in performing an abortion and also includes claims based on

107 See Dietrich, above n 47.

108 (2003) 215 CLR 1; 199 ALR 131. See also J Seymour, '*Cattanach v Melchior*: Legal principles and public policy' (2003) 11 *TLJ* 208.

109 See, eg, B Golder, 'From *McFarlane* to *Melchior* and beyond: Love, sex, money and commodification in the Anglo-Australian law of torts' (2004) 12 *TLJ* 128 at 129, who says *McFarlane v Tayside Health Board* [2000] 2 AC 59; [1999] 4 All ER 961, in which the House of Lords reached the opposite conclusion to that of the majority in *Cattanach*, overturns 'seemingly unassailable (and orthodox) tortious principles'. See also Seymour, above n 108, at 215–17.

110 As Callinan J, in the majority, noted, the arguments against liability are based on 'emotional and moral values and perceptions of what public policy is, or should be' (2003) 215 CLR 1; 199 ALR 131 at [292]. Cf K Burns, 'The way the world is: Social facts in High Court negligence cases' (2004) 12 *TLJ* 215 at 231–7.

111 See (2003) 215 CLR 1; 199 ALR 131 at [261] per Hayne J, [353] per Heydon J.

112 See the discussion in Golder, above n 109, of some of the gender-biased assumptions contained in the judgments in *Cattanach*.

113 See *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47.

innocent misrepresentations resulting in the conception of, or failure to abort, a child.

The NSW Act takes a much broader approach, the full implications of which are difficult to contemplate. It applies to any civil claims for damages for the birth of a child, in tort, contract, under statute or otherwise (s 70(1)), but not to claims for personal injuries sustained by a child prenatally or during birth (s 70(2)). Section 71 goes on to provide:

Limitation of the award of damages for the birth of a child

- (1) In any proceedings involving a claim for the birth of a child to which this Part applies, the court cannot award damages for economic loss for:
 - (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or
 - (b) any loss of earnings by the claimant while the claimant rears or maintains the child.
- (2) Subsection (1)(a) does not preclude the recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability that arise by reason of the disability.

The NSW Act is so all encompassing that, presumably, it would apply to claims based on fraudulent misrepresentations about the effectiveness of particular sterilisation procedures (where, for example, a charlatan demands large sums of money to perform some such procedure). Further, it would presumably preclude a claim for breach of an express term of a contract (entered into by a prospective father for example) to pay for child rearing costs should a child be born to a woman, were it not for the general provision in s 3A(2) allowing contractual rights to be enforced. The existence of s 3A does, however, also raise a possible argument to circumvent the effect of s 71. If a contract between a doctor and patient contains an express term (such as an oral statement as to the effectiveness of the surgery) that guarantees the particular outcome of a sterilisation procedure ('you will be incapable of getting pregnant'), could the patient sue for breach of such an express term? Would the damages flowing from such breach include the costs of child-raising and, if so, would s 71 have any application?

Conclusion

The Civil Liability Acts have responded to the torts and insurance 'crisis' by significantly modifying the common law of torts and, specifically, the law of negligence and personal injury damages. The gist of the Acts is to limit liability of defendants by expanding defences, narrowing liability rules and capping damages awards. A significant aspect of this 'reform' agenda has been to identify what are perceived to be deserving defendants, or undeserving plaintiffs, and creating general immunities from liability to protect such defendants or disentitle such plaintiffs.

In the author's view, many of these changes are retrograde steps. Like historical immunities which have long since been swept aside or are in the process of being swept aside, there is very little rationale for many of the immunities or disentitling situations created by the legislation. Some of the 'no-duty' situations in the Civil Liability Acts appear to be driven as much by prejudice as any coherent policy basis, often creating the potential for serious

injustice, at least when the drafting has been deliberately wide-ranging or just simply sloppy. This seems contrary to a cautious approach to the denial of basic common law rights, that such a taking away of rights from plaintiffs should not occur unless clearly justified and only in narrow terms that are geared towards a particular mischief.

To the extent that it is possible to draw any such general conclusions, the NSW Act appears to be the least thoughtfully drafted of all the Acts. It takes the widest approach on most issues, one senses without any real understanding of the possible consequences. Even if some of the provisions were motivated by (in some cases) legitimate public concerns about the justice (and social consequences) of decisions reached by courts on the basis of existing principles,¹¹⁴ the legislative response has been disproportionate or poorly thought through. The approach of non-restraint that underlies the NSW Act is worrying and suggests that the populist politics that accompanied the 'torts crisis' has infiltrated the drafting process. Unthinking sloganeering is evident, that 'criminals and drunks should not be able to sue', for example. It will be some time before the full (most likely harsh) impact of some of these provisions will be realised.¹¹⁵

114 See text after n 94.

115 Cf the Honourable J J Spigelman AC, 'The new liability structure in Australia — Swiss Re liability conference', 14 September 2004 <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_140904> (accessed 11 October 2004).