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Liability for personal injuries arising from recreational services: The interaction of contract, tort, State legislation and the Trade Practices Act and the resultant mess

Joachim Dietrich[*]

Recent changes to the Trade Practices Act and to State tort law regimes have significantly altered the law on liability arising from personal injury incurred in the course of participation in recreational services. In particular, where a service provider seeks to waive liability for negligence and breach of contract, the interaction between the TPA, the common law of contract and torts, and State legislation, has led to excessive complexity. In the context of recreational services, the article suggests that recent 'tort reforms' are a failure according to the criteria of consistency and simplicity.

1. Introduction

There has been a significant sea-change in Australian torts law over the last two years or so as a raft of 'reforms' have been enacted by State and federal parliaments. The driving force behind these developments has been a public liability insurance 'crisis', in the form of dramatically rising insurance premiums and, in relation to some activities, liability insurance being unobtainable altogether. Widely held public opinion, fuelled by insurance industry claims, has laid the blame for such 'crisis' on the torts system and, specifically, on (i) increasing numbers of claims and a more litigious society generally (with claims often being made by plaintiffs who are perceived to be 'undeserving' in the sense of being largely responsible for their own harms); (ii) a ready willingness by courts to find negligence on the part of defendants and; (iii) excessively 'generous' tort damages awards.[1] In response to this highly politically-charged debate, Commonwealth and State ministers set up the Negligence Review Panel, chaired by Justice Ipp, to inquire into the problem and suggest solutions.[2] The final report of the panel (the Ipp Report) recommended numerous reforms to the law governing personal injury claims. Since then (and, indeed, even before the final report) many changes to the law have been proposed and introduced into legislatures. Some of these proposals have already become law.

* Faculty of Law, ANU. I would like to thank Professor Jim Davis for his ideas and input in the course of our discussions of this topic and for his comments on an earlier draft. I would also like to thank the anonymous referee for drawing my attention to a number of helpful cases.

1 Compare the perceived causes of the torts law problems identified by the Commonwealth of Australia, *Review of the Law of Negligence Final Report*, October 2002, p 25, § 1.6. The report can be accessed at <revofneg.treasury.gov.au> (the Ipp Report). This perception is perhaps ironic given that since before the 'insurance crisis' there has been an apparent change in sentiment in the High Court in its approach to tort law, with a trend towards more pro-defendant decisions. See H Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford Uni Cth L Jnl* 95.

2 Ipp Report, ibid.

The purpose of this article is to consider only one focus of the legislative changes, namely, personal injuries (or death) arising in the course of participation in recreational services. In particular, the focus will be on cases in which 'recreational' service providers seek to incorporate a waiver clause into the contract of service, whereby participants waive their rights to sue for personal injury damages for breach of contract and negligence.

At least two factors appear to have driven calls for reforms to allow operators of recreation businesses to restrict their liability and, conversely, for participants in such activities to take responsibility for their own actions and any consequent injuries. First, a number of high profile torts cases, in which plaintiffs engaging in inherently risky activities successfully sued for damages, received considerable media publicity.[3] Secondly, one manifestation of the insurance crisis has been increasing liability insurance premiums. From the period June 2001 to May 2002, for example, premium increases averaged 22%,[4] with some industries, such as outdoor sport and recreation, particularly hard hit, facing premium increases in the range of 100–500%.[5] As a result, it has been asserted, the survival of many small businesses is threatened, particularly in the tourism and recreation industry.[6] In response to the crisis, federal and State legislation has been passed, instituting significant changes to both tort law generally and changes to the law with a particular focus on recreational services.

At first blush, the focus of this article may seem unduly narrow, but it is an area of practical importance, given that many injuries occur in the course of sports and leisure activities, especially in a society in which adventure sports and tourism are becoming increasingly popular.[7] More importantly, however, a consideration of the law on recreational services will illustrate the disastrous state of affairs we have reached even before the ink is dry on much of the relevant legislation.[8] It will become evident that the interaction between the

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3 Eg, in *Swain v Waverley Municipal Council* (NSW SC, 13 May 2002, unreported) a body surfer successfully sued the council for failing to warn of the possibility of shifting sandbars under the water between the flags at an ocean beach. There was much media and political debate generated by the decision in New South Wales. The iconic status attained by the decision amongst the 'tort reform' lobby is ironic given that it was overturned on appeal: *Waverley Municipal Council v Swain* (2003) Aust Torts Reps 81-694. Interestingly, the original decision overturned by the Court of Appeal was a jury verdict.

4 Australian Competition and Consumer Commission, *Second insurance industry market pricing review*, September 2002, p viii (statistics available at <http://www.accc.gov.au>). Thanks to D Koc, *Public Liability Insurance 'Crisis': Fact or Fiction*, unpublished ANU Honours Thesis, 2002, for drawing my attention to this. The references in nn 5–6 below are also sourced from this thesis, pp 14–16.

5 Office of Small Business — Department of Industry, Tourism and Resources, *Submission to the Senate Economic References Committee Inquiry into the impact of public liability and professional indemnity insurance cost increases*, May 2002, p 4.

6 Trowbridge Consulting, *Public Liability Insurance — Practical Proposals for Reform*, 30 May 2002, at <http://www.trowbridge.com.au/>, p 4. Despite recent law reforms, the problem does not seem to have abated, with the continuing closure of small 'recreational' service businesses. See S Strutt, 'Tour Groups Forced Into Liability Wilderness', *Australian Financial Review*, 28 July 2003.

7 See, eg, the statistics cited by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145 at [62], that in 1995, 228,800 persons had sport or recreational activity related injuries in the month immediately prior to a health survey.

8 All States, except South Australia, Victoria and Western Australia have passed legislation

Trade Practices Act 1974 (Cth) (TPA), contract law, tort law and different State legislation operating in the context of injuries sustained by plaintiffs while participating in recreational services is complex; factual differences such as whether the plaintiff is a minor or adult, whether the defendant is a corporation or not, the State in which the recreational activity takes place and whether it is 'dangerous' or the risks which eventuated are 'obvious', will have significant impact upon a plaintiff's chances of success. Further, as will be seen below, legal complications new to tort litigation are set to arise, for example, whether State legislation is consistent with provisions of the TPA.

These consequences are ironic, given that the first recommendation of the Ipp Report was that its recommendations be incorporated 'in a single statute . . . to be enacted *in each* jurisdiction'.[9] This recommendation was based on the Ipp Report's 'unqualified' support for the aspiration of developing a 'consistent national approach . . . to bring the law in all Australian jurisdictions as far as possible into conformity'.[10] The enactment of the recommended provisions was aimed at achieving 'uniformity' and 'consistency'.[11] Not only were State legislatures to uniformly implement the proposals, it was also proposed in Recommendation 2 that:

> The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.[12]

With all due respect, even *if* (and it was a big *if*, given the controversial nature of the subject matter) the State legislatures adopted both these

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which implements a significant proportion of the Ipp Report recommendations. The various Acts are considered further below. Although the WA Civil Liability Amendment Bill 2003 (amending the Civil Liability Act 2002) has received only its second reading in the Legislative Council on 26 June, this article proceeds on the assumption that the legislation will be passed. It should be noted that the Tasmanian Civil Liability Amendment Act 2003 was assented to only on 4 July 2003. Victoria has passed the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002, which contains amendments to the Goods Act to similar effect to s 68B of the TPA, both of which are considered further below; and the Wrongs and Limitations of Actions Acts (Insurance Reform) Act 2003, which deals with some aspects of the Ipp Report but does not comprehensively implement the recommendations. South Australia has passed the Recreational Services (Limitation of Liability) Act 2002, which is relevant to this article. Although the Law Reform (Ipp Recommendations) Bill 2003 is before the SA Parliament, and contains a significant part of the Ipp Report recommendations, the Bill does not specifically deal with recreational services. Hence, unless otherwise noted below, the Bill will not be considered. At the time of writing, the Australian Capital Territory and the Northern Territory have not passed legislation implementing the bulk of the Ipp Report recommendations. (The Personal Injuries (Civil Claims) Act 2003 (NT) is essentially procedural and the Personal Injuries (Liabilities and Damages) Act 2003 (NT) only deals in part with reforms which are the subject of the Ipp Report's recommendations). I do not propose to consider the position in the Territories: the law relating to recreational services is complex enough with a focus on seven jurisdictions. In any case, the relevant law of the Territories may be simpler, given that the TPA applies to all contracts entered into in the course of trade and commerce within those jurisdictions.

9 Ipp Report, above n 1, Recommendation 1, p 1.

10 Ibid, p 26.

11 Ibid p 35.

12 Ibid, p 1, Recommendation 2.

recommendations, it was always a doubtful, even misconceived, proposition that uniformity and consistency could be achieved by adopting Recommendation 2. This is because of the complex interaction between common law, State legislation and the TPA; the combinations and permutations of which are labyrinthine. This is borne out by the discussion of the law governing recreational services that is the subject of this article. In any case, as it turns out, the States have not uniformly adopted the Ipp Report's recommendations: there are considerable differences between the various Acts passed by the States, some seemingly minor, others significant. The result of the 'reform' process put in place by the Ipp Report, it is suggested, is a failure according to the criteria of consistency and simplicity, at least in relation to recreational services. Complexity is the only certainty; more litigation the only certain consequence. Whether this conclusion is also valid for the reform package as a whole remains to be seen.

I will commence with a consideration of the background to personal injury claims provided by the TPA, where that Act is applicable, and the recent amendments to that Act in the context of recreational services.

2. Cases in which the TPA applies: The operation of s 74 and recent reforms

A person injured in the course of recreational activities may be able to sue the defendant provider of such services either in negligence or for breach of contract. In relation to the latter, such a claim is possible either for breach of an express term of the contract[13] or else for breach of an implied term. In particular, where a plaintiff consumer (as defined in s 4B of the TPA)[14] enters a contract for the provision of recreational services with a defendant who is a 'corporation' (as defined in s 4, or whose conduct otherwise falls within the more extended operation of the TPA under s 6),[15] then s 74 implies a term into such contract that the services will be 'rendered with due care and skill' and that any materials supplied in connection with the service be 'reasonably fit for the purpose'.[16] (For convenience, I will refer merely to the obligation as one of 'due care and skill'.) Further, s 68 of the TPA provides that any term of a contract that seeks to exclude, restrict or modify the application of s 74 is void. Prior to the passage of s 68B of the TPA, there were no exceptions to this non-excludability.[17] Perhaps surprisingly, given the limited capacity of

13 Eg, *Mouritz v Hegedus* (WA FC, 19 April 1999, unreported, BC9901806); affirming the decision of *Hegedus v Mouritz* (1997) 18 SR (WA) 327.

14 The discussion which follows will proceed on the basis that service contracts are entered with a consumer.

15 For simplicity's sake, the term 'corporation' will be used throughout, but is intended to include non-corporate defendants whose conduct brings them within the operation of the TPA under s 6.

16 I am assuming for the purposes of this article that a failure to act with 'due care and skill' equates with carelessness, that is, a breach of duty, in tort. Hence, a breach of a duty of care will also be a breach of s 74 or its State equivalents, and vice versa.

17 See, however, s 68A which allows for terms of contracts limiting liability, in relation to services performed in breach of contract, to the resupply of the services or the costs of such resupply (s 68A (1)(b)), unless it is not 'fair or reasonable' for a corporation to rely on such term (ss (2)). I do not know whether such limitation clauses are in common use but where

suppliers of services to restrict their liability for breach of s 74, most claims for personal injury in the past generally appear to have been brought in negligence, rather than contract.[18] None the less, the presence of s 68 no doubt indirectly facilitates such tort claims: the absence of an enforceable exclusion clause in contracts of service also means that tort claims in negligence are not excluded. It should be added that Victoria, South Australia and Western Australia have equivalent provisions that are not limited in their application to corporations.[19]

Trade Practices Act amendments: s 68B

In December 2002, as part of the Federal Government's response to the perceived insurance and torts law 'crisis', s 68B became part of the TPA. The stated purpose of s 68B is to 'permit self-assumption of risk by individuals who choose to participate in inherently risky activities, and [to] allow them to waive their rights under the' TPA.[20] The section provides:

> **Limitation of liability in relation to supply of recreational services**
>
> (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;

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a plaintiff suffers personal injury as a result of the negligent performance of the services, I suggest that it would not be fair or reasonable to rely on such a limitation clause. Support for this view can be found in the operation of the Contracts Review Act 1980 (NSW). See, eg, *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (NSW CA, 18 December 1996, unreported, BC9606183), in which a wide-ranging exclusion clause excluding liability for personal injury sustained at a gymnasium was held to be 'unjust' in its width of operation when considered alongside the circumstances in which the contract had been entered. Contrast *Gowan v Hardie* (NSW CA, 18 November 1991, unreported, BC9102718), where the existence of a wide-ranging exclusion clause was not a factor that on its own rendered the contract 'unjust' in the circumstances (trainee parachutist suffering injury from defendants' negligence). See also the Unfair Contract Terms Act 1977 (UK), under which clauses excluding liability for negligence have been deemed 'unfair'. See E Macdonald, *Exclusion Clauses and Unfair Terms*, Butterworths, London, 1999, pp 198–9, 203–4.

18 See, eg, the very small number of cases listed under s 74 in R V Miller, *Miller's Annotated Trade Practices Act*, 24th ed, Lawbook Co, 2003, p 520. This is despite the fact that such negligence claims potentially at least could be met with a contractual waiver clause should such exist.

19 The equivalent sections to s 74 and s 68 are, respectively: Consumer Transactions Act 1972 (SA) ss 7 and 8; Goods Act 1958 (Vic) ss 91–92 and 95 (as a result of the Fair Trading Act Amendment Act 2003 (Vic), these provisions will be incorporated into the Fair Trading Act 1999 (Vic) and repealed from the Goods Act; the relevant sections are ss 32J–32JA and 32L–32LA); and Fair Trading Act 1987 (WA) ss 34 and 40. In New South Wales, although no ss 68 and 74 equivalent applies, a plaintiff may seek to overcome the effects of a waiver clause by relying on the Contracts Review Act 1980 (NSW), as in *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (NSW CA, 18 December 1996, unreported, BC9606183).

20 Explanatory Memorandum provided with the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth).

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.

'Recreational services' are defined for the purposes of the section as meaning services that consist of participation in:

(a) a sporting activity or a similar leisure-time pursuit; or
(b) any other activity that:
(i) involves a significant degree of physical exertion or physical risk; and
(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

For convenience, I will label any term that seeks to exclude, restrict or modify liability for breach of s 74 a waiver clause. A number of important points need to be made about the operation of this section and related matters.

First, the effect of s 68B is to allow for contractual waivers of liability for breaches of s 74. Clearly, s 68B envisages that defendant corporations may thus exclude liability for the negligent performance of services or supply of unfit goods. Such a waiver clause in most cases, if it successfully excludes liability for conduct amounting to a breach of s 74 (that is, the performance of a service without 'due care and skill') will also exclude liability for any tort claims in negligence; that is, for breach of a duty of care.[21] If a waiver clause is not effective in excluding liability for breach of s 74, either because it has not been validly incorporated into a contract, or is not interpreted to extend to an exclusion of liability for negligent conduct, then a claim for breach of the contract will be available against a defendant service provider who is a corporation. In such a case, even if the 'waiver' might still operate to exclude tort liability (with knowledge of the waiver providing evidence of a voluntary assumption of risk),[22] such operation is irrelevant given the plaintiff's right to

21 See above n 16; this assumption again is necessary for the sake of simplicity, but is probably in any case a reasonable one. Note, however, *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (NSW CA, 18 December 1996, No 40386/94, unreported, BC9606183), in which Mahoney P considered that a waiver clause successfully excluded liability in tort, but not for breach of an implied term of a contract to use reasonable care and skill to provide safe premises and equipment.

22 It has been held that a non-contractual 'waiver' may none the less take effect as a voluntary assumption of risk. See, eg, *Buckpitt v Oates* [1968] 1 All ER 1145 and *Bennett v Tugwell* [1971] 2 QB 267. If, however, knowledge of the waiver is evidence of contributory negligence on the part of the plaintiff, or there is otherwise contributorily negligent conduct, then the legislative abrogation of the High Court's decision in *Astley v Austrust Ltd* (1999) 197 CLR 1; 161 ALR 155 probably means that damages will be reduced even if the claim is brought in contract. The relevant State legislation provides, in effect, that a 'wrong' for which a reduction in damages may be made now includes breaches of contractual duties of care which are 'concurrent and co-extensive with' duties of care in tort. See Law Reform (Miscellaneous Provisions) Amendment Act 2001 (ACT); Law Reform (Miscellaneous Provisions) Amendment Act 2000 (NSW); Law Reform (Miscellaneous Provisions) Amendment Act 2001 (NT); Law Reform (Contributory Negligence) Amendment Act 2001 (Qld); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Tortfeasors and Contributory Negligence Amendment Act 2000 (Tas); Wrongs (Amendment) Act 2000 (Vic); and Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act (WA) 2001.

The reason for my doubts on this latter point stems from the possibility of such provisions being inconsistent with ss 68 and 74 of the TPA. See n 24 below, and text below at nn 44–51.

sue for breach of contract. This is so on the assumption that a failure to act with 'due care and skill' equates with carelessness, that is, a breach of duty, in torts.

Importantly, if the recreational service provider is a corporation and liability for breach of s 74 has not been waived, then this means that any State legislative provisions which seek to limit the liability of recreational service providers will also be ineffective. This follows from the inconsistency between State and federal statutory rights, a point which will be discussed further below. It suffices for now to say that the High Court in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*[23] has taken a broad approach to the question of inconsistency between the TPA and State legislation, such that any limitation of liability in State legislation will be inconsistent with the full (and under s 68 non-excludable) contractual liability for breach created by s 74.[24]

Hence, for example, although statutory provisions in New South Wales, Queensland, Tasmania and Western Australia all purport to exclude liability by defendant service providers to plaintiffs who have been injured as a result of the occurrence of an obvious risk while engaged in 'dangerous recreational activities',[25] such provisions would not limit liability if there was any lack of due care or skill on the part of the defendants amounting to a breach of s 74; that is, if plaintiffs can show negligence. The prospect of inconsistent rights arising from State and federal legislation is one of the minefield of complexities that must now be negotiated as a result of the 'reforms' relating to recreational services.

Secondly, although various State legislative provisions also deal with recreational services, and these will be discussed further below, the definitions adopted from State to State differ. The NSW and WA definitions appear wider than the TPA definitions, as they do not require there to be any element of physical exertion or risk in leisure pursuits;[26] the Tasmanian definition is similar in effect, albeit more brief in its wording;[27] the Victorian and SA definitions are identical to that of the TPA;[28] and s 18 of Queensland's Civil Liability Act 2003 only has a definition of dangerous recreational activities, meaning 'an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person'. Despite these different definitions, however, I will assume that the meaning of 'recreational services' in all jurisdictions is the same. There is, of course, no basis for such an assumption, since the different language adopted may well lead to significantly different outcomes; given the absence of any authority on the point, however, and more importantly, for the sake for simplicity, such an

23 (1994) 179 CLR 388; 120 ALR 440.

24 One interesting, indeed startling, possibility, however, is that the decision in *Wallis* will extend to override State limitations in the form of reduced damages as a result of contributory negligence and that the legislation cited above in n 22 might be held to be inconsistent with ss 68 and 74 where no effective waiver operates.

25 Some of the relevant provisions will be discussed further below.

26 Civil Liability Act 2002 (NSW) s 5K and Civil Liability Act 2002 (WA) s 5E respectively.

27 Civil Liability Act 2002 (Tas) s 19.

28 Goods Act 1954 (Vic) s 97A (and Fair Trading Act 1999 (Vic) s 32N; see above n 19) and Recreational Services (Limitation of Liability) Act 2002 (SA) s 3 (1) respectively (note also subs (2)).

assumption is necessary in order to proceed with the discussion below. Obviously, however, if such assumption proves incorrect then the complexities noted below are significantly multiplied.

Thirdly, the focus on leisure-time pursuits and activities for 'recreational enjoyment' may mean that some sporting and physical activities are not covered, for example, an exercise and sports regime prescribed by a physiotherapist as part of ongoing treatment and rehabilitation. This raises the question of whether the purpose for which a participant undertakes a physical activity (such as swimming) is a relevant consideration in defining recreational services. If so, the rights to compensation of several participants in the same activity could conceivably differ.

Fourthly, in allowing for contractual waivers, s 68B does not set out how such a waiver is to be effectively worded and incorporated into a service contract. Hence, it is the applicable common law principles of contract as to the incorporation of terms, valid waivers, and interpretation of such terms, to which one needs to turn. That is the topic for the next section.

Contractual waivers

It is outside the scope of this article to consider in detail the relevant contract principles governing waivers. Two preliminary points can be made quite briefly. First, the law as to the incorporation of exclusion clauses into contracts is not straightforward. Incorporation by notice (the 'ticket' cases) may be difficult, especially where the term is particularly harsh and oppressive.[29] Even where an ostensibly contractual document has been signed and there is a presumption that the terms thereof are binding (*L'Estrange v F Graucob Ltd*),[30] an exclusion clause may not be binding, or may not take effect to the full extent of its terms, if there has been any misrepresentation in relation to its effect or meaning,[31] as evidenced by the famous case of *Curtis v Chemical Cleaning & Dyeing Co*.[32] Secondly, even if the clause is part of the contract, the courts have traditionally taken a cautious approach to interpreting such clauses too widely, so that an exclusion clause may not be effective to exclude liability for negligence, or a serious breach of contract,[33] unless the words unambiguously encompass such conduct.

The discussion which follows is predicated on the assumption that a waiver clause has been successfully incorporated into a contract and that its wording

29 See, eg, *Interphoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] 2 QB 433 at 443.

30 [1934] 2 KB 394; [1934] All ER Rep 16. Compare *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661.

31 Though note the discussion below in relation to proposed amendments to the TPA concerning claims for personal injury under s 52.

32 [1951] 1 KB 805; [1951] 1 All ER 631.

33 See, eg, *Mouritz v Hegedus* [1999] WASCA 1061 (WA FC, 19 April 1999, unreported, BC9901806), a decision which must be questioned, however, because of its reference to 'fundamental breaches' of contract (see the discussion in Professor J Davis, 'Protecting the Providers of Recreational Services', unpublished paper delivered to the 'Insurance Law and Liability 2003' Conference, held at Sydney, March 2003, pp 11–13). Contrast the views of Mahoney P with those of Cole J as to the operation of the exclusion clause in *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (NSW CA, 18 December 1996, unreported, BC9606183); and compare *Neill v Fallon* (1995) Aust Torts Reports 81-321.

extends to excluding liability for the type of conduct in question. Even where this is the case, however (and the difficulties of making such a determination ought not to be underestimated), further difficulties arise. It is to these I now turn.

Minors

One complication that arises from the common law of contractual waivers is that minors are not generally bound by contracts they enter or which are entered (by parents or guardians) on their behalf.

At common law, a minor does not have capacity to contract unless the contract is one for *necessary* goods or (relevantly here) services and, further, even if the contract is for necessaries, such as a contract for transportation to and from work, the contract as a whole must be of benefit to the minor.[34] For example, in *Flower v London & North Western Railway Company*,[35] a necessary contract for transportation of an infant to and from work was none the less not binding upon him as it was detrimental; specifically, the contract had sought to exclude the liability of the railway company for any accident, injury or losses occasioned by the company, even by their negligence. In any case, it will be a rare situation where a contract for recreational services will be considered *necessary* unless, perhaps, it relates to the provision of educational holiday camps, or sports training, for example. Even if such a contract were considered for necessaries, the presence of exclusion clauses of the type foreshadowed by the TPA almost certainly renders the contract not one that as a whole is for the benefit of the minor. In New South Wales, the position under the Minors (Property and Contracts) Act 1970 would not appear to be different: although contracts generally beneficial to a minor are binding,[36] it is doubtful whether a service contract containing a wide-ranging exclusion clause would be so, especially where the services are of a recreational nature.

Even if a contract of (recreational) services is signed by a parent or guardian on the minor's behalf, it is not likely to be binding. The status of parent or guardian does not carry with it any power to act on the minor's behalf.[37] There appears to be little authority on the point, but Young J affirmed this position in *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd*.[38] Further, even though minors have power at common law (and under s 46 of the NSW Act) to appoint agents, the acts of such agents have no greater validity against the

34 See D J Harland, *The Law of Minors in Relation to Contract and Property*, Butterworths, Sydney, 1974, Ch 2, at [603]–[614]; and N C Seddon and M P Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 7th Aust ed, Butterworths, Sydney, 1997, at [17.13]–[17.16].

35 [1894] 2 QB 65. See also *Keays v Great Southern Railway Co* [1941] IR 534; *Harnedy v National Greyhound Racing Company Ltd* [1944] IR 160, and compare *Clements v London & North Western Railway Co* [1894] 2 QB 483, where the common law liability was validly excluded alongside provisions for no-fault insurance cover. In a case not dealing with exclusion clauses, *Fawcett v Smethurst* (1914) 84 LJKB 473, a term of a contract imposing strict liability for loss of a car in a (necessary) car hire contract rendered the contract too onerous and hence unenforceable.

36 See Seddon and Ellinghaus, above n 34, at [17.43]–[17.50].

37 See Harland, above n 34, at [201].

38 (1996) 131 FLR 447 at 456; 20 ACSR 67.

minor than they would have if the minor had acted on his or her own behalf.[39]

As a consequence of these principles, plaintiffs who are injured in the course of recreational services will be in a very different position depending on whether they are minors (or presumably, otherwise incapacitated) or adults. Contractual waivers will be binding against the latter, but not the former. However, even if a contract of service is not binding upon the minor, none the less the minor can sue for breach of such contract.[40] Whether this means a minor can also sue for breach of implied terms and continue to enjoy the protection of s 74, despite the presence of a waiver clause, however, is a doubtful proposition. It is likely the minor must either avoid the contract as a whole, or enforce it as whole.[41] Irrespective of whether a contract claim can be brought, however, a minor should be able to proceed with a *tort* claim by avoiding the contract containing the waiver clause.[42]

One way in which recreational service providers might seek to overcome these difficulties when dealing with minors is to require parents to sign an indemnity agreement. The terms of such an agreement would require the parents to indemnify the provider against any damages or losses arising from a claim by the minor against the provider. Obviously, if valid, such an indemnity could significantly reduce the incidence of litigation against service providers by minors. Although I am not aware of any Australian authority in point, one must question the validity of any such indemnity; I suggest it is contrary to public policy to deprive minors, in effect and for most practical purposes, of their legal rights by such a backdoor means. As far as I am aware, such indemnity agreements are not uncommonly used by recreational service providers and, no doubt, litigation on their validity will be forthcoming.[43]

Valid waivers under the TPA: The problem in South Australia, Victoria and Western Australia

South Australia, Victoria and Western Australia have provisions equivalent to s 74.[44] These provisions apply to all service contracts with consumers, whether the provider is a corporation or not. Hence, the State and federal provisions have an overlapping sphere of operation. To the extent that there is inconsistency between the State and federal legislation, the latter will prevail. Whether, however, there is an inconsistency in a given case is not an easy

39 Harland, above n 34, at [508]–[509].

40 Seddon and Ellinghaus, above n 34, at [17.34].

41 See Harland, above n 34, at [612]–[613].

42 Such a claim may be subject to State legislation limiting liability for recreational services discussed further below, as well as arguments based on *volenti* arising from the (non-contractually binding) waiver clause: see above n 22. In relation to the State legislation, however, some of the provisions limiting liability may not have as onerous an operation in relation to minors as with adults. For example, in a number of States plaintiffs are presumed to be aware of obvious risks (and thus defendants have no duty to warn of such risks) *unless* they can prove that they were not aware of the existence of the risk (eg, Civil Liability Act 2002 (Tas) s 16(1)). I would assume that such a subjective test would make it much easier for minors to overcome the presumption.

43 See, eg, the indemnity agreement for the 'Bondi Beach Cole Classic' surf lifesaving carnival, at <www.coleclassic.com/terms> and cl 22 of the Australian Olympic Team agreement, at <http://www.olympics.com.au/cp7/c9/webi/externaldocument/000534ad.pdf>.

44 See above n 19.

question. The problem arises because of legislation in all three States that allows recreational service providers to limit their liability for breach of the implied terms of due care and skill, but on different terms from those of the TPA. In Victoria, a recreational service provider may limit or exclude liability for breach of the implied term, but such waiver cannot be relied upon if the service provider's act or omission was done 'with reckless disregard . . . for the consequences of the act or omission'.[45] The WA provisions (yet to be passed) are similar.[46] In South Australia, a recreational service provider may modify the duty of care owed to a consumer[47] consistently with the undertaking of reasonable measures that the provider has set out in a registered code of practice governing the type of services.[48] As at 10 July 2003, no codes had been approved or draft codes submitted.

The problem which arises is this (to use the Victorian legislation as the example): what if a defendant corporation seeks to waive its liability for negligence for recreational services provided to a plaintiff in Victoria, but the plaintiff's injuries were sustained as a result of the defendant's 'reckless' conduct? Section 68B of the TPA would allow the defendant to exclude such liability but the Victorian legislation, which also governs, would not. Is there an inconsistency between the two provisions such that the TPA will prevail (as a result of s 109 of the Constitution)?

Obviously this is not an easy question to answer. The starting point is the High Court decision in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*,[49] in which the court has taken a broad approach to the question of inconsistency between the TPA and State legislation in relation to s 74. In that case, Queensland legislation limited the liability of a carrier of goods to a certain monetary sum in specific circumstances. When goods were damaged in transit, the plaintiff claimed more than such sum, relying on a breach of s 74 (and the non-excludability of such implied term by s 68). The High Court held that the provisions of the Queensland legislation were inconsistent with s 74. Section 74 carried with it a full contractual liability for breach which the Queensland legislation sought to limit.[50] This appears quite a broad approach to inconsistency. Section 68 states that a *term of a contract* that limits liability is void; it says nothing about State legislation having such effect. It could be argued that s 74 implies one contractual duty, whereas the Queensland

45 Goods Act 1958 (Vic) s 97A; Fair Trading Act 1999 (Vic) s 32N. Forms for this purpose are prescribed by the Goods (Recreational Services) Regulation 2003 (Vic).

46 See Civil Liability Act 2002 (WA) s 5K, especially subs (6) (as amended by the Civil Liability Amendment Bill 2003 (WA), see above n 8).

47 Recreational Services (Limitation of Liability) Act 2002 (SA) s 6. Interestingly, although the Act appears clearly intended to allow waiver of liability, it is not clear that it successfully achieves this aim even where a code has been registered. Section 6 refers to 'modifying the *duty of care* owed' by the service provider. This could be interpreted as referring to tort negligence claims and not necessarily to a claim for breach of a term of the contract to perform the services with 'due care and skill' implied under the Consumer Transactions Act 1972 (SA) s 7 (the s 74 equivalent). This, however, would be an odd conclusion.

48 Recreational Services (Limitation of Liability) Act 2002 (SA) s 4(2). If the SA Law Reform (Ipp Recommendations) Bill 2003 is passed then there will be no duty to warn of obvious risks unless a recreational service code of practice is in force (see s 38(2)(b)).

49 (1994) 179 CLR 388; 120 ALR 440.

50 Ibid, at CLR 396 per Toohey and Gaudron JJ (Deane, Dawson and McHugh JJ concurring).

legislation merely limits the damages payable as a result of any breach of contract. None the less, such arguments were not accepted by the High Court.

Even given the High Court's broad approach to inconsistency, however, it is not clear that the Victorian provisions are inconsistent with the TPA. Section 68B allows for waiver clauses to be used and thus reinstates the common law contract principles (namely freedom of contract) that are otherwise disallowed by s 68. It does not stipulate that such clauses must be used, nor that those clauses must *exclude* liability (as opposed, say, to merely limiting it in certain circumstances). Arguably, then, the Victorian legislation only places a limit on the *common law* right to waive liability for breaches of contract. Hence, the Victorian corporate defendant will not be able to escape liability for its reckless conduct.[51] Obviously, however, the issue remains an open one.

Of course, where the recreational service provider is not a corporation and hence, the TPA does not apply, then the Victorian and SA legislation will govern the situation and no issue of inconsistency will arise.

Further proposed amendments to the TPA

I would like to add to the confusion arising as a result of the operation of the TPA, by foreshadowing another possible complication. Presently before the Federal Parliament is the Trade Practices Amendment (Personal Injuries and Death) Bill 2003. This Bill, if passed, will amend the TPA to preclude damages for personal injury or death for breach of Div 1 of Pt V of the TPA. This Division, importantly, includes s 52, which prohibits misleading or deceptive conduct. The passage of this Bill could have quite startlingly harsh consequences. At least two situations present themselves. First, consider a defendant who misleads the plaintiff as to the extent and nature of the actual risks involved in a particular recreational activity, which actual risks eventuate. A well-drafted exclusion clause precludes a claim for breach of contract (s 74 implied term) and in negligence generally. The new amendment would seem to preclude any claim for breach of s 52 for the personal injuries sustained and, unless perhaps the plaintiff could show common law fraud, would presumably leave a plaintiff without any rights. Such a conclusion is appalling, but appears difficult to circumvent.

The second situation which could arise is where a defendant misleads the plaintiff as to the extent, meaning, or effect of a waiver clause in a contract. Here the plaintiff's position would not be as hopeless. The plaintiff could alternatively: (1) rely on the common law to argue that the waiver is ineffective or limited to the meaning represented by the defendant,[52] or (2) seek relief under s 87 to have the contract amended to comply with the representation, or (3) could argue that he or she has suffered *economic loss* as a result of breach of s 52 in entering a contract on terms which he or she otherwise would not have (that is, that the loss is the right to sue for breach

51 If it were held that the Victorian provisions were not inconsistent with the TPA, could a corporation providing recreational services in Victoria avoid the Victorian legislation by stipulating, say, New South Wales to be proper law of the contract? Professor Jim Davis suggested this possibility to me.

52 See above n 32.

of contract which otherwise would have existed had the misleading conduct not been engaged in, because a contract in different terms would have been entered).

It should be added that unless State Fair Trading Acts are amended to also incorporate such a change, claims against both corporate (assuming there is no inconsistency with the TPA) and non-corporate defendants for breach of s 52 could continue under those Acts until such changes take place.

Let us turn, then, to the law as it applies to recreational service providers who are not corporations, that is, who are not covered by the TPA. What is the legal position relating to waivers, breach of contract and tort in such cases?

3. Cases in which the TPA does not apply: Defendants who are not 'corporations'

Introduction

Where the TPA (and hence s 74) does not apply, some of the difficulties discussed above may none the less still arise in some States which have enacted provisions equivalent to s 74. Even in those States which do not have such equivalent provisions, however, there are still a number of other difficulties and complexities. These will be discussed under the relevant State headings. I will commence with a discussion of Victoria and South Australia together, as they raise similar issues.

Victoria and South Australia

As already noted, Victoria and South Australia have provisions equivalent to s 74. Consequently, in order to waive liability for breach of the contractual implied terms, a valid and effective waiver would need to govern the contract of service. This means that all the difficulties associated with contract law and waivers discussed above apply equally in these States: that is, problems associated with the incorporation of terms and their interpretation, as well as the inability of service providers to bind minors to such waivers. Further, the potential operation of waivers is limited in the ways noted above such that, in Victoria, for example, liability for 'reckless' conduct cannot be waived.

If *no* effective waiver governs the service contract, then a breach of contract claim will arise where the services are performed negligently. This means that even if a tort claim is precluded because, for example, the (contractually ineffective) waiver establishes a voluntary assumption of risk on the part of the plaintiff, none the less the claim for breach of contract can proceed. If an effective waiver *does* govern the contract of service then in most cases, one would assume, such waiver will also preclude a tort claim.

Western Australia

Western Australia also has a provision equivalent to s 74.[53] Under the yet to be passed amendments to the Civil Liability Act 2002 (WA),[54] liability for breach of such term can be waived other than for 'reckless' conduct (s 5K).

53 Fair Trading Act 1987 (WA) s 40.

54 As amended by the Civil Liability Amendment Bill 2003 (WA); see n 8, above.

Hence, the legal position generally is the same as in Victoria, with one possible difference. The difference may arise where a waiver is not effective in excluding liability for breach of contract for recreational services. In such a case, the question which arises is whether other limitations of liability applying to recreational services under the Civil Liability Act 2002 still apply. The Act excludes any liability for harm arising from 'obvious risks' occurring during 'dangerous recreational activities' (s 5H) (that is, ones involving a significant risk of harm (s 5E)).[55] Further, where a 'risk warning' in respect of a risk of a recreational activity has been given to an adult, then a service provider does not owe a duty to take care in relation to such risk, either to an adult participant or a child aged 16 or over of such adult or who is controlled or accompanied by such adult (s 5J). Do these restrictions of liability apply even in the absence of an effective waiver of an implied term of the contract to take reasonable care? The answer is that they probably do. This is because s 5A(2) states that the relevant part of the Act 'applies to claims for damages for harm caused by a person even if the damages are sought to be recovered in an action for breach of contract or any other action'.

New South Wales

Perhaps the most restrictive of all the legislative regimes is that contained in the Civil Liability Act 2002 (NSW). Since New South Wales does not have an equivalent to s 74 of the TPA, there is no statutory implied term as to due care and skill in service contracts. In any case, at common law defendants can exclude their liability for both breaches of contract and in tort generally where a contract of service is entered. This common law position is confirmed by s 5N.[56] Even in the absence of an effective contractual waiver, however, recreational service providers are given wide protection under the Act. Similarly to the position in Western Australia (but it must be stressed, the relevant sections are *not* identical), the Act excludes any liability for harm arising from 'obvious risks' occurring during 'dangerous recreational activities' (s 5M) and where a 'risk warning' in respect of a risk of a recreational activity has been given to an adult (s 5M) (which is also effective against a child *of any age* or otherwise incapable participant who is controlled or accompanied by such adult). Further, the NSW Act also denies any duty to warn of an obvious risk (s 5H).

This raises the problematic question of what, precisely, is an obvious risk? Section 5F states:

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

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55 Problems as to the meaning of 'obvious risk' will be discussed further below, under 'New South Wales'.

56 One issue that needs to be addressed is how s 5N inter-relates with the Contracts Review Act 1980 (NSW), under which a wide-ranging waiver may be held to render the contract 'unfair' (see above n 17).

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

At least three complications arise from this definition. First, since the test is stated to be objective, can minors argue that as reasonable persons *of such age*, they were not aware of the risk.[57] More generally, this question is complicated in relation to all plaintiffs by s 5G, which states that persons will not be presumed to be aware of an obvious risk if they can prove they were not aware of it. This seems to introduce a subjective element into the meaning of obvious risk but, unfortunately, the section does not state how it inter-relates with other sections utilising the term 'obvious risk'.

The second complication is as follows: does the Act require merely that the end result of an activity be an obvious risk (eg, falling off a horse) or must the manner in which the risk materialised also have been obvious (eg, falling off a horse after the service provider slapped its rump and the horse bolted). If the latter interpretation is adopted, then the provisions will not be as unduly harsh as they otherwise could be. If the former interpretation is adopted, then defendants may escape liability for accidents (even if the result of their negligence, even gross negligence) as long as that negligence led to an 'obvious' outcome. Interestingly, the Queensland drafters have foreseen the problem and attempted to deal with it by incorporating into the definition of obvious risk the following addition:

> (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.[58]

The third complication is the inherent vagueness of the concept of 'obviousness' and the considerable divergence of opinion that can legitimately arise as to how widely or narrowly one formulates a particular risk. For example, in *Woods v Multi-Sport Holdings Pty Ltd*, the majority (Gleeson CJ, Hayne and Callinan JJ) treated the risk of being hit in the eye and suffering serious injury while playing indoor cricket as 'obvious'.[59] The minority (McHugh and Kirby JJ), by way of contrast, focused on the enhanced risk of serious eye injury posed by the softness and size of the ball used, such as would allow it to penetrate the eye socket. The latter risk, in their opinion, was not 'obvious'.[60]

Queensland and Tasmania

The positions in Queensland and Tasmania appear to be similar to that in New South Wales with the exception that there is no provision dealing with 'risk warnings' and, of course, the sections are not all identically drafted. For example, as already noted above, Queensland has clarified the meaning of obvious risk.

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57 Comparably to the position at common law: eg, *McHale v Watson* (1966) 115 CLR 199; [1966] ALR 513.

58 Civil Liability Act 2003 (Qld) s 13.

59 (2002) 208 CLR 460; 186 ALR 145 at [34]–[36] per Gleeson CJ, [144] per Hayne J.

60 Ibid, at [80] per McHugh J, [126]–[131] per Kirby J.

4. Conclusion

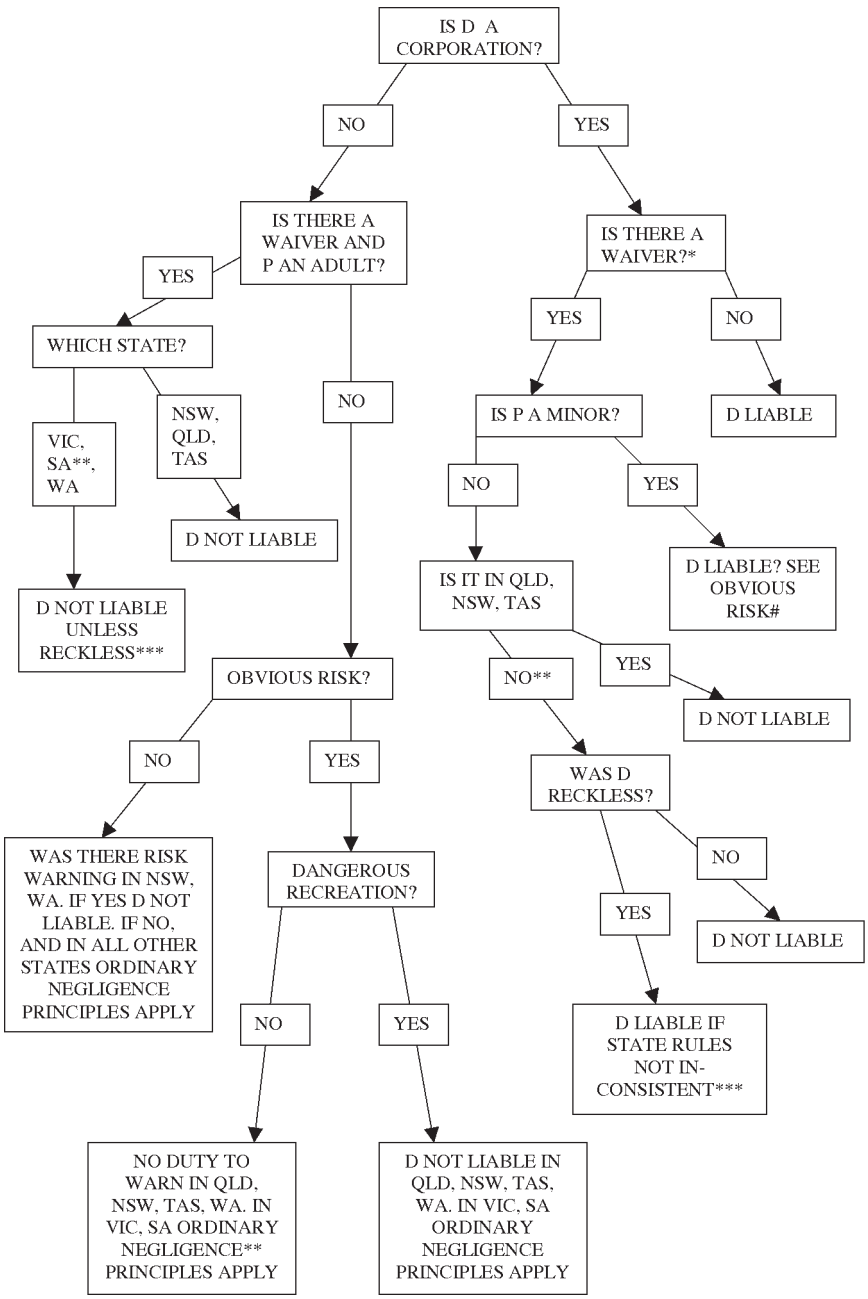
The legal position of recreational service providers seeking to exclude their liability for negligently performed services is complex and uncertain. To try to present an overview of this complexity and uncertainty, I have drawn the following flow chart. The chart deals with the situation in which a defendant recreational service provider has performed services without due care and skill, causing the plaintiff personal injury. The chart seeks to outline the defendant's liability in contract or tort (taking into account State and federal legislation modifying such liability rules), in particular where questions arise as to the effect of any waiver clause. Obviously, the flow chart is a simplification, and the notes below need to be considered.

* The waiver must form part of the contract and its wording must apply to the relevant conduct.

** I am treating South Australia's legal regime as the same as those of Victoria and Western Australia in relation to waivers, for the sake of simplification. If the Law Reform (Ipp Recommendations) Bill 2003 (SA) is passed, then there will be no duty to warn of an obvious risk unless a recreational service code of practice is in force (s 38(2)(b)).

*** In Western Australia, other limiting principles relevant to recreational services probably govern and will preclude liability if applicable (see above under 'Western Australia').

\# The State provisions in relation to obvious risks may in some circumstances also be applicable to minors. See above n 42.


IS D A CORPORATION?
NO
YES
IS THERE A WAIVER AND P AN ADULT?
YES
WHICH STATE?
VIC, SA**, WA
NSW, QLD, TAS
D NOT LIABLE
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WAS THERE RISK WARNING IN NSW, WA. IF YES D NOT LIABLE. IF NO, AND IN ALL OTHER STATES ORDINARY NEGLIGENCE PRINCIPLES APPLY
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IS THERE A WAIVER?*
YES
NO
D LIABLE
IS P A MINOR?
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D LIABLE? SEE OBVIOUS RISK#
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D LIABLE IF STATE RULES NOT IN-CONSISTENT***

As can be seen from the 'simplified' flow chart, the legal framework is complex almost to the point, I suggest, of being unworkable. In part, this stems from the reform process having been given momentum by the Ipp Report. In my view, the process was always going to be flawed. This is because the process by which the Ipp Report's conclusions and recommendations were reached was fundamentally compromised from the outset. The Ipp Report noted that:

> the Terms of Reference . . . indicate that there is a *widely held view* in the Australian community that there are problems with the law stemming from *perceptions* that [among other things] . . . the law of negligence as it is applied in the courts is unclear and unpredictable [and that] . . . it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.[61]

Importantly, however, the Ipp Report acknowledges that it did not test the accuracy of these community perceptions, but took 'as the starting point for conducting [the] inquiry the general belief in the Australian community that there is an urgent need to address these problems'![62] That is surely a tendentious basis for recommending sweeping reforms to the law.

Views will differ, of course, as to the merits of the process of reform. However, few would disagree with the conclusion that the end result of that process (if, indeed, the end stage has been reached) in relation to recreational services, at least, has not been a success judged on the criteria of consistency and simplicity. Since the insurance industry itself bears much of the responsibility for initiating the reform, one can only hope that the insurance industry, at least, is happy. I very much doubt it.

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61 Ipp Report, above n 1, p 25, § 1.6 (emphasis added).
62 Ibid, p 26.