THE TORT LAW REFORMS

Since 2002, governments across Australia have undertaken a comprehensive programme of law reform to improve the cost and availability of the liability classes of insurance.1

Jurisdictions introduced reforms progressively from 2002 to 2006, with each jurisdiction taking into account its own circumstances. However, these reforms were broadly consistent with the recommendations of the Review of the Law of Negligence (the Ipp review).2

The law reforms fall into three categories, dealing with:

- Establishing liability — changes to the law governing decisions on liability, including contributory negligence and proportionate liability.
- Damages — changes to the amount of damages paid to an injured person for personal injury or for a claim for economic loss against a professional.
- Procedural reforms — time limits and methods for making and resolving claims, including court procedures, legal conduct and legal costs.

The sections below refer, where appropriate, to two previous publications: the Review of the Law of Negligence and a subsequent survey of the tort law reforms, Reform of liability insurance law in Australia.3

1 Do not rely on the information in this chapter as a statement of the law. Instead, refer to the Australian legislation in force from time to time and seek appropriate legal advice.

2 Minter Ellison Special report: Tort law reform throughout Australia: a brief review of recent amendments (Sixth edition, December 2005) 1

Establishing Liability

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<tr>
<th>Reforms to liability</th>
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### Foreseeability

| A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |
| A person is not negligent for failing to take precautions against a risk of harm unless that risk is 'not insignificant' | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |
| A person is not negligent for failing to take precautions against a not insignificant risk unless a reasonable person would have taken such precautions | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |

### Negligence Calculus

| Negligence calculus | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |

### Causation and Remoteness of Damage

| Plaintiff bears the onus of proof in relation to issues associated with causation | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |
| Principles of the two elements of causation and guidance in application | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |
| Principles for determining when the 'evidentiary gap' should be bridged in circumstances of material contribution by the defendant to risk or harm | n/a | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | u/c |
| Principles for determining what the plaintiff would have done had the negligent conduct not occurred | n/a | ✓ | ✓ | ✓ | — | ✓ | — | u/c |
Reforms to liability

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<thead>
<tr>
<th>Standard of care for professionals</th>
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<tr>
<td>Restatement of duty to inform for medical practitioners to give greater clarity and address hindsight bias</td>
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<td>—</td>
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<td>Non-delegable duties</td>
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<td>Existence and extent of liability for breach of a non-delegable duty is determined on the basis of principles applicable to vicarious liability</td>
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<td>Action prohibited for personal injury and death under Division 1 of Part V of the <em>Trade Practices Act 1974</em> and similar provisions under state and territory fair trading law</td>
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<td>—</td>
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<td>Mental harm</td>
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<td>Pure mental harm and economic loss for consequential mental harm must be a recognised psychiatric illness and harm must be foreseeable to a person of normal fortitude</td>
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<td>Restatement of factors relevant to assessing mental harm</td>
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### Reforms to Liability

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<td>Providers of dangerous recreations can enter into contracts limiting their liability</td>
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<td>A ‘good Samaritan’ is not liable in any civil proceedings for any acts or omissions done in good faith</td>
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**Volunteers**

Protect volunteers doing work for community organisations from civil liability for acts or omissions in good faith

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<tr>
<td>Protect volunteers doing work for community organisations from civil liability for acts or omissions in good faith</td>
<td>✓</td>
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**Public authorities**

Policy defence if an authority is sued for negligence in the exercise or non-exercise of a public function

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Restore highway immunity rule

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### DAMAGES

**Reforms to damages**

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**General damages**

Set threshold before general damages apply

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Assessment procedure for general damages

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Cap on general damages

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**Earnings loss cap**

Limit compensation for loss of future earnings or loss of earning capacity

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<td>Align discount rate used in civil liability matters at 5 per cent</td>
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## PROCEDURAL REFORMS

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ESTABLISHING LIABILITY

FORESEEABILITY

In tort, a person owes another person a duty of care if the first person could reasonably have foreseen that if they did not take care the other would suffer either physical injury or death or economic loss.

The concept of negligence has two components under Australian law: foreseeability of the risk of harm and a calculation of the degree of negligence, the ‘negligence calculus’.

A person will not be liable for failing to take precautions against an unforeseeable risk. For a risk to be foreseeable, it must not be so improbable that a reasonable person would ignore it.

Once foreseeability is established, the negligence calculus helps to decide what precautions a reasonable person would have taken to avoid the harm that occurred and what precautions it would have been reasonable to expect the defendant to take. The calculus considers:

- the probability that the harm would occur if care was not taken;
- the likely seriousness of that harm;
- the burden of taking precautions to avoid the harm; and
- the social utility of the activity creating the risk (that is, it is more worthwhile to take risks for some activities than for others – for example, if life is at stake).

Case law in Australia had evolved so that events with a very low probability of occurring could still be held to be foreseeable. In Wyong Shire Council v Shirt (1980) 146 CLR 40, the court found that persons could be held liable for any foreseeable risks other than risks that were far-fetched or fanciful. This may have required a person to take precautions against a risk with a very low probability of occurring, simply because it was foreseeable. However, determining whether a foreseeable risk was not far-fetched or fanciful does not help determine whether precautions to prevent the risk occurring would be reasonable. That is the role of the negligence calculus.
The reforms to tort law replaced the test of foreseeability established by Wyong Shire Council v Shirt with a test that persons can only be held liable for risks that are ‘not insignificant’.

The reforms also clarified that foreseeability is a necessary but not sufficient condition for a finding of negligence. A person is not liable just because the risk was foreseeable.

In addition, the reforms set out the negligence calculus in legislation, to prescribe what the court should take into account when determining negligence.

**CAUSATION AND REMOTENESS OF DAMAGE**

In tort, a person cannot be liable for damages for failure to take care to prevent injury or death unless negligent conduct on his or her part (whether by act or omission) caused the harm and unless that harm was not too remote from the negligent conduct.

In determining whether negligent conduct caused the harm, the court considers whether the negligent conduct played a part in bringing about the harm. That is, whether the harm would have occurred without the conduct.

The court also considers whether to hold the defendant liable to pay damages for the harm caused.

It was possible that a court would impose liability where the defendant’s conduct was only remotely responsible for the loss. Where it is not possible to prove, on the balance of probabilities, that there was a causal link between the conduct and the harm, it may be necessary to address this ‘evidentiary gap’ by allowing proof that negligent conduct materially contributed to harm or risk of harm. In these circumstances, a defendant might be liable for the total injury suffered by a plaintiff, despite being only partially responsible.

The major problem was in establishing when to relax the normal requirements of proof of causation.

Another difficulty lay in determining what the plaintiff would have done if the defendant had not been negligent. For example, where a doctor failed to give appropriate warnings before an operation, the question is whether the patient would have continued had the doctor given the warnings. There is an inherent difficulty in determining the state of mind of the plaintiff prior to harm occurring, without the influence of hindsight bias.

The reforms to tort law improved understanding of this area of the law by providing legislative guidance on the principles underlying causation.
The tort law reforms

In addition, to address the ‘evidentiary gap’, the reforms made it clear that the onus of proof in relation to causation always rests with the plaintiff.

The reforms also clarified the way in which a court should consider what the plaintiff would have done had the negligent conduct not occurred.

**STANDARD OF CARE FOR PROFESSIONALS**

There are two aspects to the standard of care required of professionals:

- negligence related to the duty to disclose relevant information before undertaking treatment; and
- negligent treatment.

**Duty to disclose relevant information**

- Review of the Law of Negligence recommendations 5-7
- Reform of liability insurance law in Australia section C3

A doctor has an obligation to advise a patient contemplating treatment of the material risks inherent in that treatment and of risks about which the doctor ought to appreciate that the patient would wish to be aware. A doctor who negligently fails to warn of a risk, which eventuates in circumstances where the patient would not have undergone the treatment if the doctor had advised them of the relevant risk, will be held liable.

Doctors have a proactive and a reactive duty to inform.

The proactive duty to inform requires a doctor to take reasonable care to give a patient such information as a reasonable person in the patient’s position would, in the circumstances, want to be given before deciding whether to undergo treatment.

The reactive duty to inform requires a doctor to take reasonable care to give a patient such information as the doctor knows or ought to know that the patient wants to be given before deciding whether to undergo treatment.

Some statements concerning the duty of doctors to provide information did not refer to the obligation as being a duty of reasonable care. This required consideration of the circumstances of the doctor.

Professions and occupations other than doctors may also have a duty to give particular categories of information in particular circumstances. However, the law is still evolving in this area. Given this, the reforms to this area of tort law related only to doctors.
A doctor only has a duty to exercise reasonable care in giving information and does not have a duty to give whatever information is obtainable. However, some doctors were uncertain as to their duties. In addition, there was also concern among doctors that hindsight bias increased the risk of their being found liable.

The reforms to the tort law made it clear that a doctor’s obligations to give information are only to take reasonable care. In addition, the reforms made it clear that the assessment of whether there had been a breach of the duty to inform should be set at the time the decision to undergo treatment was made by the patient and not at some later time.

**Treatment**

*Review of the Law of Negligence* recommendations 3–4

*Reform of liability insurance law in Australia* section C3

Until 1992, it was widely thought that a rule derived from the English case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, the ‘Bolam rule’, applied to cases of professional negligence in Australia. The Bolam rule was that a professional was not guilty of negligence if he or she had acted in accordance with a practice considered proper by a body of professional practice skilled in that particular art.

Strictly applied, the Bolam rule could allow small pockets of medical opinion to be arbiters of the requisite standard of medical treatment, even where a substantial majority of medical opinion would take a different view.

In 1992, the judgment in *Rogers v Whitaker* (1992) 175 CLR 479 found that a court was entitled to consider the entirety of the expert evidence to determine whether, in its view, the professional had acted negligently.

The basic rule is that the standard of care is determined by reference to what could reasonably be expected of a person exercising the skill that the defendant professed to have. However, there was considerable fear and uncertainty about the risk of being sued. Professionals thought that a court would find them negligent for an act that accorded with generally accepted practice at the time they carried out the procedure.

The reforms to the tort law introduced a modified version of the Bolam rule. In most circumstances, they require a court to take into account views current at the time the event that gave rise to a loss took place. The modified test ensures that the view had to be widely held — to avoid the drawbacks of the original test — and allows a court to intervene where the view was irrational.

The effect of these reforms is that the standard of care is determined by what could reasonably be expected of a person professing the skill and the relevant circumstances at the date of the alleged negligence.
The tort law reforms

**NON-DELEGABLE DUTIES**

*Review of the Law of Negligence recommendation 43*

*Reform of liability insurance law in Australia section C4*

Vicarious liability is liability for the negligence or other wrong of another. It is also strict liability — that is, liability without proof of fault. A person can be vicariously liable for the negligence of another no matter how careful the person was in all relevant matters, such as choosing and supervising that person.

The general rule of vicarious liability is that an employer is vicariously liable for the negligence of an employee, provided the employee was acting in the course of their employment.

Vicarious liability does not apply where independent contractors, as opposed to employees, performed a task. While an employer is not vicariously liable for the negligence of an independent contractor, there are a number of exceptions to this rule. The concept of a non-delegable duty allowed such exceptions.

A non-delegable duty imposes liability on one person for the negligence of another to whom the former has entrusted or delegated the performance of some task on their behalf. However, the precise nature of a non-delegable duty was uncertain. Given this, the Ipp review expressed the concern that, if governments accepted all its recommendations, it would be possible to avoid the reforms by pleading that the incident was the result of breach of a non-delegable duty. Accordingly, the Ipp review recommended that the tort law reforms should treat liability for a breach of a non-delegable duty as though it were equivalent to vicarious liability.

States and territories agreed that it was important to deal with a breach of a non-delegable duty in the same way as a breach of any other duty.

The reforms to tort law either treat a breach of a non-delegable duty as being equivalent in all respects to vicarious liability (in line with the findings of the Ipp review) or include it within the terms of application of the tort law reform legislation.
Division 1 of Part V of the Commonwealth *Trade Practices Act 1974* and similar provisions under state and territory fair trading law prohibit unfair practices in trade and commerce, including misleading and deceptive conduct.

These have rarely been used to seek damages for personal injuries or death. However, this remained a possibility and potential loophole allowing the circumvention of the tort law reforms.

This is so even though section 52 of the Trade Practices Act (a key provision in Division 1 of Part V) is limited to conduct in the course of activities that are ‘in trade or commerce’. There are various areas of everyday life that might give rise to claims for damages for personal injuries or death, such as claims arising out of the provision of professional services or the occupation of land. For example, suppose a surgeon informed a patient that a certain operation would improve the patient’s health. In the course of the operation, the surgeon decides — because of unforeseeable circumstances — that the operation was not, in effect, necessary and should not continue. The patient may be able to claim damages on the ground that the surgeon was guilty of misleading conduct in advising that the operation should occur.

Plaintiffs rarely relied on the trade and commerce provisions of the Trade Practices Act to claim damages for personal injury or death because the common law was seen as an adequate source of compensation.

This would have changed once state and territory reforms blocked or made less attractive avenues for plaintiffs under the law of negligence (by the reform of rules on quantum of damages and other limitations of liability). Cases would have shifted to Commonwealth law, effectively undermining the state and territory civil liability reforms.

To avoid this, the tort law reforms prevented actions for personal injury and death under Division 1 of Part V of the Trade Practices Act and similar provisions of state and territory fair trading laws.
MENTAL HARM

Personal injury may be either physical or mental. Mental harm may be a consequence of physical injury (for instance where depression is suffered because of a bodily injury), or it may stand alone (for example, where a person suffers anxiety from witnessing traumatic events).

It is harder for people to recover damages for negligently caused pure mental harm than for negligently caused physical harm and consequential mental harm. Reasons for this include the difficulty of diagnosing pure mental harm objectively and proving pure mental harm for legal purposes. In addition, the risk of causing pure mental harm may be more difficult to foresee.

Reasonable foreseeability of mental harm is the only precondition of the existence of a duty of care. However, a duty of care will only be owed if it was foreseeable that a person of normal fortitude might suffer mental harm in the circumstances of the case if care was not taken. That is, a plaintiff’s abnormal vulnerability is not taken into account when determining the standard of care to be applied. The exception to this rule is where the defendant knew or ought to have known of this vulnerability.

The circumstances of the case include matters such as whether or not the mental harm was suffered as the result of a sudden shock, whether the plaintiff witnessed the event or the aftermath, what the relationship was between the plaintiff and defendant and the nature of the relationship between the plaintiff and anyone killed or injured.

There was a difference between the law’s treatment of consequential mental harm on the one hand and pure mental harm on the other. Pure mental harm only attracted compensation if the plaintiff had suffered a ‘recognised psychiatric illness’. This had the effect that expert evidence was normally required to establish whether damages were recoverable for pure mental harm. By contrast, consequential mental harm did not have to constitute a ‘recognised psychiatric illness’.

The reforms to tort law applied the same evidentiary requirements to both pure mental harm and to economic loss associated with consequential mental harm. That is, in order to be compensated for these a plaintiff must have suffered a ‘recognised psychiatric illness’ and the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a ‘recognised psychiatric illness’ if reasonable care was not taken.

In addition, the reforms restated the relevant factors in assessing mental harm.
The tort law reforms

The reforms also restricted the circumstances in which pure mental harm can be awarded — because of another being imperilled, injured or killed — to a specified list of family relationships.

APOLOGIES

Reform of liability insurance law in Australia section C7

In many cases, defendants were reluctant to communicate with injured persons in any sympathetic or cooperative way for fear any comments might be taken as an admission of liability.

Advice from insurers (including in policy wordings) and lawyers instructing policyholders against admissions of liability reinforced this reluctance.

Research showed that plaintiffs — particularly medical patients — are less likely to seek recovery of damages where the doctor or potential defendant explained the cause of the loss or apologised for the loss.

The reforms to tort law made it possible for certain apologies or expressions of regret not to be taken as an admission of liability.

CONTRIBUTORY NEGLIGENCE AND THE ASSUMPTION OF RISK

Review of the Law of Negligence recommendations 30-32

Reform of liability insurance law in Australia section C8

Contributory negligence is failure by a person (usually the plaintiff) to take reasonable care for his or her own safety, which contributes to the harm the person suffers.

Legislation in all Australian jurisdictions provides for the apportionment of damages. Apportionment reduces the damages to which the plaintiff is entitled because of contributory negligence. The court has very wide discretion to reduce the plaintiff’s damages to the extent the court considers just and equitable having regard to the plaintiff’s share of responsibility of the harm suffered.

The basic principle underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well as for that of others. Contributory negligence is an objective concept that refers to the care that a reasonable person in the plaintiff’s position would have taken for his or her own safety.

The onus of proving that a plaintiff was guilty of contributory negligence traditionally rested on the defendant.
The tort law reforms

There was a perception that, on occasion, lower courts accepted a lower standard of care from the plaintiff in contributory negligence and were more indulgent to plaintiffs than to defendants. In some cases, judges expressly applied a lower standard of care.

Apportionment legislation provided that the reduction of damages for contributory negligence should be ‘just and equitable’. The High Court held that a reduction of 100 per cent was not permissible, on the basis that a finding of 100 per cent contributory negligence would be incompatible with the finding that the defendant was negligent. Contributory negligence allowed some recovery to the plaintiff, even where the plaintiff bore a significant share of responsibility for the harm suffered.

There may be circumstances in which the plaintiff’s relative responsibility for the injuries suffered is so great that it seems fair to deny the plaintiff any damages at all. For example, where the risk created by the defendant was patently obvious and could have been avoided by the plaintiff exercising reasonable care.

The reforms to tort law ensured that the standard of care applied to the determination of contributory negligence was the same as that applied to negligence. The reforms also allowed the court to reduce the damages of a plaintiff by 100 per cent where it considered it just and equitable to do so.

In theory, the standard of care that applied to the actions a person should take to protect themselves is equivalent to the actions required of others to take care of that person.

For that reason, the negligence calculus (described above in the discussion of foreseeability) provides a framework for deciding what precautions it is reasonable to expect a plaintiff to have taken for his or her own safety.

The defence of voluntary assumption of risk is a complete defence in the sense that it provides the basis for denying the plaintiff any damages at all. A person will be held to have voluntarily assumed a risk only if they were actually aware of the precise risk in question and freely accepted that risk.

Following the introduction of the defence of contributory negligence, the defence of the voluntary assumption of risk fell into disuse. This was because any conduct that could amount to voluntary assumption of risk would also amount to contributory negligence.

The reforms to tort law made it easier to establish the defence of the assumption of risk, by reversing the burden of proof on the issue of awareness of risk in relation to obvious risks. That is, there is a presumption that a person against whom the defence is pleaded was aware of an obvious risk unless that person can prove, on the balance of probabilities, that he or she was not aware of the risk. The question is whether the person was aware of the type or kind of risk, not of its precise nature, extent or manner of occurrence.
PROPORTIONATE LIABILITY FOR ECONOMIC CLAIMS

Review of the Law of Negligence recommendation 44

Reform of liability insurance law in Australia section C9

The common law applying to all tort claims, for personal injury and economic losses, involved joint and several liability.

Professionals, such as accountants, with ‘deep pockets’ and adequate insurance, expressed concern that they could be liable for the full amount of a loss even though they had made only a small contribution to the loss.

The reforms to tort law applied proportionate liability to claims for economic loss.


In Queensland, the Professional Standards Act 2004 amended the Civil Liability Act 2003 to introduce proportionate liability of concurrent wrongdoers in claims for damages for economic loss or damages to property.

In July 2006, the Standing Committee of Attorneys-General approved the formation of a working group to review the current national legislative framework on proportionate liability, to make recommendations to achieve greater national consistency in proportionate liability legislation and to consider issues with contracting out of proportionate liability.
The tort law reforms

**RECREATIONAL ACTIVITIES AND WAIVERS**

*Review of the Law of Negligence sections 5.48-5.67*

*Reform of liability insurance law in Australia* section C10

Section 74 of the *Trade Practices Act 1974* implies into certain contracts statutory warranties that the parties cannot waive. These statutory warranties include a requirement to provide services with due care and skill.

Similar provisions apply in state and territory fair trading acts.

Providers of recreational services, and in particular those with a high degree of inherent risk, argued that the existence of these statutory warranties prevented the effective use of waivers.

The law reforms allow recreational service providers to enter into effective waivers overriding the statutory warranties of section 74 and similar provisions in state and territory law.

**GOOD SAMARITANS**

*Review of the Law of Negligence sections 7.20-7.24*

*Reform of liability insurance law in Australia* section C11

In South Australia, the *Wrongs Act 1936* provides that a ‘good Samaritan’ is immune from civil liability for any act or omission done in good faith and without recklessness in assisting a person in apparent need of emergency assistance.

Other jurisdictions did not have such an exemption from liability prior to the tort law reforms. Good Samaritans could incur personal civil liability actions against them in certain circumstances.

In most jurisdictions, the tort law reforms protect a Good Samaritan who comes to the assistance of a person in danger from all civil liability for acts or omissions done in good faith.
The tort law reforms

**Volunteers**

*Review of the Law of Negligence* sections 11.20-11.23

*Reform of liability insurance law in Australia* section C12

A plaintiff may sue a volunteer for harm they inflicted during the course of their volunteering activities.

While the number of claims against volunteers is not significant, fear of incurring negligence liability could have discouraged people from doing voluntary work.

Legislation protected emergency service providers from civil liability arising out of incidents that arise in the course of performing a rescue in good faith.

The reforms to tort law excluded volunteers doing work for community organisations from civil liability for acts or omissions done in good faith in most circumstances and made the organisation for which they provided services liable for any negligence of the volunteers.

Some jurisdictions have continued to reform this area of law.

In New South Wales, the *Civil Liability Amendment (Food Donations) Act 2005* protects people making food donations from civil liability.

In Queensland, the *Justice and Other Legislation Amendments Act 2004* amended the *Civil Liability Act 2003* to alter the definitions of ‘community work’ and ‘volunteer’ and to protect from civil liability people who donate food in good faith and without reward to community organisations.

The Western Australian Parliament is considering the *Volunteers (Protection from Liability) Amendment Bill 2006*, which would amend its volunteers legislation to protect food donors from liability.

**Public Authorities**

*Review of the Law of Negligence* recommendations 39-42

*Reform of liability insurance law in Australia* section C13

In 2001, in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, the High Court abolished the rule that a highway authority is not liable for injury or damage resulting from ‘non-feasance’ in the performance of its functions as a highway authority. This affected the liability of all public authorities.
The tort law reforms

The High Court found that, where the state of a highway poses a foreseeable risk of harm to road users, the public authority with power to remove the danger is obliged to take reasonable steps to do so. The duty to take care arises when the authority knows of the danger, or when it would have known of the danger if it had taken reasonable care to inspect the highway.

In determining whether the public authority took reasonable steps to remove the risk, regard is had to ‘competing or conflicting responsibilities or commitments of the authority’.

Because of this decision, increasing amounts of time were spent in the course of a trial considering whether the authority’s conduct in relation to a risk was reasonable given the other demands on the resources available to the authority.

The reforms to tort law provide public authorities with a ‘policy defence’; recognition that the variety of responsibilities they face may limit their resources. Some jurisdictions also reintroduced the rule that an authority is not liable for injury or damage resulting from ‘non feasance’ in the performance of its function.

DAMAGES

GENERAL DAMAGES

*Review of the Law of Negligence* recommendations 47-48

*Reform of liability insurance law in Australia* section C14

General damages are damages for non-economic loss, including pain, suffering, loss of amenities and loss of expectation of life.

Pain and suffering are matters of subjective experience. Loss of amenities refers to the inability of an injured person to enjoy life as they did before the injury. This may relate to the ability to work, play sport, engage in hobbies, marry, have children, realise ambition or achieve sexual satisfaction. Damages for loss of expectation of life are awarded for the loss of prospective happiness resulting from the reduction in an injured person’s life expectancy.

Underlying the award of damages for non-economic loss is the idea that money can provide the plaintiff with some consolation for their injury.

The subjective nature of general damages leads to uncertainty for insurers in their premium setting and reserving.
For claims between $20,000 and $100,000, 45 per cent of the cost was in general damages. Therefore, the reforms to tort law imposed a threshold on general damages, to reduce the number and cost of smaller claims.

The reforms also capped general damages. These caps improved stability and assisted the consistent calculation of general damages amounts below the cap.

In making these reforms, each jurisdiction took into account its own circumstances.

The Australian Government amended the *Trade Practices Act 1974* through the *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004*. The amendments limited recovery for personal injury or death arising out of a contravention of the Act. This ensured that damages limits under the state or territory law of the tort would apply and that access to the *Trade Practices Act 1974* for the same cause of action would not undermine the state or territory tort law reforms.

Western Australia imposed thresholds in the same manner as its *Motor Vehicle (Third Party Insurance) Act 1943*. However, it chose not to impose a cap on general damages as it considered that this had the potential to operate unfairly in relation to the most seriously injured claimants.

Queensland introduced a cap on general damages of $250,000 as appropriate for the jurisdiction, having regard to the more conservative approach historically adopted by the Queensland courts in the assessment of general damages.

Rather than introduce thresholds for general damages in personal injuries actions, Queensland instead introduced a system of graduated general damages. It uses ‘injury scale values’ that describes different types of injuries and allocates them a point value as a guide to courts in assessment. Corresponding dollar values for different ranges of point values provide more compensation for the more seriously injured. Queensland considers that this system provides clarity and transparency and is fairer than eliminating general damages for smaller claims altogether. Queensland is currently reviewing this scheme and expects to report on the outcome of consultation soon.

In contrast with this approach, Victoria uses guides to assess injuries for awarding damages, including in relation to workers’ compensation and transport accidents. Victoria argues that the guides have a proven record of measuring the extent and nature of injury.

Victoria has set permanent impairment thresholds to access general damages at 5 per cent for physical injury impairment and 10 per cent for psychiatric injury impairment, whereas New South Wales uses a 15 per cent threshold for extreme cases.

Tasmania did not set a cap on general damages. Traditionally, general damages awarded in Tasmania were modest so it saw no need for a cap. Also, because of the

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4 American Medical Association *Guides to the evaluation of permanent impairment* (Fourth edition, 1995).
modest damages awarded in Tasmania, the threshold set for general damages is low and indexed to the consumer price index.

The Northern Territory’s Personal Injuries (Liabilities and Damages) Act 2003 provides thresholds that relate to percentages of permanent impairment. This reflects the approach taken in the Territory for the statutory, no fault schemes in place in respect of workers’ compensation and motor vehicle accidents.

**Earnings Loss Cap**

*Review of the Law of Negligence* recommendation 49  
*Reform of liability insurance law in Australia* section C15

Damages for loss of earning capacity were limited only by the earning potential of the injured person.

While cases involving very high-income earners are rare, insurers found the uncertainty in their risk profile difficult to manage.

Insurance premiums funded income protection for very high earners who could instead arrange their own insurance protection.

The reforms to tort law set a limit on compensation for loss of future earnings or loss of earning capacity. The maximum award is based on a multiple of average weekly earnings for the expected duration of the plaintiff’s loss, except in South Australia, where the cap is set as a dollar amount.

**Gratuitous Care**

*Review of the Law of Negligence* recommendation 51–52  
*Reform of liability insurance law in Australia* section C16

In 1977, in *Griffiths v Kerkemeyer* (1977) 139 CLR 161, the High Court decided that compensation could be awarded in respect of the injured person’s need for care and assistance even if that need was met gratuitously by relatives or friends at no cost to the plaintiff. The compensation was for the loss of the capacity to care for oneself and the consequent need to be cared for by others, which existed regardless of whether the person who actually met the need did so gratuitously. The quantum of damages was the market value of the services required to meet the need.

The rule in *Griffiths v Kerkemeyer* was criticised on the basis that it allowed compensation for plaintiffs for care provided free of charge. A plaintiff might never have to pay for the services.
Another criticism was that claims by plaintiffs about the nature and extent of their need for gratuitous services are easy to make and difficult to refute. The needs of a plaintiff are partly subjective, dependent on the level of injury and the plaintiff’s age, general state of health, personality and state of mind.

The reforms to tort law limited gratuitous care claims to circumstances where the plaintiff will require care for a significant period and where the amount of gratuitous care is significant.

The reforms also provided guidance for the calculation of gratuitous care.

In subsequent developments in New South Wales, the Civil Liability Amendment Act 2006 No 56 partially reinstated Sullivan v Gordon (1999) 47 NSWLR 319 damages; that is, the ability to claim damages for the loss of capacity to provide gratuitous domestic services to dependants.

Tasmania had abolished claims for gratuitous services provided to plaintiffs in 1986. It reinstated damages for gratuitous care to a person following the Ipp review, except for claims to which Part III of the Motor Accidents (Liabilities and Compensation) Act 1973 applies.

**DISCOUNT RATE**

*Review of the Law of Negligence recommendation 53*

*Reform of liability insurance law in Australia section C17*

In awarding compensation for future economic loss or future expenses that will be suffered or incurred periodically as a lump sum, courts assume the plaintiff will invest the lump sum and receive a stream of income from it. To calculate the present value of this lump sum, the court uses a discount rate to ensure that the plaintiff does not receive too much. The discount rate is a way of arriving at the present value of compensation for future losses and expenses.

In 1981, the High Court set the discount rate for personal injury and death claims at a default rate of 3 per cent, a rate that continued to apply in the absence of any statutory provision to the contrary. A number of jurisdictions set discount rates higher than the default rate.

The reforms to tort law saw most jurisdictions align the discount rate used in civil liability matters with those in their respective compulsory third party motor vehicle and workers’ compensation statutory schemes. The common discount rate is 5 per cent, although there are variations.
The tort law reforms

The Australian Capital Territory did not prescribe a discount rate, so it therefore remains at the default rate of 3 per cent. In 2005, Tasmania reduced its discount rate, which was 7 per cent, to 5 per cent.

Western Australia calculates lump sum award payments using a discount rate of 6 per cent, under the Law Reform (Miscellaneous Provisions) Act 1941.

In Victoria, a discount rate of 5 per cent applies to assessments for future economic loss, under section 28I of the Wrongs Act 1958. However, legislation for the Transport Accident Commission and the Victorian WorkCover Authority mandate a discount rate of 6 per cent. Reducing this rate would have a significant impact on liabilities of these schemes and substantially increase the cost of major awards.

A New South Wales parliamentary report into personal injury compensation legislation recommended that New South Wales reduce the discount rate on damages for future economic loss paid as a lump sum to 3 per cent. The report noted that the Ipp review had recommended the lower rate and that the higher rate was likely to affect most the severely injured in the greatest need of assistance.5

The New South Wales Government did not support this recommendation. It argued that its Motor Accidents (Lifetime Care and Support) Act 2006, establishing the Lifetime Care and Support Authority, would provide medical treatment, care and support services for life to all people catastrophically injured in motor vehicle accidents.6

**STRUCTURED SETTLEMENTS**

*Review of the Law of Negligence* recommendation 57

*Reform of liability insurance law in Australia* section C18

Typically, a court in Australia awarded compensation for future economic loss or future expenses that the plaintiff will suffer or incur periodically as a lump sum.

Lump sum compensation was more tax advantageous than an income stream and courts could not always make structured settlement awards for periodic payments.

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While there was an assumption that the plaintiff would invest the lump sum and receive a stream of income from the investment, a plaintiff who did not know how to manage a large sum of money could dissipate it within their lifetime.

The reforms to tort law removed the tax impediment to structured settlements and facilitated court ordered structured settlements.

The Treasurer, the Hon Peter Costello MP, is due to appoint a person to review by the end of 2007 the operation of the structured settlements and orders provisions of Division 54 of the *Income Tax Assessment Act 1997*.

### Punitive damages

*Review of the law of negligence recommendation 60*

*Reform of liability insurance law in Australia* section C19

Punitive damages include both exemplary and aggravated damages.

Exemplary damages are damages awarded over and above the amount of damages necessary to compensate the plaintiff. Their purpose is to punish the defendant, to act as a deterrent to the defendant and others who might behave in a similar way, and to demonstrate the court’s disapproval of the defendant’s conduct.

Aggravated damages are damages awarded to compensate the plaintiff for increased mental suffering caused by the manner in which the defendant behaved in committing the tort.

Various arguments have been used to support abolition of exemplary damages:

- exemplary damages confuse the punishment function of the criminal law with the compensation function of the civil law;
- exemplary damages constitute an undeserved windfall for the plaintiff;
- awards of exemplary damages are unpredictable, especially in jury trials; and
- awards for exemplary damages are often too high.

The main argument for abolishing aggravated damages is that, if they are truly compensatory, they are unnecessary because compensation for mental distress can be given on other grounds.

The status of insurance coverage for punitive damages was unclear, with insurers sometimes using exclusion clauses and insureds expressing concern about unprotected exposures.
The tort law reforms

The reforms to tort law specifically abolished punitive damages in personal injury cases.

**CAPS ON PROFESSIONAL LIABILITY**

Reform of liability insurance law in Australia section C20

Professional standards schemes help to minimise economic loss and property damage claims against professionals through improved professional standards. Schemes gazetted under the relevant state or territory professional standards law require risk management strategies, compulsory insurance cover, professional education and appropriate complaints and disciplinary mechanisms, in return for caps on the liability of the professionals covered by the schemes. This is intended to facilitate the ongoing affordability of professional indemnity insurance.

New South Wales was the first jurisdiction to facilitate professional standards schemes, prior to the tort law reforms, with the introduction of its *Professional Standards Act 1994*. While New South Wales had gazetted professional standards schemes under its legislation, the *Trade Practices Act 1974* and other Commonwealth law had the potential to limit the effectiveness of these schemes by providing an alternative, unlimited, cause of action against professionals.

As part of the tort law reforms, the Australian Government enacted the *Treasury Legislation Amendment (Professional Standards) Act 2004* to amend the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001* and the *Trade Practices Act 1974* to provide for capped liability. These amendments supported the implementation of professional standards schemes legislation across the states and territories.

All states and territories are now implementing or amending existing arrangements to facilitate these schemes. For example, Western Australia’s *Professional Standards Amendment Act 2004*, which amended its *Professional Standards Act 1997*, commenced on 26 January 2005.

Schemes generally cap the upper limit of liability for a profession. However, Tasmania’s *Professional Standards Act 2005*, which commenced on 1 August 2005, provides that an occupational association must approve a higher maximum liability than would otherwise apply, if its member wishes to hold a higher liability. Tasmania considered that the level of indemnity was a matter for agreement between two contracting parties on a purely commercial basis and that there was not a sufficiently strong public interest case to intervene in such an arrangement.
PROCEDURAL REFORMS

LIMITATION PERIODS

Limitation periods limit the time within which a potential plaintiff can bring an action to court.

Limitation periods are generally defined in terms of:

- the date of commencement;
- the length of the limitation period;
- whether there should be an ultimate bar to commencing proceedings (a ‘long stop period’, which prevents an action from being taken more than a set period after the events on which the claim is based took place);
- whether the court should have the discretion to extend the limitation period and, if so, on what basis; and
- whether the limitation period should be suspended, particularly for minors and incapacitated persons.

Prior to the reforms to tort law, the rules applying to these criteria varied between states and territories and by claim type. The most common limitation period was six years, although courts could generally extend this period on a case-by-case basis. In most cases, the limitation period did not commence for minors until the age of 18.

More generous limitation periods meant that defendants were subject to long periods of uncertainty regarding whether a claim was to be brought. A claim could be brought against an obstetrician up to 25 years after the date of the date of an injury sustained by a child during birth.

Defendants were likely to be disadvantaged and less well prepared for defence, due to the passage of time. This had the ability to prejudice the fair trial of a claim. Evidence is likely to diminish, be lost or be affected by additional influences over time. As time passes, it becomes more difficult to verify the accuracy of information regarding the nature of the loss and the conduct of the defendant.

Except in certain special circumstances, settling claims within a short period is generally likely to reduce the costs associated with the claim and court proceedings, increase the quality and accuracy of the evidence and information presented and provide certainty for both plaintiffs and defendants.
The tort law reforms

In general, the reforms:

- defined the commencement of the limitation period as the ‘date of discoverability’;
- set the limitation period as three years from the date of commencement;
- inserted a 12-year long stop period;
- provided the court with discretion to extend the long stop period to the expiry of three years from the date of discoverability;
- provided guidance to the court on matters it must have regard to before extending the long stop provision; and
- provided special protection to persons operating under a disability.

Western Australia’s reforms to its limitations laws, in the Limitations Act 2005, included reducing the base limitation period for personal injuries claims from six years to three years. A detailed scheme for suspension and extension of limitations period in circumstances of undiscovered disease or injury or of undiscovered facts material to a claim provides flexibility and fairness that was not available under the generally fixed limitations periods of its Limitations Act 1935.

Tasmania’s Limitation Amendment Act 2004 commenced on 1 January 2005. This amended its Limitation Act 1974 to adopt the above reforms and to ameliorate the effect of restrictive limitation periods (three years from the date the cause of action arose) particularly in relation to persons suffering a latent disease.

**PRE-LITIGATION PROCEDURES**

*Review of the Law of Negligence* recommendation 9

*Reform of liability insurance law in Australia* section C22

The laws, regulations and court rules in each jurisdiction dealing with civil actions govern court procedures for liability claims.

Prior to the tort law reforms, only a couple of jurisdictions had rules aimed at liability claims. However, most jurisdictions had modified the normal court procedures for claims in the statutory schemes: motor accidents and workers’ compensation. There was a wide variety of provisions involving a variety of pre-litigation procedures.
Insurers believed that court procedures in a few jurisdictions had disadvantaged them, through:

- tactical delays in notifying claims;
- not notifying the insurer of a claim before commencing proceedings; and
- a reluctance to reveal details of a claim and evidence until court, thus reducing settlement opportunities and increasing costs.

The reforms to tort law improved pre-litigation procedures.

**LEGAL ADVERTISING**

*Reform of liability insurance law in Australia section C23*

States and territories, in conjunction with the relevant professional bodies, regulate the activities of the legal profession.

Some commentators argued that aggressive advertising by law firms contributed to a more litigious culture and an increase in claims.

In effecting the tort law reforms, some jurisdictions restricted advertising and touting by law firms. These were mainly jurisdictions that had previously introduced similar rules for motor accidents or workers' compensation claims.

Restrictions on advertising of personal injury legal services and touting are consistent across New South Wales, Western Australia, Queensland and the Northern Territory.

In Queensland, the *Personal Injuries (Legal Advertising) and Other Acts Amendment Act 2006* amended the *Personal Injuries Proceedings Act 2002* to extend the advertising restrictions for personal injury legal services to non-lawyers. Previously the restrictions caught only lawyers or persons acting on behalf of lawyers.

**LEGAL COSTS**

*Review of the Law of Negligence recommendation 45*

*Reform of liability insurance law in Australia section C24*

Australia experienced a substantial increase in the number of small to medium sized claims before 2002. Legal expenses were a major component of the cost of the smaller personal injury claims.

The reforms to tort law limited the amount of legal costs that a court could award for small claims.
Western Australia did not fix limits on legal costs for personal injuries claims as it already had a system for fixing maximum legal fees, by way of scales set by an independent Legal Costs Committee.

**CLAIMS-MADE POLICIES**

Section 54 of the *Insurance Contracts Act 1984* seeks to balance the interests of the insurer, the insured and third parties in response to some act of the insured, provided that the act could not reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract. The section allows an insurer to reduce its liability under the contract to an amount representing the extent to which the act prejudiced its interests.

A ‘claims-made and notified’ policy covers an insured if, during the policy period, a claim is made against them and they notify their insurer of the claim. Late notification of a claim or circumstance that may give rise to a claim by an insured may breach the terms of a claims made and notified policy. However, judicial interpretation of section 54 has prevented an insurer from relying on this non-compliance to avoid a claim by an insured, provided the non-compliance did not cause or contribute to the loss.

This interpretation may increase the costs of, and reduce the breadth of coverage of, claims-made insurance. This is because it may require insurers to have higher ongoing claims reserves than they would otherwise have to allow for such claims.

In response to concerns raised by the insurance industry at the judicial interpretation of section 54, the Australian Government established an independent panel to review and make recommendations on section 54, together with the remainder of the Act, in November 2003.

The review panel concluded that legislative reform of section 54 and associated provisions was necessary. The panel made further recommendations to revise draft amendments released for public consultation in 2004, in response to submissions and stakeholder consultations.

The Government expects to consult soon on draft legislation to amend the operation of the *Insurance Contracts Act 1984*. 