Review of the Law of Negligence
Final Report

September 2002

ISBN 0 642 74165 4

Printed by Canprint Communications Pty Ltd

30 September, 2002

Senator the Hon Helen Coonan
Minister for Revenue & Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Dear Minister

We have pleasure in submitting the Final Report of the Review of the Law of Negligence, in accordance with the Terms of Reference announced by the Government on 2 July 2002.

Yours sincerely

The Hon David Andrew Ipp
Chairman

Professor Peter Cane
Member

A/Prof. Don Sheldon
Member

Mr Ian Macintosh
Member

Contents

Terms of Reference: Principles-based Review of the Law of Negligence

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

Accordingly, the Panel is requested to:

1 Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death, including:

(a) the formulation of duties and standards of care;

(b) causation;

(c) the foreseeability of harm;

(d) the remoteness of risk;

(e) contributory negligence; and

(f) allowing individuals to assume risk.

2 Develop and evaluate principled options to limit liability and quantum of awards for damages.

3 In conducting this inquiry, the Panel must:

(a) address the principles applied in negligence to limit the liability of public authorities;

(b) develop and evaluate proposals to allow self assumption of risk to override common law principles;

(c) consider proposals to restrict the circumstances in which a person must guard against the negligence of others;

(d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;

(e) develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant is only partially responsible for damage, they do not have to bear the whole loss; and

(f) develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations[1] from damages claims for death or personal injury (other than for intentional torts).

4 Review the interaction of the *Trade Practices Act 1974* (as proposed to be amended by the Trade Practices Amendment (*Liability for Recreational Services) Bill 2002*) with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk). In conducting this inquiry, the Panel must:

(a) develop and evaluate options for amendments to the Trade Practices Act to prevent individuals commencing actions in reliance on the Trade Practices Act, including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and

(b) evaluate whether there are appropriate consumer protection measures in place (under the Trade Practices Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Trade Practices Act.

5 Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons. In developing options the panel must consider:

(a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and

1 A not-for-profit organisation in this context may include charities, community service and sporting organisations.

(b) establishing the appropriate date when the limitation period commences.

Report Date

The Panel is required to report to Ministers on terms 3(d), 3(f), 4 and 5 by 30 August 2002 and on the remainder of terms by 30 September 2002.

Panel of Eminent Persons

Chairman

The Honourable David Ipp

Justice Ipp has been an Acting Judge of Appeal, Court of Appeal, Supreme Court of New South Wales, since 2001 and Justice, Supreme Court of Western Australia, since 1989. He was admitted to the Western Australian Bar in 1984 and appointed as a Queen's Counsel in 1985.

Members

Professor Peter Cane

Professor Cane has been a Professor of Law in the Research School of Social Sciences at the Australian National University since 1997. For 20 years before that he taught at Corpus Christi College, Oxford, being successively a lecturer, reader and professor. His main research interests lie in the law of obligations (especially tort law), and in public law (especially administrative law).

Associate Professor Donald Sheldon

Dr Sheldon has been the Chairman of the Council of Procedural Specialists since 1993. His particular interests are in Upper GI Surgery.

Mr Ian Macintosh

Mr Macintosh has been the Mayor of Bathurst City Council in New South Wales since 1995. He also has been the Chairman of the NSW Country Mayors Association since 2000.

List of Recommendations

Implementation of the Panel's Recommendations

A national response

Recommendation 1

The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act') to be enacted in each jurisdiction.

Paragraph 2.1

Overarching recommendation

Recommendation 2

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.

Paragraphs 2.2 – 2.3

Professional Negligence

Treatment by a medical practitioner — standard of care

Recommendation 3

In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

> A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

Paragraphs 3.5 – 3.19

Standard of care — professionals generally

Recommendation 4

The Proposed Act should embody the following principles:

In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:

(a) What could reasonably be expected of a person professing that skill.

(b) The relevant circumstances at the date of the alleged negligence and not a later date.

Paragraphs 3.31 – 3.33

Duties to inform

Recommendation 5

In the Proposed Act the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.

Paragraphs 3.37 – 3.39

Recommendation 6

The medical practitioner's duties to inform should be expressed as duties to take reasonable care.

Paragraphs 3.43 – 3.46

Recommendation 7

The legislative statement referred to in Recommendation 5 should embody the following principles:

(a) There are two types of duties to inform, a proactive duty and a reactive duty.

(b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.

(c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.

(d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient, unless giving the information is required by statute.

(e) Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.

(f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

Paragraphs 3.47 – 3.69

Procedural recommendations

Recommendation 8

Consideration should be given to implementing trials of a system of court-appointed experts.

Paragraphs 3.70 – 3.79

Recommendation 9

Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.

Paragraphs 3.81 – 3.83

Not-for-Profit Organisations (NPOs)

No exemption for NPOs

Recommendation 10

Not-for-profit organisations as such should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.

Paragraphs 4.1 – 4.7

Recreational services generally

Recommendation 11

The Proposed Act should embody the following principles:

The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.

(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.

(b) Obvious risks include risks that are patent or matters of common knowledge.

(c) A risk may be obvious even though it is of low probability.

Paragraphs 4.11 – 4.18

Recommendation 12

For the purposes of Recommendation 11:

(a) 'Recreational service' means a service of

(i) providing facilities for participation in a recreational activity; or

(ii) training a person to participate in a recreational activity; or

(iii) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.

(b) 'Recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

Paragraph 4.19

Recommendation 13

The principles contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.

Paragraph 4.24

Warning and giving notice of obvious risks

Recommendation 14

The proposed Act should embody the following principles:

A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.

(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.

(b) Obvious risks include risks that are patent or matter of common knowledge.

(c) A risk may be obvious even though it is of low probability.

Paragraphs 4.26 – 4.34

Recommendation 15

The principles contained in Recommendation 14 should not apply to 'work risks', that is, risks associated with work done by one person for another.

Paragraph 4.35

Emergency services

Recommendation 16

There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.

Paragraph 4.37

Trade Practices

Part IVA

Recommendation 17

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any

claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Paragraphs 5.14 – 5.22

Recommendation 18

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Paragraphs 5.14 – 5.22

Part V Div I

Recommendation 19

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.

Paragraphs 5.23 – 5.33

Recommendation 20

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

Paragraphs 5.34 – 5.35

Part V Div IA, Part V Div 2A and Part VA

Recommendation 21

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Paragraphs 5.36 – 5.41

Recommendation 22

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Paragraphs 5.36 – 5.41

Limitation of Actions

General provision

Recommendation 23

The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.

Paragraphs 6.6 – 6.9

The limitation period and the long-stop period

Recommendation 24

The Proposed Act should embody the following principles:

(a) The limitation period commences on the date of discoverability.

(b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:

  (i) had occurred; and

  (ii) was attributable to negligent conduct of the defendant; and

  (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

(c) The limitation period is 3 years from the date of discoverability.

(d) Subject to (e), claims become statute-barred on the expiry of the earlier of:

  (i) the limitation period; and

(ii) a long-stop period of 12 years after the events on which the claim is based ('the long-stop period').

(e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.

(f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:

(i) whether the passage of time has prejudiced a fair trial of the claim.

(ii) the nature and extent of the plaintiff's loss.

(iii) the nature of the defendant's conduct.

Paragraphs 6.18 – 6.40

Suspending the limitation period — minors and incapacitated persons

Recommendation 25

The Proposed Act should embody the following principles:

(a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.

(b) 'Person under a disability' means:

(i) a minor who is not in the custody of a parent or guardian;

(ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.

(iii) a minor whose custodial parent or guardian is a person under a disability.

(c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.

(d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period

(called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.

(e) A close relationship is a relationship such that:

(i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or

(ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.

(f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

Paragraphs 6.41 – 6.56

Survival of actions

Recommendation 26

The Proposed Act should embody the following principles:

(a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.

(b) In such a case, the limitation period should begin at the earliest of the following times:

(i) when the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;

(ii) when the personal representative was appointed, if he or she had the necessary knowledge at that time;

(iii) when the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.

Contribution between tortfeasors

Recommendation 27

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.

Foreseeability, Standard of Care, Causation and Remoteness of Damage

Standard of care

Recommendation 28

The Proposed Act should embody the following principles:

(a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).

(b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as 'not insignificant'.

(c) A person is not negligent by reason of failing to take precautions against a risk that can be described as 'not insignificant' unless, under the circumstances, the reasonable person in that person's position would have taken precautions against the risk.

(d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):

  (i) the probability that the harm would occur if care was not taken;

  (ii) the likely seriousness of that harm;

  (iii) the burden of taking precautions to avoid the harm; and

  (iv) the social utility of the risk-creating activity.

Paragraphs 7.15 – 7.19

Causation

Recommendation 29

The Proposed Act should embody the following principles:

Onus of proof

(a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The two elements of causation

(b) The question of whether negligence caused harm in the form of personal injury or death ('the harm') has two elements:

(i) 'factual causation', which concerns the factual issue of whether the negligence played a part in bringing about the harm; and

(ii) 'scope of liability' which concerns the normative issue of the appropriate scope of the negligent person's liability for the harm, once it has been established that the negligence was a factual cause of the harm. 'Scope of liability' covers issues, other than factual causation, referred to in terms such as 'legal cause', 'real and effective cause', 'commonsense causation', 'foreseeability' and 'remoteness of damage'.

Factual causation

(c) The basic test of 'factual causation' (the 'but for' test) is whether the negligence was a necessary condition of the harm.

(d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.

(e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.

(f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:

(i) whether (and why) responsibility for the harm should be imposed on the negligent party, and

(ii) whether (and why) the harm should be left to lie where it fell.

(g)

(i) For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff's own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible.

(ii) Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances.

Scope of liability

(h) For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:

(i) whether (and why) responsibility for the harm should be imposed on the negligent party; and

(ii) whether (and why) the harm should be left to lie where it fell.

Paragraphs 7.25 – 7.51

Contributory Negligence, Assumption of Risk and Duties of Protection

Contributory negligence

Recommendation 30

The Proposed Act should embody the following principles:

(a) The test of whether a person (the plaintiff) has been contributorily negligent is whether a reasonable person in the plaintiff's position would have taken precautions against the risk of harm to himself or herself.

(b) For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence.

(c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:

(i) The probability that the harm would occur if care was not taken.

(ii) The likely seriousness of the harm.

(iii) The burden of taking precautions to avoid the harm.

(iv) The social utility of the risk-creating activity in which the person was engaged.

(d) Whether a plaintiff has been contributorily negligent according to the criteria listed in (a) and (c) must be determined on the basis of what the plaintiff knew or ought to have known at the date of the alleged contributory negligence.

Paragraphs 8.6 – 8.13

Apportionment

Recommendation 31

The Proposed Act should embody the following principle:

Under the Apportionment Legislation (that is, legislation providing for the apportionment of damages for contributory negligence) a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.

Paragraphs 8.20 – 8.27

Assumption of risk

Recommendation 32

The Proposed Act should embody the following principles:

For the purposes of the defence of assumption of risk:

(a) Where the risk in question was obvious, the person against whom the defence is pleaded (the plaintiff) is presumed to have been actually aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.

(b) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks

include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

(c) The test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk, not its precise nature, extent or manner of occurrence.

Paragraphs 8.28 – 8.32

Mental Harm

Recognised psychiatric illness

Recommendation 33

A panel of experts (including experts in forensic psychiatry and psychology) should be appointed to develop guidelines, for use in legal contexts, for assessing whether a person has suffered a recognised psychiatric illness.

Paragraphs 9.5 – 9.7

Duty of care — mental harm

Recommendation 34

The Proposed Act should embody the following principles:

(a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.

(b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless 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.

(c) For the purposes of (b), the circumstances of the case include matters such as:

(i) whether or not the mental harm was suffered as the result of a sudden shock;

(ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;

(iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;

(iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and

(v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

Paragraphs 9.8 – 9.28

Recommendation 35

The Proposed Act should embody the following principle:

The rules about when a duty to take reasonable care to avoid pure mental harm arises are the same regardless of whether the claim for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

Paragraphs 9.29 – 9.30

Contributory negligence

Recommendation 36

The Proposed Act should embody the following principle:

In an action for damages for negligently-caused pure mental harm arising out of an incident in which a person was injured, killed or put in peril as a result of negligence of the defendant, any damages awarded shall be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Paragraphs 9.31 – 9.33

Consequential mental harm

Recommendation 37

The Proposed Act should embody the following principles:

(a) Damages for economic loss resulting from negligently-caused consequential mental harm are recoverable only if:

(i) the mental harm consists of a recognised psychiatric illness; and

(ii) 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

(b) In determining the question of foreseeability in (a)(ii), the test is whether it was foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm.

Paragraphs 9.34 – 9.39

Expert evidence

Recommendation 38

The expert panel referred to in Recommendation 33 should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

Paragraphs 9.40 – 9.41

Public Authorities

Policy defence

Recommendation 39

The Proposed Act should embody the following principle:

In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant

was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.

Paragraphs 10.1 – 10.33

Recommendation 40

In the Proposed Act, the term 'public functionary' should be defined to cover both corporate bodies and natural persons.

Paragraph 10.29

Compatibility

Recommendation 41

The Proposed Act should embody the following principle:

A public functionary can be liable for damages for personal injury or death caused by the negligent exercise or non-exercise of a statutory public function only if the provisions and policy of the relevant statute are compatible with the existence of such liability.

Paragraphs 10.34 – 10.39

Breach of statutory duty

Recommendation 42

The Proposed Act should embody the following principle:

In the absence of express provision to the contrary in the relevant statute, any action for damages for negligently-caused personal injury or death made in the form of a claim for breach of statutory duty is subject to the provisions of this Act.

Paragraphs 10.40 – 10.45

Non-Delegable Duties and Vicarious Liability

Recommendation 43

The Proposed Act should embody the following principle:

Liability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.

Paragraphs 11.9 – 11.19

Proportionate Liability

Recommendation 44

In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability.

Paragraphs 12.17 – 12.19

Damages

Legal costs

Recommendation 45

The Proposed Act should embody the following principles:

(a) No order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than $30,000.

(b) In any case where the award of damages is between $30,000 and $50,000, the plaintiff may recover from the defendant no more than $2,500 on account of legal costs.

Paragraphs 13.15 – 13.18

Tariffs for general damages

Recommendation 46

The Proposed Act should embody the following principles:

(a) In assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it.

(b) Counsel may bring to the court's attention awards of general damages in such earlier cases.

(c) The Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the English Judicial Studies Board's Guidelines for the Assessment of General Damages in Personal Injury Cases.

Paragraphs 13.19 – 13.26

Threshold for general damages

Recommendation 47

The Proposed Act should impose a threshold for general damages based on 15 per cent of a most extreme case.

Paragraphs 13.27 – 13.47

Cap on general damages

Recommendation 48

(a) The Proposed Act should provide for a cap on general damages of $250,000.

(a) If such a provision is not enacted, each State and Territory should enact legislation providing for a single cap on general damages that will apply to all claims for personal injury and death.

Paragraphs 13.48 – 13.59

Cap on damages for loss of earning capacity

Recommendation 49

The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).

Paragraphs 13.58 – 13.67

Health care costs

Recommendation 50

The Proposed Act should embody the following principle:

For the purposes of assessing damages for health care costs, the issue of reasonableness should be determined by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable).

Paragraphs 13.68 – 13.71

Gratuitous services

Recommendation 51

The Proposed Act should embody the following principles:

(a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months.

(b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.

(c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.

(d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.

Paragraphs 13.72 – 13.87

Loss of capacity to care for others

Recommendation 52

The Proposed Act should embody the following principles:

(a) Damages for loss of capacity to provide gratuitous services for others shall not be recoverable unless, prior to the loss of capacity, such services were being provided for more than six hours per week and had been provided for more than six consecutive months.

(b) Such damages are recoverable only in relation to services that were being provided to a person who (if the provider had been killed rather than injured) would have been entitled to recover damages for loss of the deceased's services.

(c) The maximum hourly rate for calculating damages for loss of capacity to provide gratuitous services for others shall be one fortieth of average weekly FTOTE.

(d) The maximum weekly rate for calculating damages for loss of capacity to provide gratuitous services shall be average weekly FTOTE.

Paragraphs 13.88 – 13.91

Future economic loss

Recommendation 53

The Proposed Act should embody the following principles:

(a) The discount rate used in calculating damages awards for future economic loss in cases of personal injury and death is 3 per cent.

(b) An appropriate regulatory body should have the power to change the discount rate, by regulation, on six months notice.

Paragraphs 13.96 – 13.109

Interest

Recommendation 54

The Proposed Act should provide that pre-judgment interest may not be awarded on damages for non-economic loss.

Paragraphs 13.110 – 13.114

Death claims — damages for loss of support

Recommendation 55

The Proposed Act should embody the following principles:

(a) In calculating damages for loss of financial support any amount by which the deceased's earnings exceeded twice average FTOTE shall be ignored.

(b) A dependant may not recover damages for the loss of gratuitous services the deceased would have provided unless such services would have been provided for more than six hours per week and for more than six consecutive months.

(c) The maximum hourly rate for calculating damages for loss of gratuitous services the deceased would have provided is one fortieth of average weekly FTOTE.

(d) The maximum weekly rate for calculating damages for loss of gratuitous services the deceased would have provided is average weekly FTOTE.

(e) A dependant shall be entitled to damages for loss only of those gratuitous services that the deceased would have provided to the dependant but for his or her death.

Paragraphs 13.115 – 13.119

Death claims — contributory negligence

Recommendation 56

The Proposed Act should provide that in a claim by dependants for damages in respect of the death of another as a result of negligence on the part of the defendant, any damages payable to the dependants shall be reduced on account of contributory negligence on the part of the deceased by the same proportion as damages payable in an action by the estate of the deceased person would be reduced.

Paragraph 13.120

Structured settlements

Recommendation 57

Rules of court in every jurisdiction should contain a provision to the following effect:

Before judgment is entered in any action for damages for negligently-caused personal injury or death where:

(a) In a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits, loss of gratuitous services and future health-care expenses) that in aggregate exceed $2 million; or

(b) In a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed $2 million,

the parties must to attend mediation proceedings with a view to securing a structured settlement.

Paragraphs 13.121 – 13.127

Superannuation contributions

Recommendation 58

The Proposed Act should embody the following principles:

(a) Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).

(b) The percentage should be the minimum level of compulsory employers' contributions required under the relevant Commonwealth legislation (the Superannuation Guarantee (Administration) Act 1992 (Cwth)).

Paragraphs 13.128 – 13.133

Collateral benefits

Recommendation 59

The Proposed Act should embody the following principles:

(a) In assessing damages in an action under this Act, whether for personal injury or death, all collateral benefits received or to be received by the plaintiff as a result of the injury or death (except charitable benefits and statutory social-security and health-care benefits) should be deducted from those damages on the basis of the like-against-like principle.

(b) Collateral benefits should be set off against the relevant head of damages before any relevant damages cap is applied.

Paragraphs 13.134 – 13.158

Exemplary and aggravated damages

Recommendation 60

The Proposed Act should contain a provision abolishing exemplary and aggravated damages.

Paragraphs 13.159 – 13.167

Indexation

Recommendation 61

The Proposed Act should provide that the fixed monetary amounts referred to Recommendations 45, 48 and 57 should be indexed to the CPI.

Paragraph 13.168

1. Introduction

The formation of the Panel and the Terms of Reference

1.1 On 30 May 2002, a Ministerial Meeting on Public Liability comprising Ministers from the Commonwealth, States and Territory governments jointly agreed to appoint a Panel of four persons to examine and review the law of negligence including its interaction with the *Trade Practices Act 1974*. The Terms of Reference, as jointly agreed to by the Ministers, were announced by the Commonwealth Government on 2 July 2002.

1.2 This was the second Ministerial Meeting held to discuss public concerns about the cost and availability of public liability insurance. In the Ministerial communiqué that followed, Ministers stated, 'unpredictability in the interpretation of the law of negligence is a factor driving up [insurance] premiums'.

1.3 Within this broad context, the Terms of Reference for the review stated that '[t]he award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death'.

1.4 The Ministerial communiqué, the Terms of Reference, and the breadth and range of the responses the Panel received in submissions and consultations, indicate that there is a widely held view in the Australian community that there are problems with the law stemming from perceptions that:

(a) The law of negligence as it is applied in the courts is unclear and unpredictable.

(b) In recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.

(c) Damages awards in personal injuries cases are frequently too high.

1.5 Irrespective of whether these perceptions are correct, they are serious matters for the country because they may detract from the regard in which people hold the law, and, therefore, from the very rule of law itself.

1.6 The Panel's task is not to test the accuracy of these perceptions but to take as a starting point for conducting its inquiry the general belief in the Australian community that there is an urgent need to address these problems.

The general task of the Panel

1.7 The prime task of the Panel, as stated by the Terms of Reference, is 'to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death'.

1.8 Having been appointed as a result of a jointly agreed decision of the Commonwealth, State and Territory governments, the Panel, as noted in the Ministerial communiqué, is to assist governments in 'developing consistent national approaches for implementing measures to tackle the problems of rising premiums and reduced availability of public liability insurance'.

1.9 Many of those with whom the Panel has consulted (representing many different interests) have stressed the desirability of enacting measures to bring the law in all the Australian jurisdictions as far as possible into conformity. The Panel unqualifiedly supports this aspiration and would urge upon those with the responsibility of deciding on measures to implement our recommendations to give it their serious consideration.

1.10 In developing a consistent national approach, the Panel has been asked to develop, evaluate and recommend options for reform of personal injury law (by which we mean the law governing liability and damages for personal injury and death resulting from negligence) that address the concerns set out above and that take due account of the interests of both plaintiffs and defendants.

1.11 Some have submitted that the phrase 'with the objective of limiting liability and quantum of damages' in the first paragraph of our Terms of Reference should be understood as instructing the Panel to restate the current law with a view to preventing the further expansion of liability and damages. Furthermore, it has been suggested to the Panel that its task does not include developing options for changing the law so as to reduce the incidence of

liability and the quantum of damages currently provided for. We have not interpreted our task in this way.

1.12 Nevertheless, it has become clear in the course of the Panel's investigations and consultations that in some respects the law is not well understood by many of those who are significantly affected by it. The Panel has reached the conclusion that in certain areas the best way of furthering the objectives of the review is merely to restate the law in an attempt to provide a greater degree of clarity and certainty, and we will make appropriate recommendations in this regard.

1.13 In the course of our deliberations we also formed the view that, in some areas, perceived problems are the result of the way courts apply legal rules and principles that are open to various interpretations. In such cases, we have recommended that the law be restated in such a way as to give courts more guidance about how to apply relevant rules and principles in individual cases.

The scope of the Review

1.14 In conformity with the Panel's Terms of Reference, our reports focus primarily on liability for negligently-caused personal injury and death. We have not considered the law governing liability for negligently-caused property damage and economic loss (although some of our broader proposals and recommendations have implications beyond personal injury law). Nor have we considered liability for intentionally or recklessly caused personal injury and death.

1.15 Throughout its consultations, the Panel was requested to consider issues which we believe extend beyond our Terms of Reference.

1.16 A number of these issues were concerned with the operation of liability insurance, in particular the interaction between the law of negligence and insurance (or between the law of negligence and what has been described in the media and other places as the 'insurance crisis'). Although the Ministerial communiqué (as earlier referred to in paragraphs 1.2) asserts that there is a relationship between the current law and recent rises in insurance premiums, the Panel has not investigated, and has formed no view about that relationship or the likely impact of our recommendations on the insurance market.

1.17 Many of the people and organisations we consulted and who have made submissions to us stressed the importance of improving risk-management and enhancing regulation of potentially harmful activities.

These are important strategies for reducing the incidence of injury and death and, therefore, the amount of resources devoted to the compensation system. However, we consider that this topic is outside our Terms of Reference.

1.18 The costs of the personal injury liability system comprise the 'primary cost' of compensation and the 'secondary costs' of delivering compensation. Most notable of the secondary costs are legal fees and insurers' administrative costs. Secondary costs are relatively very high. Empirical evidence from research projects conducted over the last 30 years suggests that they make up as much as 40 per cent of total costs.[1] Measures to reduce secondary costs could make a significant contribution to furthering the wider objectives of this review, but we consider that they are outside our Terms of Reference.

1.19 Many of those who consulted with the Panel suggested that changes to the law relating to the payment of legal costs in personal injury actions would reduce the litigious culture that, they perceive, contributes to the problems that the Panel is required to address. We have taken the view that legal costs are generally outside our Terms of Reference. However, we make one recommendation on this issue in Chapter 13 (Recommendation 45).

1.20 If implemented, the recommendations made by the Panel will, to a degree, shift the cost of injuries from injurers to injured persons. As a result, some injured persons who, under the current law, would be entitled to compensation will no longer be so entitled; and other persons will be entitled to less compensation. How these issues are to be dealt with is a matter of policy for governments to determine and is not dealt with in our Report.

1.21 In this context it needs to be said that many of the people and organisations we consulted and who have made submissions to us argued that there is a strong case for a no-fault system of compensating injured persons. This is clearly not an issue within our Terms of Reference, and we make no comment on it save to draw attention to the fact that there is a significant body of opinion that supports the implementation of such a system.

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1 The earliest major research on the secondary costs of the tort system was conducted for the UK Royal Commission on Civil Liability and Compensation for Personal Injury chaired by Lord Pearson (1978) discussed in P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (London, 1999), 337-9. There is a useful discussion of Australian data in the New South Wales Law Reform Commission's *Report on a Transport Accident Scheme for New South Wales* (LRC 43/1, 1983), paras 3.84-3.93. A recent estimate is that 'defence costs currently represent around 20-35 per cent of total payments made by MDOs.' (G. Harrex, K. Johnston and E. Pearson, *Medical Indemnity in Australia* (a paper presented to the Institute of Actuaries of Australia, XIII General Insurance Seminar, 25-28 November, 2001), 28.

1.22 Despite the fact that the issues discussed above are outside the Terms of Reference for this Review, the Panel nevertheless believes many of these issues deserve careful attention.

1.23 Some people have contended that any statutory reform of the law as contemplated by the Terms of Reference will deprive injured persons of their 'rights'. As long as any such reform is not retrospective, that proposition is incorrect. Parliament can change the law at any time, and parliamentary amendment of the law — including the common law — is, of course, a very common occurrence in Australia. It is part of our democratic system. It is true that the Commonwealth Constitution has been interpreted to prevent legislative removal of a 'vested' cause of action.[2] But a cause of action vests only when all the facts on which it is based have occurred. We do not recommend any interference with vested causes of action.

Considerations underlying the Report

1.24 The Panel's starting point is that personal injury law comprises a set of rules and principles of personal responsibility. The Panel sees its task as being to recommend changes that impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves, consistently with the assumption inherent in the first paragraph of the Terms of Reference that the present state of the law imposes on people too great a burden to take care of others and not enough of a burden to take care of themselves.

1.25 Some of the submissions and representations made to us have stressed the importance of personal injury law as a source of compensation for injured persons, while others have stressed the interest of potential defendants in not being subjected to unduly burdensome legal liabilities. Within the constraints of our Terms of Reference, we have attempted to give due weight to both of these perspectives.

1.26 Some submissions have urged the Panel not to recommend changes to personal injury law that would reduce the level of protection provided to individual consumers of goods and services. The Panel has taken the view that the interests of individual consumers must be weighed against the interests of the community as a whole in reform of the law, and it has tried to strike a reasonable balance between these two sets of interests.

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2 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

1.27 Our Terms of Reference require us to undertake a 'principles-based' review. This is an approach suggested by Spigelman CJ in his article 'Negligence: the Last Outpost of the Welfare State' (2002) 76 *ALJ* 432. The Chief Justice contrasted principles-based law reform with 'underwriter-driven proposals' for special rules to govern particular types of cases or particular categories of potential defendants. The Panel understands principles-based reform as favouring general rules governing as many types of cases and as many categories of potential defendants as is reasonably possible. Principles-based reform favours consistency and uniformity and requires special provisions for particular categories of cases to be positively argued-for and justified. This is the approach to reform that the Panel has adopted in conducting the review and making its proposals and recommendations.

1.28 Our view is that in order to be 'principled' and effective, reforms of personal injury law must deal with such liability regardless of the legal category (tort, contract, equity, under statue or otherwise) under which it arises. If they do not, it may be possible for a claimant to evade limitations on liability for personal injury and death that attach to one cause of action by framing the claim in another cause of action. For example, if a limitation on liability or damages were applied only to the tort of negligence, injured persons would be encouraged to explore the possibility of framing their claim in contract or for breach of a statutory provision.

1.29 Another important consideration underlying our deliberations is that only a small proportion of the sick, injured and disabled recover compensation through the legal liability system, and only a very small proportion of deaths result in the payment of compensation. As a result, only a very small proportion of the total personal and social costs of personal injury and death are met by the imposition of legal liability to pay compensation. The vast majority of those who are injured or suffer disease or lose a breadwinner have to rely on their own resources and on other sources of assistance, notably social security.

1.30 We are also mindful of the fact that the levels of compensation available through personal injury law are generally much higher than those available under the social security system. Relatively speaking, personal injury law provides very generous compensation to a very small proportion of injured people. The Panel has taken the view that the relationship between personal injury law and other systems for meeting the needs of injured people is relevant to its Terms of Reference, especially to that part concerned with assessment of damages.

The Review timetable

1.31 Some submissions criticised the shortness of the period within which the Panel is required to produce options for reform. Some have even urged the Panel to seek an extension of its reporting dates.

1.32 The Panel accepts that the period available for the Review is indeed extremely brief given the complexity and difficulties of the task it has been asked to perform. But that is not the entire picture. The position requires some elaboration.

1.33 The law concerned with liability for personal injury and death has been developed by courts and parliaments over hundreds of years. It is comprised of countless principles and rules, many of which are inter-dependent. Together they form a system of great complexity and subtlety. It is often extremely difficult — and sometimes impossible — to ascertain how changes in one area will affect others. In addition, none of the issues raised by our broad and encompassing Terms of Reference admits of one obvious solution, and all require a balancing of legitimate and competing interests. Some of the issues have been the subject of lengthy and comprehensive reviews by Law Reform Commissions in Australia and other countries. In the time allotted to it, the Panel cannot carry out such a review. (We have, of course, relied heavily on such valuable work in formulating our own recommendations.) These matters are mentioned to make it plain that the Panel is properly cognisant of the nature of the task set for us in our Terms of Reference.

1.34 On the other hand, evidence has been provided to the Panel that throughout the country absence of insurance or the availability of insurance only at unaffordable rates has adversely affected many aspects of community life. Results have included the cancellation of community festivals, carnivals, art shows, agricultural shows, sporting events of all kinds, country fetes, music concerts, Christmas carols, street parades, theatre performances, community halls, and every manner of outdoor event. The Panel has been informed that some schools and kindergartens are not able to offer the facilities they would wish and some have had to close. Hospitals have experienced difficulties and the problems faced by members of the medical and other professions are well-attested. These are merely some examples of the way in which the fabric of everyday life has been harmed.

1.35 These problems have been experienced in the cities of Australia but their effect is most strongly felt in the country. There is evidence that the smaller the town, the more noticeable the impact.

1.36 The Panel understands that:

(a) There is a widely held view that personal injury law has contributed to this state of affairs, and that reducing liability and damages would make a significant contribution to resolving the crisis.

(b) At present an opportunity exists for legislation to be passed throughout the country that will reform personal injury law, and that this will be a considerable help in making things better.

(c) If the Panel does not produce its reports on the scheduled dates, the opportunity may be lost.

1.37 In these circumstances, public interest requires the Panel to do the best it can in the time allotted to it and to provide recommendations within the required dates. In doing so the Panel considers that it is able to propose some principled and soundly-based options for reform.

The absence of empirical evidence and its consequences

1.38 Many different changes could be made to the current law of negligence to further the objectives stated in the first paragraph of the Terms of Reference. Many bodies and individuals with differing interests and objectives have made submissions to the Panel as to the changes that should be made. Such changes were often recommended on the basis of assertions about their likely effects; but typically they were not supported by reliable and convincing empirical evidence. The vast majority of the assertions were based merely on anecdotal evidence, the reliability of which has not been tested.

1.39 A consequence of the dearth of hard evidence in the areas in which decisions are called for, is that the Panel's recommendations are based primarily on the collective sense of fairness of its members, informed by their knowledge and experience, by their own researches and those of the Panel's Secretariat, and by the advice and submissions of those who have appeared before the Panel and who have made written representations to it.

1.40 Consistently with our understanding of the objectives motivating our Terms of Reference (see paragraphs 1.4-1.12), the Panel has sought to strike a balance between the interests of injured people and those of injurers that seems to it to be fair and, on the basis of what we have been told, likely to be widely acceptable in the community at large.

The composition of the Panel

1.41 Certain submissions criticised the make-up of the Panel. In particular, they criticised the fact that the Panel is not comprised solely of legally trained persons. We have interpreted the mixed membership of the Panel as indicating that its task is to draw upon the personal knowledge and experience of all its members and on their perceptions of the attitudes and wishes of the Australian community as a whole (and not solely lawyers, medical practitioners, members of local government councils and others who are closely and frequently involved in the application of the law of negligence).

1.42 This approach is consistent with the observation of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580 that the law of negligence should be based on a general public sentiment of moral wrongdoing — a statement said by the Judicial Committee of the Privy Council in *The Wagon Mound*, to be the 'sovereign principle' of negligence ([1961] AC 388, 426).

Consultations and submissions

1.43 The Panel has had the benefit of consultations with, and has received submissions from, a wide range of senior judges, leading barristers and academics, representatives of a wide range of interested bodies and persons from many walks of life, and from all around Australia. The names of the persons and organisations who have participated in the consultation process, and who have made submissions, are listed at the end of this Report.

The structure of the Report

1.44 The Panel was required to report on certain issues (Terms of Reference 3(d), 3(f), 4 and 5) by 30 August 2002 and on the remaining issues by 30 September 2002. As a result, this Report was written in two parts. Chapters 3-6 (which were submitted on 30 August 2002) deal with the former set of issues, and Chapters 7-13 deal with the latter set of issues. As we make clear in Chapter 2, however, this Report should be read as making a single, integrated set of proposals for reform of personal injury law on a national basis. Chapter 2 contains two pivotal recommendations dealing with the implementation of the Panel's proposals that are of equal relevance to all the recommendations made in both phases of our work.

1.45 Each of Chapters 3-6 deals with one of the four Terms of Reference on which we were required to report by 30 August 2002. In dealing with the remaining Terms of Reference, it has not been possible to relate Chapters to Terms of Reference in this one-to-one fashion. This is because various of the Terms of Reference, and the issues they raise, inter-relate with others in complex ways. Our aim in Chapters 7-13 has been to deal in a clear and logical way with the various issues we have identified as deserving attention.

1.46 The Terms of Reference on which we were required to report by 30 September 2002 raise very many difficult and complex issues. In the time available we have not been able to deal with them all. Consistently with the Terms of Reference, we have focused on aspects of the law in relation to which we consider that useful and effective changes might be made for the purpose of 'limiting liability and quantum of damages arising from personal injury and death'. Our basic concern in Chapters 7-13 is with changes that will promote the objectives underlying the Terms of Reference. It should not be concluded from our silence about any topic that we believe that reforms of that area of the law would be neither possible nor desirable. Nevertheless, the Report discusses each of the issues that the Panel was expressly asked to consider, whether or not we have made recommendations for reform of the law in that respect.

Acknowledgments

1.47 The Panel would like to praise and thank the members of the Secretariat for their professional and dedicated contribution to the Review. Without their many skills, unfailing enthusiasm and hard work, this Report could not have been produced on time.

2. Implementation of the Panel's Recommendations

2.1 The Panel has interpreted its task as being to suggest a package of legislative measures which will further the objectives expressed and implied in the Terms of Reference. That said, the Panel's recommendations are not so tightly integrated that they must stand or fall in their entirety. Within limits, it would be possible for some elements of the package to be accepted and others to be rejected without seriously undermining the value of the exercise. The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute that might be called the *Civil Liability (Personal Injuries and Death) Act*.

Recommendation 1

The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act') to be enacted in each jurisdiction.

Overarching recommendation

2.2 For reasons explained earlier (see paragraphs 1.8-1.9) the Panel's aim in making recommendations has been to provide the basis for the drafting of model statutory provisions that could be adopted in any and every Australian jurisdiction (subject, of course, to any necessary consequential amendments of existing law in the particular jurisdiction). In some cases such provisions would achieve uniformity and in other cases consistency.

2.3 We would reiterate (see paragraph 1.28) that any statute incorporating any or all of our recommendations should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injuries or death resulting from negligence, regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action. Here, and throughout our reports, we use the term 'negligence' to mean 'failure to exercise reasonable care and skill'. We use the term 'personal injury' to include (a) any disease, (b) any impairment of a person's physical or mental condition, and (c) pre-natal injury.

Recommendation 2

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.

3. Professional Negligence

Term of Reference

3 In conducting this inquiry, the Panel must:

(d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission.

Preliminary: the dichotomy between treatment and information

3.1 Issues about the standard of care in medical negligence cases may arise in relation to treatment (which includes diagnosis, the prescribing of medications and the carrying out of procedures) and to the giving of information about treatment. The Panel considers that the distinction between treatment, on the one hand, and the provision of information, on the other, is a very important one, and that the law should deal with these two activities in different ways. The standard of care therefore has to be discussed separately in regard to each.

Treatment

The principal issue

3.2 The issue that principally causes controversy in regard to the standard of care applicable to the treatment of patients is whether the court should be the ultimate arbiter of the standard of care or whether it should defer to some designated body of opinion within the medical profession. Until *Rogers v Whitaker* (1992) 175 CLR 479, it was thought by many that the law on this question in Australia was embodied in the so-called '*Bolam* rule', although courts had expressed reservations about its application in Australia. The rule derives from a famous statement by McNair J in the English case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582:

> a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … merely because there is a body of opinion that would take a contrary view.

3.3 There are several points that need to be made about this statement:

3.4 Although it refers specifically to medical practitioners, there are reasons to think that it may apply to other occupational groups.

(a) The *Bolam* case involved treatment rather than the giving of information about treatment.

(b) Under the rule the defendant will be held to have exercised reasonable care if what was done was in accordance with 'a responsible body of medical opinion'.

3.5 Our consultations suggest that there is a significant body of opinion, especially among the medical profession, in favour of reinstating the *Bolam* rule in its original form. However, the Panel has formed the view, for the reasons which follow, that it should not recommend the reintroduction of the *Bolam* rule in its original form but rather a modified version of that rule.

Should the court defer to expert medical opinion?

3.6 Under the current law, courts are never required to defer to expert opinion as such. What the law says is that the court is entitled to accept a responsible body of expert opinion, unless there is a strong reason to reject it. The principle underlying this approach is that it is always for the court to decide what the test of reasonable care requires in particular cases, and it is always for the court to decide whether to defer to any particular body of expert opinion in the case before it. By contrast, the traditional *Bolam* rule requires courts to defer to responsible medical opinion, so that if the defendant acted in accordance with a responsible body of expert opinion, the court cannot decide that the defendant acted without reasonable care.

3.7 The choice between these two options may depend, in part at least, on how the body of professional opinion to which deference is accorded is defined. There are various options in this regard.

The *Bolam* rule

3.8 As already noted, under the *Bolam* rule, deference is accorded to a 'responsible body' of medical opinion. A common objection to the *Bolam* rule is that it gives too much weight to opinions that may be extreme and held by only a very few experts, or by practitioners who (for instance) work in the same institution and so are unrepresentative of the views of the larger body of practitioners. The *Bolam* rule also gives added importance to the influence of so-called 'rogue experts'. The problems with the *Bolam* rule in its original form are well-illustrated by two instances.

3.9 The first is discussed in *Bolitho v City and Hackney Health Authority* [1998] AC 232 by Lord Browne-Wilkinson, referring to *Hucks v Cole* [1993] 4 Med. L.R. 393, 397 (a 1968 case), in which 'a doctor failed to treat with penicillin a patient who had septic spots on her skin even though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated [the patient] with penicillin'. Despite this body of supportive opinion, the Court of Appeal held the doctor to have been negligent because he had knowingly taken a risk of causing grave danger even though it could have been easily and inexpensively avoided.

3.10 The second instance concerns the events described in the *Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters* (1988). The report arose out of a research programme, conducted over the course of almost 20 years, at the National Women's Hospital (Auckland, New Zealand), to determine the natural history of carcinoma-in-situ of the female genital tract. The programme involved leaving untreated women who returned positive Pap smears. A positive Pap smear may be indicative of carcinoma-in-situ, which may develop into invasive cancer. This procedure involved deliberately omitting to treat women in accordance with standards accepted elsewhere, in order to determine whether they would later develop invasive cancer. The approach followed in the programme was accepted by many other practitioners, within and outside the hospital, and formed the basis for under-graduate and post-graduate teaching. According to the Report, several women died as a result of the failure to offer conventionally-accepted treatment. Under a strict application of the *Bolam* rule as originally formulated, the practitioners involved arguably were not negligent.

3.11 These examples demonstrate that the *Bolam* rule, when strictly applied, can give rise to results that would be unacceptable to the community. They show the main weakness of the *Bolam* rule to be that it allows small pockets of

medical opinion to be arbiters of the requisite standard of medical treatment, even in instances where a substantial majority of medical opinion would take a different view. It is well-established that in many aspects of medical practice, different views will be held by bodies of practitioners of varying size and in different locations. This can result in the development of localised practices that are not regarded with approval widely throughout the profession. Thus, the *Bolam* rule is not a reliable guide to acceptable medical practice. The Panel therefore recommends that *Bolam* rule, in its original form, not be reinstated.

3.12 The question then is whether deference to a body of expert medical opinion would be acceptable if the relevant body of opinion were differently defined.

3.13 Term of Reference 3(d) suggests that deference should be paid to 'the generally accepted practice' of the medical profession. A problem with this formulation is that it does not allow for cases in which there is a genuine difference of opinion about whether generally accepted practice represents best practice, and it gives no scope for the properly regulated development of new techniques with a view to their future general adoption as best practice.

3.14 A third possibility, which would overcome the problems both of the *Bolam* test as originally formulated, and of the test suggested by Term of Reference 3(d), is a rule that a defendant could not be held liable where the court is satisfied that the conduct in question was in accordance with an opinion widely held by a significant number of respected practitioners in the relevant field.

3.15 In this formulation, the requirement that the opinion be 'widely held' is designed to prevent reliance being placed on localised practices that develop in isolation from the mainstream of professional activity. The requirement of 'a significant number' is designed to filter out idiosyncratic opinions. The requirement of 'respected practitioners' is designed to ensure that the opinion deserves to be treated as soundly based.

3.16 The Panel considers that the test set out in paragraph 3.13 is preferable both to the *Bolam* rule as originally formulated, and to the test suggested by Term of Reference 3(d). If it were thought right to require courts to defer to expert medical opinion relating to the standard of care applicable to medical treatment, the Panel's view is that the rule for determining the standard of care in all cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be as follows: 'A medical practitioner is not negligent if the court is satisfied that the treatment provided was in

accordance with an opinion widely held by a significant number of respected practitioners in the relevant field'.

3.17 As we have noted, however, under current law a court is never required to defer to medical opinion, although in the normal run of cases, it will. A serious problem with this approach is that it gives no guidance as to circumstances in which a court would be justified in not deferring to medical opinion.

3.18 This problem could be addressed by adding to the rule suggested in paragraph 3.15 the following proviso: 'unless the court considers that the opinion was 'irrational'. This proviso follows the law as laid down by the English House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232. In the opinion of the Panel, this formula gives doctors as much protection as is desirable in the public interest, because the chance that an opinion which was widely held by a significant number of respected practitioners in the relevant field would be held irrational is very small indeed. But, if the expert opinion in the defendant's favour were held to be irrational, it seems right (in the opinion of the Panel) that the defendant should not be allowed to rely on it. The Panel therefore recommends that this formula be adopted as the test of standard of care in relation to medical treatment administered by medical practitioners.

3.19 The proviso relating to 'irrational treatment' needs further elaboration. Under the recommended rule, it is for the court to decide whether treatment is irrational. It would be rare indeed to identify instances of treatment that is both irrational and in accordance with an opinion widely held by a significant number of respected practitioners in the field. Such a rare instance is the finding of the court in *Hucks v Cole* [1993] 4 Med. L.R. 393, referred to in paragraph 3.8.

3.20 Although some might think that this proviso is unnecessary, the Panel is of the opinion that there may be very exceptional cases (for example, *Hucks v Cole*) where such a situation may arise. In those circumstances, the court should have the power to intervene. As was argued in paragraph 3.17, if the court considers that the expert opinion on which the defendant relied is 'irrational', it seems right that the defendant should not be allowed to rely on it.

Recommendation 3

In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

(a) A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

Advantages of the Panel's recommendation in respect of provision of treatment

3.21 The recommended rule contains sufficient safeguards to satisfy the reasonable requirements of patients, medical practitioners and the wider community. It is hoped that the test will address the sense of confusion, and the perception of erratic decision-making, which (the Panel has been told) have contributed to the difficulty that medical practitioners face in obtaining reasonably priced indemnity cover and which have, in consequence, harmed the broader community.

3.22 The recommended rule recognises, first, that there might be more than one opinion widely held by a significant number of respected practitioners in the field. It provides a defence for any medical practitioner whose treatment is supported by any such an opinion, provided the court does not consider it irrational. It would not be for the court to adjudicate between the opinions.

3.23 Because there may be more than one opinion that meets the description in the recommended rule, it protects the practitioner who is at the cutting edge of medical practice provided that the procedure followed was in accordance with an opinion that meets that description.

3.24 The 'irrational treatment' proviso enables the community, through the court, to exercise control over the very exceptional cases where even the modified *Bolam* test does not provide adequate safeguards.

The scope of the rule about treatment: to which occupational groups should it apply?

3.25 If the rule contained in Recommendation 3 is adopted, the next issue to consider is to which occupational groups the rule should apply. Although the rule has been framed in terms of treatment of patients by medical practitioners, it could be applied more widely. Term of Reference 3(d) contemplates application to all professional groups. The Panel has identified four options in this regard.

Option 1

3.26 A first possibility is to limit the application of the rule to 'medical practitioners' within the meaning of s 3 of the *Health Insurance Act 1973* (Cwth).

Option 2

3.27 A second possibility is to extend the application of the rule to all health-care professionals.

Option 3

3.28 A third possibility is to extend the application of the rule to all 'professionals'.

Option 4

3.29 A fourth possibility is to extend the rule to 'all professions and trades'. This formula was used by the majority in the leading decision of the High Court of Australia in *Rogers v Whitaker* (1992) 175 CLR 479.

Assessment of the options

3.30 Which of these options ought to be adopted is ultimately a political question for governments to determine. In the Panel's view, there is no principled basis on which a decision between the various options could be made. Historically, the *Bolam* rule and variations on it have been discussed and applied chiefly in the context of medical negligence cases. The questions whether the rule applies to other occupational groups and, if so, to which ones, have not been authoritatively answered. Given the historical context, the Panel's view is that the recommended rule in Recommendation 3 should be stated to apply to medical practitioners, but in such terms as to leave it open to the courts to extend the rule to other occupational groups.

3.31 The discussion so far has been in terms of the provision of medical treatment to patients by medical practitioners. If Option 2, Option 3 or Option 4 were adopted, the recommended rules would need to be rephrased along the following lines: A service provider is not negligent if the service was provided in accordance with an opinion widely held by a significant number of respected service-providers in the relevant field, unless the court considers that the opinion was irrational. This formulation reflects the distinction between the provision of a service (which is analogous to the concept of

'treatment' in the medical context) and the giving of information about the service (see paragraph 3.1).

The need for restatement of the basic rule about the standard of care

3.32 In the course of its consultations and investigations, the Panel has formed the view that there is a considerable amount of misunderstanding, especially amongst medical practitioners, about personal injury law. We believe that this is a source of a certain amount of unnecessary fear and anxiety on the part of medical practitioners (in particular) about the risk of being successfully sued, and a source of unrealistic expectations in society about the role of personal injury law in providing compensation for personal injury and death. For this reason, we believe that there are certain respects in which it would be worthwhile legislatively to restate the law to make it more widely known and understood, even if a decision is made not to change it.

3.33 One area in which we believe that such a legislative restatement would be helpful concerns the basic rule about the standard of care applicable to cases where defendants have held themselves out as possessing a particular skill. In such cases, 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. We recommend legislative restatement of this rule in order to make it clear that skilled persons are not required by the law to exercise skills that they have not held themselves out as having.

3.34 The wording of Term of Reference 3(d) also suggests that there may be some value in restating the basic rule that the standard of care should be determined by reference to the date when the service was provided, and specifying that changes of practice after that date are not relevant. This raises a larger question about the dangers of hindsight that arises in relation to certain other of the Panel's Terms of Reference. Even so, it is worth considering dealing with it specifically in this context. We recommend that this be done.

Recommendation 4

The Proposed Act should embody the following principles:

In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:

(a) What could reasonably be expected of a person professing that skill.

(b) The relevant circumstances at the date of the alleged negligence and not a later date.

The provision of information

Basis for treating provision of information differently: the patient's right to decide

3.35 People have the right to decide for themselves whether or not they will undergo medical treatment. Originally, consent to medical treatment was seen as relevant only to the question of whether a medical practitioner administering the treatment could be sued for trespass to the person (battery), for interfering with the patient's bodily integrity. In this context, the law only required the medical practitioner to tell the patient, in general terms, about the nature of the proposed treatment.

3.36 Under current law, however, the giving of information by the medical practitioner, and the giving of consent by the patient, are seen as relevant to the issue of whether the medical practitioner has exercised reasonable care in relation to the patient. More importantly, it is now thought that medical practitioners must provide the patient with sufficient information to enable the patient to give 'informed consent' This obligation is commonly (although inaccurately) referred to as the 'duty to warn'.

3.37 An important implication of the patient's right to give or withhold consent is that the opinions of medical practitioners about what information ought to be given to patients should not set the standard of care in this regard. The giving of information on which to base consent is not a matter that is appropriately treated as being one of medical expertise. Rather, it involves wider issues about the relationship between medical practitioners and patients and the right of individuals to decide their own fate. The court is the ultimate arbiter of the standard of care in regard to the giving of information by medical practitioners.

To whom the duty should apply: the relevant occupations

3.38 As stated, the obligation of medical practitioners to provide information derives originally from the law relating to trespass to the person.

3.39 In regard to professions and occupations other than the medical profession, the law does recognise duties on the part of service providers to give particular categories of information in particular circumstances. The historical source of these duties, and their nature and scope, differ from the duty of medical practitioners to inform their patients. Moreover, while duties to inform have from time to time been imposed, they have yet to be analysed and categorised into a principled set of rules. This is very much a developing area and in the view of the Panel it is desirable to make a legislative statement of certain aspects of duties to inform in the medical context only.

3.40 Accordingly, the Panel recommends that any legislative statement of duties to provide information should relate only to medical practitioners. When dealing with the duty to provide information, the Panel will confine the discussion accordingly.

Recommendation 5

In the Proposed Act, the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.

When the duty arises and who owes it

3.41 In all of the cases to which the Panel has been referred and which the Panel has considered in its own research, it has been assumed by the parties that it is the treating medical practitioner who owed the relevant duty to inform. While in most instances this will be the case, it is not necessarily so.

3.42 In many instances of modern medical practice, the treatment of a patient, while under the direction of what (in common practice) is known as the 'attending medical officer', is shared by several health care providers. For example, in the course of pre-operative treatment, the operation itself and post-operative treatment, the patient might be attended by the general practitioner, a physician, a radiologist, a principal surgeon and an assisting surgeon, a registrar, an intern, an anaesthetist, theatre nurses and ward nurses. Each one of these persons may administer treatment to the patient. It is unlikely that each will incur an obligation to inform the patient about the treatment administered, but is quite possible that more than one of these persons will incur such an obligation.

3.43 The law is undeveloped in regard to determining precisely when a duty to inform will arise and on whom it will be imposed. The Panel considers it inadvisable to attempt to lay down any rules or principles in this connection.

Often, the answer will lie in responsibilities assumed by the various practitioners, and orders given and accepted. The Panel considers that this aspect should be left for the development of the common law.

The nature of the duty: a duty to take reasonable care

3.44 Some of the statements made concerning the duty to provide information make no reference, either expressly or impliedly, to the duty to inform being a duty of reasonable care. In these statements, the content and scope of the duty to inform are looked at solely from the point of view of the patient. In the Panel's view, however, this should not be the case. It should always be borne in mind that the duty to inform is part of the law of negligence, and accordingly is a duty to take reasonable care to inform. This means that consideration must be given to the situation of the practitioner.

3.45 It is by no means unknown, for example, for general practitioners in country areas to conduct surgery of a kind that elsewhere would be conducted by specialist surgeons. We are not here talking of instances where general practitioners profess skill that they do not have. The example we are giving is of general practitioners who hold themselves out as having only the skill of a general practitioner, but who are requested by their patients to carry out surgery that would elsewhere be carried out by specialist surgeons. Such general practitioners may not have the same knowledge as specialist surgeons would have of (for instance) risks of surgery. The law must accommodate this fairly, and will do so if it is recognised that the practitioner only has a duty to exercise reasonable care in giving information, and does not have a duty to give whatever information can be obtained.

Recommendation 6

The medical practitioner's duties to inform should be expressed as duties to take reasonable care.

3.46 An express statement that obligations to give information are obligations only to take reasonable care may help to reassure doctors that the law does not require of them unrealistic standards of behaviour, even though the law does not defer to medical opinion in this area to the extent that it does in relation to treatment. For instance, a doctor is not required to ensure that the patient fully comprehends the information given, but only to take reasonable care in this and other respects.

3.47 On the other hand, it is important to note that the information that the doctor must take reasonable care to provide is the information necessary to

enable the patient to give informed consent, not the information that the reasonable doctor would consider necessary for this purpose.

Analysis of the categories of information to be provided

3.48 It is necessary to distinguish between two different kinds of obligation to provide information.

3.49 An obligation to give information about treatment might be imposed on the practitioner regardless of whether the practitioner knows or ought to know that the patient wants to be given the information. The Panel will call this the 'proactive duty to inform'. On the other hand, an obligation to give certain information might be imposed only when the practitioner knows or ought to know that the patient wants or expects to be given the information. The Panel will call this the 'reactive duty to inform'.

3.50 The proactive duty to inform relates to information that the practitioner must give a patient even when the particular patient does not ask for it or otherwise communicate a desire to be given it. The reactive duty to inform relates to information the practitioner must give when the particular patient asks for information, or otherwise communicates a desire to be given it.

The proactive duty to inform

3.51 Under current Australian law, the proactive duty to inform requires the medical practitioner to put the patient in a position to make an informed decision about whether or not to undergo the treatment by telling the patient about material risks inherent in the provision of the treatment, and by providing other relevant information. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position would attach significance to it in deciding whether or not to undergo the treatment.

3.52 It seems clear that the proactive duty to inform is not confined to information about risks but extends to other types of information that may be needed to enable patients to make an informed decision about their health. What types of information are required to be given will depend on the circumstances of each case, and it is not possible or desirable to make general provision about this matter.

3.53 The test for determining what information the proactive duty to inform requires to be given should be objective, but should take account of the personal characteristics of the patient. In determining what information the

reasonable person would want, relevant factors might include the nature and effects of the treatment, the nature and probability of inherent risks of the treatment, and alternatives to the treatment.

3.54 Accordingly, we recommend that the proactive duty to inform should be formulated to the effect that the practitioner must exercise reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.

3.55 It is important that this formula be applied by reference to the time at which the decision whether or not to undergo the treatment was made and not with the benefit of hindsight. This is the current law. Research by psychologists suggests that it is very difficult to eliminate the effects of 'hindsight bias'. This problem may be thought particularly great where the question is what a person would have done if they had been given certain information that they were not given. So, in this context (at least), the Panel recommends providing explicitly that the question of what information the reasonable person in the patient's position would have wanted to be given is to be answered by reference to the time at which the relevant decision was made and not at a later time. This provision will, at least, require the issue of hindsight to be explicitly addressed.

Giving the proactive duty to inform greater specificity

3.56 On the basis of its consultations and investigations, the Panel has formed the view that the medical profession finds the current legal specification of the proactive duty to inform unsatisfactory because it gives insufficient guidance as to what information the medical practitioner has to give to the patient in order to avoid legal liability for negligence. There is anecdotal evidence that this may be having an adverse and distorting effect on medical practice. For example, it is sometimes said that medical practitioners may spend more time giving patients information than examining them. The Panel wishes to avoid further distortion of medical practice.

3.57 One way of addressing this concern might be to attempt to frame detailed, prescriptive legislative provisions specifying the matters about which information must be given to satisfy the proactive duty to inform. The Panel's considered view, however, is that this course of action would be impractical and undesirable. The precise content of the obligation has to depend on the facts and circumstances of individual cases, which are likely to be extremely diverse and incapable of being dealt with in such a way.

3.58 Another proposal that has been made in this regard is that the medical colleges (or the National Health and Medical Research Council) should develop guidelines, protocols or codes of practice concerning provision of information. We have not been able to investigate the feasibility of such developments. However, our view is that while compliance (or non-compliance) with such advisory regimes would (in accordance with current law) be relevant to the legal issue of reasonable care, it could never be treated as conclusive of the issue. For this reason, such proposals are not directly relevant to the Panel's Terms of Reference.

3.59 A specific issue raised in the course of the Panel's consultations is whether the proactive duty to inform requires the practitioner to tell the prospective patient that the treatment is also available from other more skilled or experienced practitioners. This question cannot be answered in the abstract. Although, generally, such an obligation would not arise, there might be exceptional circumstances in which it would. It would be neither desirable nor practicable to attempt to spell these out in legislative form.

Persons to whom the proactive duty to inform is owed, and the circumstances in which it does not arise

3.60 There are cases in which the proactive duty to inform would be appropriately owed to someone other than the patient (who might be called 'the substitute decision-maker'): for instance, where the patient is an infant, or unconscious, or otherwise lacking in decision-making capacity. The identity of the appropriate substitute decision-maker would be determined in accordance with the law of the relevant jurisdiction dealing, for instance, with the rights and obligations of parents and guardians of minors. In such cases, the content of the proactive duty to inform would be to give the substitute decision-maker such information as, in the circumstances, a reasonable person in the substitute decision-maker's position would want to be given to enable him or her to make a decision in the best interests of the patient.

3.61 There are three main situations in which the proactive duty to inform would not arise:

(a) Where its performance has been waived by the person to whom it is owed. This would be the case where the person to whom the duty to inform is owed has explicitly or impliedly told the person who owes the obligation that he or she does not want to be given information, or information of a particular kind, about proposed treatment.

(b) Where the treatment is provided on an emergency basis. To constitute an emergency, three conditions must exist: first, a threat of death or serious physical or mental harm to the person to whom the duty to inform is owed; second, the person to whom the obligation is owed temporarily lacks decision-making capacity; third, there is no appropriate substitute decision-maker for that person. In such cases, the proactive duty to inform is suspended, but not cancelled.

When the person to whom the treatment is provided regains decision-making capacity, the practitioner is under a proactive duty to give that person such information as a reasonable person in the patient's position would, in the circumstances, want to be given about the treatment that was provided.

(c) Where a medical practitioner reasonably believes that the very act of giving particular information to a patient would cause the patient serious physical or mental harm. This is the so-called therapeutic privilege. In this context, the phrase 'serious physical or mental harm' does not include harm likely to be suffered by reason only of a decision not to undergo the treatment in question. If it did, the patient's freedom to choose whether or not to undergo the treatment could be seriously compromised by a decision of the practitioner that the patient did not know what was in his or her own best interests.

3.62 The Panel considers that the development of these principles is best left to the common law.

Obvious risks

3.63 In the course of the Panel's consultations, the suggestion was repeatedly made that an obligation to give information should not entail an obligation to warn of obvious risks. Such a provision is consistent with the principle underlying the Terms of Reference that people should take more responsibility for their own safety. The Panel therefore recommends enactment of a legislative provision to the effect that a medical practitioner cannot be held to have breached the proactive duty to inform merely by reason of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to the reasonable person in the patient's position, unless giving the information was required by statute.

3.64 The term 'obvious risk' is intended to include risks that are patent or matters of common knowledge. In the Panel's view, the mere fact that a risk is of low probability does not prevent it being an obvious risk. Beyond this, however, the Panel considers that it would be undesirable and impractical to attempt to define obviousness of risk. Whether or not a risk is obvious must ultimately depend on the facts of individual cases and, in the end, will be a matter for the court to decide.

The reactive duty to inform

3.65 Under current law, the reactive duty to inform is an obligation to take reasonable care to give to the particular patient information about risks inherent in the treatment (and other matters) to which the practitioner knows or ought to know the patient would attach significance in deciding whether or not to undergo the treatment. In other words, the reactive obligation relates to information that the patient has asked for or otherwise communicated a desire to be given.

3.66 As in the case of the proactive duty to inform, the reactive obligation is not limited to information about risks but may extend to other types of information about the treatment that the practitioner knows or ought to know the patient wants to be given before making the decision about whether or not to undergo the treatment.

3.67 So far as concerns the issue of to whom the reactive duty is owed (see paragraph 3.59) , it is the view of the Panel that, in cases where the proactive duty to inform would be owed to a substitute decision-maker, the reactive duty to inform would also be owed to that person.

3.68 Concerning the issue of the circumstances in which the reactive duty might not arise, waiver (described in paragraph 3.60(a)) is obviously not relevant in this context. In emergency situations, described in paragraph 3.60(b), the Panel's view is that the reactive duty to inform would be suspended in the same way and to the same extent as the proactive duty to inform. The application of the therapeutic privilege, described in paragraph 3.60(c), to the reactive duty to inform raises difficult questions of policy that the Panel has not had time to consider.

3.69 The application of these issues to the reactive duty to inform has yet to be settled. The Panel considers that this should be left to the common law to develop.

3.70 So far as obvious risks are concerned, if a medical practitioner knows or ought to know that the patient wants to receive particular information before making the decision whether or not to undergo treatment, then the practitioner should be under an obligation to give that information, even if it concerns a risk or other matter that would, in the circumstances, have been obvious to the reasonable person in the patient's position.

Recommendation 7

The legislative statement referred to in Recommendation 5 should embody the following principles:

(a) There are two types of duties to inform, a proactive duty and a reactive duty.

(b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.

(c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.

(d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient, unless giving the information is required by statute.

(e) Obvious risks include risks that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.

(f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.

Expert evidence

3.71 A matter that has arisen repeatedly in the course of our consultations, and that is relevant in the present context, is that of the procedures for the giving of expert evidence. Problems associated with expert evidence have been very recently summarised in a Discussion Paper, published by the Family Court of Australia, entitled *The Changing Face of the Expert Witness* (2002).

3.72 In most jurisdictions, there is deep dissatisfaction with expert evidence, although this is not uniform throughout Australia. From the Panel's investigations, it seems that in some States the issue is not a pressing one.

3.73 The problems are of two kinds, one general and the other particular.

3.74 The general problem arises in many cases involving conflicting expert testimony. There is a widespread perception that, in many instances, expert witnesses consciously or sub-consciously slant their testimony to favour the party who retains them. There is also a widespread perception that, in many instances, the trial process does not afford a reliable means of adjudicating between groups of what might crudely be described as biased experts. Although this general problem has for many years been recognised and discussed throughout the common law world, it remains — to varying degrees — unresolved.

3.75 Generally, there has been growth in the expert evidence 'industry', with the result (so the Panel was told) that certain experts, including medical practitioners, devote their time substantially (and even in some cases entirely) to the giving of evidence. Many experts in this category become identified as plaintiffs' experts or defendants' experts.

3.76 The particular problem manifests itself in those States where case-management practices and the prevailing legal culture have resulted in expert evidence being given completely in writing, that is, where the evidence-in-chief is in writing and there is no cross-examination. This is the result of an understandable desire to reduce delays and ensure that cases are heard as cheaply and quickly as possible. But it may result in the judge having to choose between competing views contained in expert reports. Such decisions, taken in the absence of seeing and hearing the witnesses, may be thought to be in themselves contrary to accepted tenets of the adversarial system. They also may be thought to be inherently unreliable; and, as they usually turn on questions of fact, they are difficult to set aside on appeal.

3.77 From the submissions made to the Panel, we are satisfied that a significant body of the medical profession in particular has strong objections to the expert evidence system. On the other hand, there are some medical practitioners and lawyers who (so the Panel was told) oppose any change to this system. Some of this opposition is founded on an idealistic view of the adversarial system. In relation to the particular problem, objections that are so based are not persuasive as, in the situation in question, basic safeguards of the adversarial process have been lost. As regards the general problem, its long history suggests that it is questionable whether the adversarial system is adequately equipped to deal reliably and justly with conflicting expert evidence.

3.78 The Panel considers that careful attention needs to be given to these issues.

3.79 In the light of the differing conditions in various jurisdictions, the Panel does not recommend the introduction of national legislation. The Panel does recommend, however, in those jurisdictions where serious problems with expert evidence are recognised, that a system of court-appointed experts be implemented on a trial basis for 3 years and then evaluated.

3.80 The Panel is aware that O 34 r 2 of the *Federal Court Rules* provides for a 'court expert'. The system that the Panel recommends, however, is different in principle from that in O 34 r 2 in that it precludes the parties, of their own accord, from calling expert witnesses.

Recommendation 8

Consideration should be given to implementing trials of a system of court-appointed experts.

Suggested elements to underpin a system of court-appointed experts

3.81 In the time available, the Panel has not been able to provide a detailed exposition of what such a system would entail. Broadly, however, it should be based on the following elements:

(a) The judge would require a particular expert or experts to be called on particular issues.

(b) The expert(s) so called would, in effect, be 'joint' as contemplated by Civil Procedure Rules (CPR) Pt 35[1] (the Rules of Court now operative in England).

(c) No party would be entitled to call an expert witness on the party's own initiative. However, all parties would be entitled to cross-examine the court-appointed expert(s).

(d) The system should cater for the possibility that in the disputed area more than one opinion exists — in which case more than one expert might be appointed. This issue should be resolved in pre-trial directions hearings, although it should be open to the judge at any time to call any other expert witness should that be required by the circumstances.

(e) The decision as to which expert or experts should be called, and the issues on which the expert(s) should testify, should also be determined at pre-trial directions hearings.

(f) Any expert appointed should be:

i) A person agreed by the parties; or

ii) If the parties cannot agree on the person, a person appointed by the judge from a list agreed by the parties; or

iii) If the parties cannot agree on a list, one or more persons appointed by the judge, after hearing submissions by the parties at a pre-trial directions hearing.

(g) The Panel has not had sufficient time to investigate fully the mechanism that should be adopted in the event the parties cannot agree on a list. It may be that rules reflecting procedures developed in consultation with appropriate professional bodies would assist in this regard. Careful consideration should be given to adopting or adapting the system under CPR Pt 35.

(h) The costs of the expert should initially be shared equally between the parties, but the court should have power at any time to order that the costs should be shared differently.

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1 See *Peet v Mid-Kent Healthcare NHS Trust* [2002] 3 All ER 688.

Another procedural issue

3.82 One other procedural issue has been raised with the Panel.

3.83 The Panel has been informed that the so-called '90 day rule' in South Australia has been very successful, particularly in resolving matters of professional negligence. This rule essentially provides that, at least 90 days before commencing an action, a plaintiff must give the defendant notice of the proposed claim. The notice must give sufficient detail of the claim to give the defendant a reasonable opportunity to settle the claim before it is commenced (see Rule 6A of the Supreme Court Rules of South Australia).

3.84 In the Panel's opinion this rule has considerable practical utility, and the Panel recommends that it be considered by all jurisdictions in which a significant number of professional negligence actions are brought.

Recommendation 9

Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.

Other relevant issues

3.85 There are three other issues that are of particular relevance to this Term of Reference but which fall more squarely under other Terms of Reference. They concern the medical practitioner's obligations to give information about the provision of services, and are:

(a) Whether an objective or a subjective test should be applied to determine whether the patient would have decided to undergo the treatment if the relevant duty to inform had been performed.

(b) The proper basis for the assessment of damages in cases of breach of a duty to inform.

(c) The standard of care applicable in circumstances where a medical practitioner or other health-care professional voluntarily renders aid to injured persons in an emergency.

3.86 These issues are addressed in detail in Chapter 7, paragraphs 7.37-7.40, 7.37 (fn 9) and 7.20-7.24 respectively.

4. Not-for-Profit Organisations

Term of Reference

3. In conducting this inquiry, the Panel must:

(f) develop and evaluate options for exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury (other than for intentional torts). A not-for-profit organisation in this context may include charities, community service and sporting organisations.

Exemption from or limitation of liability

4.1 A not-for-profit organisation (NPO) is an organisation that is prohibited under its governing rules or documents from distributing profits to its members, owners or manager. Upon the winding-up of an NPO, any surplus profits may be distributed only to another NPO. A commonly used shorthand description of NPOs is that they are organisations that are conducted neither for the profit nor the gain of their individual members. It is important to note that the term 'not-for-profit organisation' does not signify that the organisation cannot and does not make profits. It only indicates that there are restrictions on what the organisation can do with its profits. In fact, many NPOs are commercial operations and compete with for-profit commercial operations.

4.2 The class of NPOs is very broad. It includes all charities (implicit in the definition of a charity is that it is not conducted for the profit or gain of individual members), and a range of community service and sporting organisations.

4.3 On the basis of our research, consultations and deliberations, and after careful thought and consideration, our leading recommendation in relation to this Term of Reference is that there should be no provision exempting NPOs as such from damages claims for death and personal injury caused by negligence or limiting their liability for such damages.[1] Instead, the Panel will make recommendations, the effect of which will be to limit liability for the materialisation of obvious risks of recreational activities (Recommendation 11)

1 For example, by providing that they will be liable only for 'gross negligence'.

and to exclude liability for failure to warn of obvious risks in any circumstances (Recommendation 14). The Panel's view is that these recommendations will make a significant contribution to furthering the objective of this Term of Reference, and that they strike a better balance between the various interests at stake than would provisions to protect NPOs as such. Together with recommendations concerning assessment of damages, for instance, they should provide a principled basis on which the NPO sector can build with renewed confidence.

4.4 The Panel's main reasons for making this leading recommendation are:

(a) There are very many NPOs, and in aggregate their activities present to members of the public considerable risks of suffering personal injury or death as a result of negligence. These risks are no different from those presented by similar activities of for-profit organisations.

(b) As a group, NPOs engage in a very wide range of activities of different sorts, ranging from organisation of small-scale recreational events to large-scale provision of health and social services.

(c) As a group, NPOs vary greatly in size, in the scale of their activities and in their financial turnover. As a result, their ability to bear or spread the costs of liability for personal injury and death also varies greatly. Our consultations suggest that the sorts of problems that have led to the appointment of the Panel are affecting smaller NPOs much more than larger NPOs.

(d) Many of the activities in which NPOs engage and many of the services they provide involve the participation of young people and underprivileged and vulnerable members of society. Many of these activities create a potential for the infliction of serious harm — for instance, sexual and other abuse of young people in schools and like institutions.

4.5 For all these reasons, the considered opinion of the Panel is that it would not, on balance, be in the public interest to provide the NPO sector as such with general limitations of, or a general exemption from, liability for negligently-caused personal injury and death. The Panel also believes that offering special protection to NPOs would not be consistent with our task of developing principled options for reform of the law. No principle has been suggested to the Panel, nor has the Panel been able to discern any principle,

that could support granting to NPOs a general exemption from, or general limitations of, liability. On the contrary, all the arguments that support imposing liability (notably, the value of compensating injured persons, of providing incentives to take care, and of satisfying the demands of fairness as between injured persons and injurers) apply as strongly to NPOs as to for-profit organisations.

4.6 It has been suggested that at least some of the arguments for not treating NPOs differently that were outlined in paragraph 4.4 could be addressed by exempting from liability only a limited sub-class of NPOs defined, for example, in terms of annual turnover. One proposal was that NPOs with an annual turnover of less the $250,000 might be given some form of protection from liability for negligently-caused personal injury and death.

4.7 In the view of the Panel, such proposals are undesirable for three main reasons. First, a financial threshold of this sort could easily be evaded in various ways that would be very difficult to control. For example, an NPO could hive off a section of its operations to ensure that its turnover, and also that of the remainder of its operations, was under the threshold. Secondly, because such a threshold is arbitrary, it would generate at least a perception of unfairness. An injured person might find it very difficult to understand why liability should depend on whether the turnover of the NPO responsible for his or her injuries was $249,999 rather than $250,001. Thirdly, there are strong reasons against protecting NPOs as a class that are not met by the proposal — such as those discussed in paragraph 4.4.

Recommendation 10

Not-for-profit organisations as such should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.

Recreational activities and services: NPOs

4.8 Another suggestion that has been widely made is that NPOs might be given some form of protection from liability for negligently-caused personal injury and death only in relation to recreational activities. Our consultations suggest that this is an area in which NPOs (especially NPOs operating in rural and regional Australia) are facing particularly serious problems. We have been told that the activities of such NPOs play an important part in maintaining the social viability and the quality of life of small rural communities.

4.9 Many of the reasons that support Recommendation 10 also provide reasons against creating a sub-class of NPOs who provide recreational services. In particular, we would draw attention again to three of those reasons.

(a) NPOs that are involved in the provision of recreational services vary greatly in size — from the local scout troop to the large metropolitan football club. The Panel believes that it would not be in the public interest to provide exemption from, or limitation of, liability for all NPOs which conduct recreational activities or provide recreational services. Similarly, we do not believe that it would be practicable or desirable to provide such protection to a sub-class of NPOs defined in terms of annual turnover.

(b) Many recreational activities are provided for the young whose health and safety especially need and deserve the law's protection.

(c) An exemption from liability for personal injury and death resulting from negligence in the conduct of a recreational activity or the provision of a recreational service would remove one incentive that NPO providers of recreational services currently have for the development of improved risk-management procedures.

4.10 For all of these reasons, the considered view of the Panel is that neither NPOs as a group, nor any sub-class of NPOs, should be given protection from liability for negligently-caused personal injury and death associated with recreational activities. The Panel considers that such a change in the law could not be justified consistently with the instruction to develop principle-based options for reform of the law. The Panel understands that NPOs play a very important part in the life of many communities by organising recreational activities; and that if they do not do so, communities may be deprived entirely of such activities. Giving full weight to this consideration, our view nevertheless remains that on balance it would not be in the public interest to protect NPOs as such from liability in relation to recreational activities.

Recreational activities and services generally

4.11 The Panel is of the view, however, that a principled reason can be given for treating recreational activities and recreational services as a special

category for the purposes of personal injury law, regardless of whether the provider of the service is an NPO or a for-profit organisation. The reason is that people who participate in such activities often do so voluntarily and wholly or predominantly for self-regarding reasons.

4.12 This is not always the case, of course. Members of schools and other institutions may be required to engage in sporting and other recreational activities. Also, people who participate in recreational activities in the course of their employment do not do so voluntarily in the relevant sense. The rationale for treating recreational services and activities as a special case does not apply to such persons. Therefore, any rule limiting liability in respect of recreational services should not apply to them.

4.13 On the basis of our consultations, the Panel has reached the conclusion that there is widespread and strong community support for the idea that people who voluntarily participate in certain recreational activities can reasonably be expected, as against the provider of the recreational service, to take personal responsibility for, and to bear risks of, the activity that would, in the circumstances, be obvious to the reasonable person in the participant's position. For this purpose, people who participate in recreational activities include not only 'players' but also, for instance, referees.

4.14 In reaching this conclusion, the Panel has not lost sight of the fact that many participants in recreational activities are children, whom most people would think need and deserve special protection from risks of personal injury and death. It is with this in mind that the phrases 'in the circumstances' and 'reasonable person in the position of the participant' have been used. These should give ample room for the law to develop flexibly to provide protection for people who are not in as good a position as a fully capable adult to take care for their own physical safety or to discern the risks of recreational activities in which they participate or which they observe.

4.15 The Panel considers that a distinction needs to be drawn between 'inherent' and 'obvious' risks. An inherent risk of a situation or activity is a risk that could not be removed or avoided by the exercise of reasonable care.[2] An inherent risk may be obvious, but equally it may not be. In *Rogers v Whitaker* (1992) 175 CLR 479, for example, the risk of sympathetic ophthalmia was inherent but far from obvious. This is one reason why it was so important for the doctor to tell the patient about it. Conversely, an obvious risk may be inherent, but equally it may not be. It may be a risk that could be avoided or

2 *Rootes v Shelton* (1967) 116 CLR 383.

removed by the exercise of reasonable care. This means that an obvious risk may be a risk that a person will be negligent.

4.16 The current law is that there can be no liability for negligence arising out of the materialisation of an inherent risk. This result actually follows logically from the definition of 'inherent risk' as being a risk that could not be avoided by the exercise of reasonable care. On the other hand, under current law, failure to guard against an obvious risk may be negligent if the risk is not an inherent one. This makes it clear that the effect of Recommendation 11 may be to relieve a person of liability for failure to remove or avoid a risk that could have been removed or avoided by the exercise of reasonable care on their part. In other words, Recommendation 11 may require a person to accept a risk that another person will be negligent.

4.17 The term 'obvious risk' is designed to include risks that are patent or matters of common knowledge. In the opinion of the Panel, the mere fact that a risk is of low probability does not prevent it from being obvious. The Panel recommends a definitional provision embodying these points. Beyond this, the Panel considers that it would be undesirable and impractical to attempt to define obviousness, because whether or not a risk is obvious will be for the court to decide and must depend ultimately on the facts of each individual case.

Recommendation 11

The Proposed Act should embody the following principles:

The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.

(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.

(b) Obvious risks include risks that are patent or matters of common knowledge.

(c) A risk may be obvious even though it is of low probability.

4.18 The Panel is of the opinion that for the purposes of this provision, the definition of 'recreational services' contained in clause 2 of the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 does not provide a suitable model for a definition of 'recreational services' and of 'recreational

activities'. This is because the provision we recommend is wider in its operation than clause 2. The effect of clause 2 is merely to remove the barrier erected by section 68 of the *Trade Practices Act 1974* against contractual exclusion of the warranties implied by section 74 of the TPA into contracts for the provision of recreational (and other) services. By contrast, the provision we are recommending excludes liability for the materialisation of obvious risks of recreational activities regardless of any agreement between the provider and the participant to this effect.

4.19 The Panel's view is that the definition of 'recreational services' in the Bill is too wide to be adopted in this context. The definition in the Bill could cover activities that do not involve any significant degree of physical risk. We think that a narrower definition that identifies activities that involve significant risks of physical harm would be more appropriate. This is because such activities are the sort that people often participate in partly for the enjoyment to be derived from risk-taking.

Recommendation 12

For the purposes of Recommendation 11:

(a) 'Recreational service' means a service of

(i) providing facilities for participation in a recreational activity; or

(ii) training a person to participate in a recreational activity; or

(iii) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.

(b) 'Recreational activity' means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

4.20 The effect of the provision in Recommendation 11 can be also be explained in terms of the defence of assumption of risk (which is dealt with in more detail in Chapter 8). Unlike the defence of contributory negligence (which involves apportionment of loss between plaintiff and defendant), the defence of voluntary assumption of risk provides a complete answer to a claim for personal injury or death. The basis of the defence of assumption of risk is that a person should not be able to recover damages in respect of a risk which they knew about and which they voluntarily took. The defence has, for all practical purposes, become defunct since the statutory introduction of

apportionment for contributory negligence. This is because contributory negligence will be available as a defence in any case in which voluntary assumption of risk is available: a person who knowingly takes a risk that another person will be negligent can be said to have failed to take reasonable care for their own safety. Courts prefer contributory negligence to assumption of risk because it enables them to apportion the loss between the parties and to give effect to more complex judgments of responsibility than the all-or-nothing approach of voluntary assumption of risk allows.

4.21 The effect of Recommendation 11 is to create a new defence of voluntary assumption of risk but limited in scope to voluntary taking of risks of participation in and observance of recreational activities. The Panel considers that this new defence is consistent with, and will further, the objectives underlying its Terms of Reference. Whereas the traditional defence of assumption of risk is available only in cases where the plaintiff subjectively knew of the relevant risk, Recommendation 11 applies the basic idea of voluntary assumption of risk to situations where the recreational activity in question carried risks that would be obvious to the reasonable person, regardless of whether the plaintiff was actually aware of those risks.

4.22 It has to be acknowledged that some will consider this to be a harsh rule. However, it must be borne in mind that:

(a) it will apply only to claims by participants in recreational activities;

(b) it will apply only to people who participate voluntarily;

(c) it will apply only to claims against providers of recreational services;

(d) it will apply only to a limited class of recreational activities of which it can be said that a significant element of physical risk is an integral part.

4.23 The Panel's investigations suggest that with these limitations, the recommended provision is likely to be widely accepted as a reasonable way of furthering the objectives of our Terms of Reference.

4.24 The Panel also recommends that risks of activities that are covered by a scheme of compulsory statutory liability insurance should be excluded from the operation of the provision contained in Recommendation 11. The main effect of this provision would be to exclude motor accident cases. This

exclusion obviously derogates from the ethical principle of personal responsibility on which Recommendation 11 is based. However, the Panel is mindful that some people may consider the provision contained in this Recommendation to be a harsh one. Since the basic purpose of compulsory insurance provisions is to ensure that harm is compensated for, the Panel is of the view that principle should not be pressed beyond the point of sound social policy by excluding obvious risks of recreational activities from the scope of relevant compulsory statutory insurance schemes.

Recommendation 13

The principles contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.

4.25 Although Recommendations 11 - 13 do not apply specifically to NPOs, they will operate for their benefit and will make a contribution to promoting the objectives of the Panel's Terms of Reference in relation to NPOs.

Warning and giving notice of obvious risks

4.26 Recommendations 11 and 12 provide relief from liability for failure to take care to eliminate obvious risks. But they do not deal with liability for failure to give notice or to warn of obvious risks.

4.27 Recommendation 7 contains a provision to the effect that a medical practitioner cannot be held to have breached a proactive duty to inform by reason only of having failed to give a patient information about a risk or other matter that would, in the circumstances, have been obvious to the reasonable person in the patient's position, unless required to do so by statute.

4.28 In the view of the Panel, the principle underlying this recommendation (ie that people should take more responsibility for their own safety) is of more general relevance. For instance, it is applicable to the liability of occupiers of land to visitors to the land. The obligation of the occupier is to take reasonable care for the visitor's safety. One way in which an occupier may be able to discharge this obligation is by giving notice or warning of dangers on the land. Even if the occupier was not negligent in failing to remove the danger, failure to warn or give notice of the danger could constitute actionable negligence. For instance, an occupier may be negligent in failing to give notice or warn of the danger of falling rocks in a particular location even though the occupier could not reasonably be expected to remove the danger.

4.29 In order to give wider effect to the rationale of Recommendation 7, the Panel recommends a provision to the effect that a person cannot be held to have breached a proactive duty to inform merely by reason of having failed to give notice or to warn of a risk of personal injury or death that would, in the circumstances, have been obvious to the reasonable person in the position of the person injured or killed, unless required to do so by statute.

Recommendation 14

The Proposed Act should embody the following principles:

A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.

(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.

(b) Obvious risks include risks that are patent or matter of common knowledge.

4.30 A risk may be obvious even though it is of low probability. The Panel considers that the provision in Recommendation 14 will make a significant contribution to furthering the objectives of its Terms of Reference. For instance, its effect would probably be to reverse the controversial decision in *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 (in which it was held that a local council's failure to warn of the dangers of diving into shallow water was negligent).

4.31 It is important to note that Recommendation 14 applies only to the proactive duty to inform and not to the reactive duty to inform. If a person asks about a particular risk, he or she should be told about that risk even if, in the circumstances, it would have been obvious to a reasonable person in the position of that person.

4.32 Recommendation 14 is an important adjunct to Recommendation 11 (although the operation of Recommendation 14 is not limited to recreational activities). Exclusion of liability for the materialisation of obvious risks could be circumvented if it were open to a claimant to allege failure to give notice or to warn of the risk.

4.33 The Panel's recommendation is that there should never be liability for breach of a proactive duty to inform consisting of failure to give notice or warn of a risk that would, in the circumstances, have been obvious to the reasonable person in the position of the person injured or killed. But in the Panel's view, it is only as between voluntary participants in recreational activities and providers of the corresponding recreational services that liability for failure to take care to eliminate an obvious risk can reasonably be excluded.

4.34 Although this recommendation does not specifically refer to NPOs, it will benefit them and will go some way toward meeting concerns that have been expressed to us and toward promoting the objectives underlying the Terms of Reference.

4.35 The Panel considers that the scope of the provision contained in Recommendation 14 should be limited in one significant respect. There has long been a principle of employers' liability law that a person who has control over the working environment is required take particular care for people in that environment. This obligation may extend to warning of obvious risks. It is not the Panel's intention to modify the law in this respect. We therefore recommend that the principles contained in Recommendation 14 should not apply to “work risks”. The Panel recommends that ‘work risks’ be defined as ‘risks associated with work done by one person for another’.

Recommendation 15

The principles contained in Recommendation 14 should not apply to 'work risks', that is, risks associated with work done by one person for another.

4.36 It should be noted that this recommendation says nothing about when work risks should be the subject of a warning, about who should give that warning or to whom it should be given. Its only effect is to exclude work risks from the operation of the rule that there can be no liability for failure to warn of obvious risks.

Emergency services

4.37 Some NPOs provide emergency services. The issue of the liability of providers of emergency services is dealt with in Chapter 7. The recommendations made there apply to NPOs which provide emergency services, as well as to other providers of such services. We therefore recommend that no special provision be made regarding the liability of NPOs

for personal injuries and death caused by negligence in the provision of emergency services.

Recommendation 16

There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.

5. Trade Practices

Term of Reference

4. Review the interaction of the Trade Practices Act 1974 (as proposed to be amended by the Trade Practices Amendment (Liability for Recreational Services) Bill 2000 ('the Bill') with the common law principles applied in negligence (particularly with respect to waivers and the voluntary assumption of risk).

In conducting this inquiry, the Panel must:

(a) develop and evaluate options for amendments to the Trade Practices Act 1974 to prevent individuals commencing actions in reliance on the Act including actions for misleading and deceptive conduct, to recover compensation for personal injury and death; and

(b) evaluate whether there are appropriate consumer protection measures in place (under the Act, as proposed to be amended, or otherwise) and if necessary, develop and evaluate proposals for consumer protection consistent with the intent of the Government's proposed amendment to the Act.

5.1 The Panel understands Term of Reference 4 as instructing it:

(a) To review the interaction of the *Trade Practices Act 1974* (Cwth) ('the TPA'), generally, with common law principles of negligence in so far as they apply to claims for personal injury and death;

(b) To develop and evaluate options for amending the TPA so as to restrict claims for personal injury and death that may be based thereon;

(c) To comment generally on the Bill and in this respect have regard to the common law principles relating to waivers and voluntary assumption of risk;

(d) In carrying out (b), to have regard to the need for appropriate consumer protection consistently with the overall intent of the TPA and, particularly, the Bill.

The Interaction between the Trade Practices Act and the law of negligence

5.2 In considering the interaction between the TPA and common law principles of negligence relating to claims for personal injury and death, it is first necessary to identify the potential bases for such claims under the TPA. It is also necessary to bear in mind that each State and Territory has legislation that is equivalent to or mirrors some of the relevant provisions of the TPA (most importantly, the 'Fair Trading Acts').

5.3 The TPA applies generally to the business and commercial activities of:

(a) most corporations;

(b) sole traders or partnerships whose activities:

i) cross State boundaries; or

ii) take place within a Territory; or

iii) are conducted by telephone or post, or use radio or television (Parts IVA and V only).

It also applies to commercial activities of the Commonwealth.

5.4 The Fair Trading Acts apply generally to business and commercial activities of any person.

5.5 Under the TPA the potential bases of claims for personal injury and death are:

(a) Part IVA (which concerns unconscionable conduct) particularly ss 51AA, 51AB and 51AC;

(b) Part V Div 1 (which concerns misleading or deceptive conduct) particularly ss 52 and 53;

(c) Part V Div 1A (which concerns product safety and product information) particularly ss 65C and 65D;

(d) Part V Div 2A (which concerns liability of manufacturers and importers of goods) particularly ss 74B, 74C and 74D; and

(e) Part VA (which concerns liability for defective products) particularly ss 75AD and 75AE.

5.6 Under the Fair Trading Acts, potential bases for claims for personal injury and death are found in unconscionable and misleading or deceptive conduct provisions that are equivalent to or mirror provisions of the TPA. There are other Commonwealth statutes that contain similar provisions relating to unconscionable and misleading or deceptive conduct. These include the *Australian Securities and Investment Commission Act 2001* (*Cwth*) and the *Corporations Act 2001* (*Cwth*). There are also certain State and Territory Acts that contain provisions that are equivalent to or mirror certain provisions of Part V Div 1A and Part V Div 2A of the TPA.

5.7 For the sake of clarity and simplicity, the discussion and recommendations in this Chapter generally will refer only to relevant provisions of the TPA. However, references to provisions of the TPA should be read (subject to any necessary adjustments) as incorporating references to State and Territory provisions that are equivalent to or mirror what seem to the Panel to be the most relevant provisions of the TPA. The appendix to this chapter contains tables of such equivalent or mirror provisions. References in this Chapter to the Australian Competition and Consumer Commission (ACCC) should be read as incorporating a reference to enforcement authorities in the States and Territories to the extent that they perform similar functions under the relevant local legislation. The appendix to this Chapter contains a list of such authorities.

5.8 Plainly, if it is thought necessary that legislative changes be made to limit potential use of these various bases for claims (as the Panel recommends), the changes should be made nationally in a uniform and consistent way. All jurisdictions will need to act co-operatively to ensure that this occurs.

5.9 Parliament intended the provisions that relate to product safety and product information, claims against manufacturers and importers of goods, and product liability (that is the relevant provisions in Part V Div IA, Part V Div 2A and Part VA) to provide causes of action to individuals who suffer personal injury and death.

5.10 On the other hand, it is open to serious question whether Parliament intended those provisions that relate to unconscionable and misleading or deceptive conduct (ie the relevant provisions in Part IVA and Part V Div I) to provide causes of action to individuals who suffer personal injury and death. We deal with this more fully below.

5.11 Until now plaintiffs have rarely relied on the unconscionable and misleading or deceptive conduct provisions in order to bring claims for personal injury and death. This state of affairs is to a significant extent a product of the prevailing legal culture. There has been no need to rely on those provisions because the common law of negligence has been seen as an adequate source of compensation. However, if personal injury law is changed in ways that the Panel recommends by limiting liability and damages, this situation is also likely to change.

5.12 If reforms that we are proposing in this Report are adopted, it will become more difficult for plaintiffs to succeed in claims based on negligence. Some may not succeed at all and others may only succeed to a lesser extent. Lawyers will inevitably search for different causes of action on which to base the same claims. Provisions of the TPA will provide an obvious target for this search. What has so far been a rarity may become commonplace, unless steps are taken to prevent this from occurring.

5.13 We will discuss each of the bases of claims for personal injury and death that have been identified in the TPA, and we will point out how each could attract claims for damages for personal injury and death if reforms to the law of negligence are adopted and implemented.

Part IVA

5.14 Part IVA is based on principles of equity. This gives a key to its underlying intent. Equity is primarily concerned with commercial and financial transactions. In Australian law, equitable principles have not been used to provide a basis for liability for personal injuries and death.

5.15 The paramount object of the unconscionable conduct provisions of the TPA was to extend certain rules of equity to afford protection to consumers. The Panel accepts that the intent of the legislature was to extend the scope of Part IVA beyond the common law doctrine of unconscionability. But, in the Panel's view, the unconscionability provisions of Part IVA were originally intended to apply only to commercial and financial transactions, not to claims for personal injury and death.

5.16 Nevertheless, there has been judicial recognition that the unconscionable conduct provisions can be used to found claims for personal injury and death.

5.17 In *Pritchard v Racecage Pty Ltd* (1997) 72 FCR 203 a claim for damages was brought by the widow of a man who died after being struck by a motor vehicle that was being driven in a race. An issue was whether such a claim could be brought under s 51AA of the TPA. In submitting that such a claim should be recognised, counsel for the plaintiff referred to the vulnerability of the deceased to exploitation by the organisers of the race. The statement of claim asserted that the organisers knew that persons in the class to which the deceased belonged trusted and relied upon them as to important matters, and the organisers acted in disregard of such trust and reliance. The Full Court of the Federal Court decided that it was open to argument that a claim for damages in respect of the death could be brought under s 51AA in such circumstances.

5.18 The important point to note about this decision is that the argument advanced on behalf of the plaintiff in *Pritchard* was based on elements that are now recognised at the highest judicial level as elements of claims based on negligence. Moreover, the facts of *Pritchard* were the kind of facts that classically give rise to claims for negligence. *Pritchard* demonstrates the potential of s 51AA to provide a basis for claims for personal injury and death.

5.19 However, unlike liability under the misleading or deceptive conduct provisions in Part V Div 1, liability for unconscionable conduct depends upon the plaintiff establishing fault on the part of the defendant (ie unconscionable conduct as defined). This requirement of fault limits the potential of Part IVA as a basis for claims for personal injury and death.

5.20 For this reason, the Panel considers that it is not necessary to prevent claims for personal injury and death being brought under Part IVA. The requirement of fault will limit the type of claim for personal injury and death for which Part IVA can provide a basis.

5.21 On the other hand, because of the potential of Part IVA to provide a basis for claims for negligently-caused personal injury and death, we think it desirable that the regime of rules about limitation of actions that we recommend in this Report, and the recommendations that we will make in our second report about quantum of damages should be explicitly expressed to apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

5.22 We also think it desirable that as a general principle, other limitations on liability that we recommend in this Report should apply, to the extent that they are relevant and appropriate, to any claim for negligently-caused personal

injury and death that is brought under Part IVA in the form of an unconscionable conduct claim.

Recommendation 17

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Recommendation 18

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA in the form of an unconscionable conduct claim.

Part V Div 1

5.23 Section 52 of the TPA has had a vast influence on the law of contract. The section is a major source of litigation in Australia. It has yet to be a significant influence on the law of negligence but, once avenues for plaintiffs under the law of negligence are blocked or made less attractive by reforms, this is likely to change.

5.24 Section 52 has gained such popularity with plaintiffs because it has been held by the courts to impose liability on defendants without the need to establish any fault. Often, a plaintiff will plead, as an alternative to a claim under s 52, a claim for negligent misrepresentation or deceit. In order for such common law claims to succeed it would be necessary for the plaintiff to prove not only that the defendant made a false representation, but also that he or she did so negligently or dishonestly (as the case may be). Under s 52, however, the plaintiff can succeed merely by proving that the statement was misleading or deceptive, even if the defendant made the statement with the utmost care and with complete honesty.

5.25 In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 a worker was seriously injured, allegedly as a result of a misleading statement made to him by a foreman about a grate that he was instructed to remove from an air-conditioning shaft. The worker brought an action for personal injuries under s 52 of the TPA. A majority of the High Court held that s 52 was not intended to extend to all conduct, regardless of its nature, in which a

corporation might engage in the course of, or for the purpose of, its overall trading or commercial business. The majority held that s 52 was concerned only with conduct in the course of activities which, of their nature, bore a trading or commercial character and thus were 'in' trade or commerce. It was held that the foreman's statement was not made 'in trade or commerce'. The limitation of the application of s 52 to conduct 'in trade or commerce' restricts the potential of Part V Div 1 to provide a basis for claims for negligently-caused personal injury and death.

5.26 Nevertheless, the Panel considers that the potential of Part V, Div I as a basis for claims for negligently-caused personal injury and death remains substantial. There are various areas of everyday life that are likely to give rise to claims for personal injury and death that could (despite *Concrete Constructions (NSW) Pty Ltd v Nelson*) be made under Part V Div 1. The most obvious are claims arising out of the provision of professional services and the occupation of land.

5.27 Much advice given (or not given) by professionals in the course of practising their professions is advice given (or not given) in trade or commerce (*Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215) and, hence, is capable of giving rise to claims for misleading or deceptive conduct. This applies to persons such as health-care professionals, engineers, architects and, indeed, all occupational groups whose advice might be relied on by consumers.

5.28 The circumstances under which claims for personal injury and death could be made under Part V Div 1, and the range of potential defendants who would be susceptible to such claims, are infinite. It is not required that the plaintiff was acting as a consumer when injured or killed. The majority in *Concrete Constructions (NSW) Pty Ltd v Nelson* made it clear that the only requirement is that the relevant conduct was 'in' trade or commerce.

5.29 It is appropriate to give some examples of claims for negligently-caused personal injury and death that might be brought against professionals under Part V Div 1 or its equivalent or mirror provisions in State and Territory legislation.

5.30 As regards architects and engineers, incorrect advice leading to the collapse of a structure, with the result that a bystander is killed or injured, could ground such a claim.

5.31 Medical practitioners are also at risk. The following scenario is but one of an infinite variety of circumstances that could give rise to claims against

such practitioners. Assume that a surgeon informs a patient that a certain operation would improve a patient's state of health. Assume further that this advice is given after all reasonable care has been taken in recommending the treatment. Assume that in the course of the operation the surgeon decides — as a result of unforeseeable circumstances undetected by the previous tests — that the operation should not proceed further and was, in effect, not necessary. The patient might then be able to claim damages in respect of the unnecessary operation on the ground that the surgeon was guilty of misleading conduct in advising that the operation should take place.

5.32 Many cases of occupier's liability could be brought as cases of misleading conduct. Take a corporation that advertises a particular area in the country as being attractive for camping, or advertises a hotel as being suitable for families. Assume that there is a muddy patch in the camping area and someone slips, or that there are uneven stairs in the hotel on which a child or elderly person trips. At present claims arising out of these circumstances would ordinarily be brought on the basis that the injuries arose from failures to take reasonable care. Any competent lawyer, however, would be able to frame such claims so that they come within the requirements of misleading or deceptive conduct under Part V Div 1.

5.33 For the reasons we have given, the possibility of making claims for damages for negligently-caused personal injury and death under Part V Div 1 and similar legislation could have an adverse effect on the reforms recommended in this Report. Accordingly, the Panel is of the view that the possibility of basing claims for personal injury and death on such provisions should be removed.

Recommendation 19

The TPA should be amended to prevent individuals bringing actions for damages for personal injury and death under Part V Div I.

5.34 Following on from Recommendation 17, the Panel also considers that the power of the ACCC to bring representative actions for damages for personal injury and death under Part V, Div 1 (see s 87(1A), s 87 (1B) of the TPA) should also be removed. (It is to be noted that the ACCC has no power to bring representative actions for breaches of the statutory warranties under Part V Div 2 and Div 2A).

Recommendation 20

The TPA should be amended to remove the power of the ACCC to bring representative actions for damages for personal injury and death resulting from contraventions of Part V Div 1.

5.35 Under Part VI of the TPA various actions can be taken, and various remedies can be sought, by the ACCC and persons who have suffered or are likely to suffer loss or damage as a result of conduct of another person in contravention of the TPA. The remedies include injunctive relief (s 80), non-punitive orders (s 86C), punitive orders (s 86D), orders to pay pecuniary penalties (s 76) and range of other orders (s 87 and 87A).[1] The ACCC can also accept written undertakings in connection with matters under the TPA (s 87B). Criminal proceedings can be brought under Part VC. Recommendations 19 and 20 are not intended to affect any of these actions or powers in any way. Both recommendations are concerned only with actions for damages.

Part V Div 1A, Part V Div 2A and Part VA

5.36 We repeat that these provisions are specifically intended to give protection to persons who suffer personal injury and death as a result of defects in goods. If the law of negligence is reformed in ways that the Panel recommends in this Report, greater attention may be paid to them by claimants as possible bases for personal injury claims.

5.37 In the Panel's opinion, the potential of these provisions to undermine reforms of personal injury law is not as great as that of Part V Div 1.

5.38 First, they are limited to harm resulting from defects in products.

5.39 Secondly, fault will arguably be an element of many, if not all claims under these provisions. For this reason, such claims may fall within the terms of Recommendation 1. That is, they may fall within the description of actions for negligently-caused personal injury and death.

5.40 Notwithstanding what is said in paragraph 5.39, the Panel thinks that for the sake of clarity and certainty, it would be desirable that the rules about limitation of actions and quantum of damages that are recommended in this Report should be explicitly expressed to apply to any claim for

1 The ACCC also has power to seek declarations under s 163A(1) of the TPA.

negligently-caused personal injury and death that is brought under these provisions in the form of an unconscionable conduct claim.

5.41 We also think it would be desirable, and we recommend, that as a general principle, claims for negligently-caused personal injury and death that are brought under these provisions should be subject to the other limitations of liability that the Panel is recommending in this Report to the extent that they are relevant and appropriate.

Recommendation 21

The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Recommendation 22

The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA.

Consumer protection

5.42 It is our considered opinion that implementation of Recommendations 19 and 20 (preventing actions for damages for personal injury and death being brought under Part V Div 1 of the TPA) will not unacceptably reduce legal protection of consumers. Its main effect will be to remove a basis of strict liability for personal injury and death resulting from misleading or deceptive conduct. It will not prevent claims, in respect of the sorts of conduct covered by Part V Div 1, being brought as negligence claims.

5.43 In any event, the actions that can be taken and the remedies that can be sought under Part VI of the TPA afford considerable protection to consumers. As stated in paragraph 5.35, these include injunctive relief, non-punitive orders, punitive orders, orders to pay pecuniary penalties, and other orders, as well as the bringing of criminal proceedings. This is a formidable armoury for individuals and the ACCC.

5.44 As regards Part IVA, Parts V Div 1A, Part V Div 2A and Part VA, our view is that although our recommendations may reduce the level of consumer

protection currently provided under the TPA (and equivalent or mirror legislation in the States and Territories) they do so consistently with the objectives underlying our Terms of Reference.

5.45 The ACCC opposes any reduction of the level of consumer protection provided by the TPA. Its opposition is based on concepts such as 'the economics of accidents', 'the optimal allocation of risk', and 'efficient management of risk'. The Panel accepts that all these are valid considerations. But we do not view personal injury law solely as a regulatory mechanism or a risk-management tool. The Panel believes that, consistently with its Terms of Reference, other considerations of importance need to be taken into account. These include the inherent value of personal autonomy, and the desirability of persons taking responsibility for their own actions and safety.

5.46 The Panel is also required by its Terms of Reference to assume that the award of damages has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another, and to propose reforms that will meet the objective of limiting liability and the quantum of damages arising from personal injury and death.

5.47 Taking a global view, the Panel does not consider that the reforms it proposes will reduce consumer protection unacceptably.

Section 74, s 68 and the Bill

5.48 Section 74(1) implies into contracts for the supply of services by a corporation to a consumer in the course of a business an implied warranty that the services will be rendered with due care and skill. Section 74(2) implies into certain contracts for the supply of services by a corporation to a consumer in the course of a business an implied warranty that the services will be reasonably fit for their intended purpose.

5.49 Section 68 provides that any term of a contract that purports to exclude or restrict the warranties implied by s 74 is void.

5.50 The Bill will prevent s 68 rendering void provisions in contracts for recreational services that purport to exclude, restrict or modify those implied warranties. In other words, the Bill will allow consumers to 'waive' the implied warranties in the case of contracts for the supply of recreational services, as defined in the Bill.

5.51 The Panel considers that the Bill will not significantly reduce consumer protection for the following reasons:

(a) Exclusion of the implied warranties will be subject to the ordinary rules of contract law. These rules are stringent. It is notoriously difficult for parties relying on contractual exclusions of the kind contemplated to succeed.

(b) There are two principal hurdles that must be overcome. First, the exclusion clause must be effectively 'incorporated into the contract'. The rules about incorporation are complex, and in cases where there is doubt about whether they have been met, the doubt will be resolved in favour of the consumer.

(c) Secondly, to be effective, the words of the exclusion clause must be clear and unambiguous. Any doubts about the precise meaning of the clause will be resolved in favour of the consumer. For instance, clauses intended by the service-provider to exclude liability for negligence are often held ineffective to do so.

(d) Finally, it should be emphasised that a contractual exclusion clause, even if effective in other respects, may only be effective against the other party to the contract. For instance, if one person enters a contract for the supply of recreational services to a group, the other members of the group may not be bound by the terms of the contract. Moreover, many people who participate in recreational services do not do so pursuant to contracts. The very nature of recreational activities is such that people often take part in them spontaneously, without any thought of entering into a contract with the person organising the activity. The Bill will have no impact on the rights of such people.

5.52 In summary, the Bill removes the obstacle presented by s 68 to the exclusion of the warranties implied by s 74. It does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.

5.53 Even so, if it is desired to allow exclusions of the kind contemplated in the Bill, an amendment to the TPA of the kind contained in the Bill is necessary.

5.54 To the extent that the Bill facilitates assumption of risk by consumers of recreational services, it is consistent with the objectives of the Panel's Terms of Reference. In this context we would draw attention to Recommendation 11 to the effect that a provider of recreational services should not be liable to a voluntary participant in the recreational activity in respect of the materialisation of an obvious risk.

5.55 In certain respects, the recommended rule is narrower in scope than the Bill.

(a) First, it covers only obvious risks, whereas the sort of clause permitted by the Bill could, in theory, exclude liability for any risk of the activity.

(b) Secondly, the definition of 'recreational services' contained in Recommendation 12 is considerably narrower than that in the Bill.

5.56 On the other hand, the recommended rule has significantly wider effect than the Bill in the sense that it excludes liability for certain risks rather than simply allowing liability to be excluded by agreement. Also, it applies to all participants in recreational activities (as defined) whether or not they have a contract with the provider of the relevant recreational services.

5.57 Attention should also be drawn to Recommendation 14 to the effect that there can be no liability for failure to warn of a risk that would, in the circumstances, have been obvious to the reasonable person. This recommendation covers, but is not limited to, risks of recreational activities as defined in the Bill. It applies to any breach of an obligation to warn regardless of whether the obligation arises under a contract.

5.58 To the extent that the warranties implied by s 74 are warranties of due care and skill, they will fall within the terms of Recommendation 1. To that extent, Recommendations 11 and 14 will apply to claims for personal injury and death based on breaches of the s 74 warranties.

5.59 Together, these two recommendations afford significant protection, additional to that contemplated by the Bill, to providers of recreational services, and they make an important contribution to furthering the objectives underlying the Terms of Reference. At the same time, we consider that they strike a reasonable balance between the interests of providers and consumers of recreational services.

5.60 These two recommendations are consistent with and compliment the policy and terms of the Bill. The Panel sees no reason why they should not exist side-by-side.

5.61 Nevertheless, the Panel strongly suggests that paragraph (c) of the definition of 'personal injury' in clause (2) of the Bill be redrafted or, preferably, deleted . It is extremely (and, in our view, unacceptably) wide in its terms and very difficult to understand. We also suggest that consideration be given to narrowing the definition of 'recreational services' in the Bill to bring it into conformity with the definition in Recommendation 12.

6. Limitation of Actions

Term of Reference

5. Develop and evaluate options for a limitation period of 3 years for all persons, while ensuring appropriate protections are established for minors and disabled persons.

In developing options the panel must consider:

(a) the relationship with limitation periods for other forms of action, for example arising under contract or statute; and

(b) establishing the appropriate date when the limitation period commences.

The nature of limitation periods

6.1 Limitation periods provide a time limit for the bringing of legal proceedings. They should not be seen as arbitrary cut-off points unrelated to the demands of justice or the general welfare of society. They represent the legislature's judgment that the welfare of society is best served by causes of action being litigated within a limited time, notwithstanding that their enforcement may result in good causes of action being defeated.[1]

6.2 It has been said that there are four broad rationales for the enactment of limitation periods. These are:

(a) As time goes by relevant evidence is likely to be lost.

(b) It is oppressive to a defendant to allow an action to be brought long after the circumstances that gave rise to it occurred.

(c) It is desirable for people to be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a certain time.

1 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 per McHugh J.

(d) The public interest requires that disputes be settled as quickly as possible[2].

6.3 A workable limitation system needs to provide fairness to both plaintiffs and defendants. Plaintiffs need sufficient time to appreciate that they have claims, to investigate their claims and to commence proceedings. In some cases plaintiffs may be under a disability that prevents prompt action. In other cases, the detection of a disease or injury (or its cause) may not be possible until many years after the date of the event that caused it. A limitation system must be sufficiently flexible to cope fairly, not only with patent damage that is suffered immediately or shortly after the occurrence of a wrongful act, but with latent damage that can only be detected years after the relevant event.

6.4 The interests of defendants are encapsulated in the four rationales set out above.

6.5 Limitation rules should, as far as possible, be of general application, and undue complexity should be avoided. While procedural in nature, a limitation system operates on the substantive rights and liabilities of the parties. Therefore, striking a just balance is imperative.

Limitation period issues

6.6 When evaluating an appropriate limitation system, consideration needs to be given to the following issues:

(a) The date when the limitation period commences to run;

(b) The length of the limitation period;

(c) Whether there should be an ultimate bar to commencing proceedings (a "long-stop" provision);

(d) Whether the court should have discretion to extend the limitation period and, if so, on what basis; and

(e) Whether the limitation period should be suspended, particularly for minors and incapacitated persons.

2 *Ibid.* 552 per McHugh J.

6.7 None of these issues can be considered in isolation. As will become apparent, the various issues interact.

6.8 There is a bewildering array of different limitation regimes in Australian jurisdictions. The rules relating to the issues set out in paragraph 6.6 differ from jurisdiction to jurisdiction and, within each jurisdiction, from one cause of action to another. These differences lead to confusion, are themselves causes of litigious disputes, often materially influence the nature of the cause of action relied upon, and occasionally lead to forum shopping. Accordingly, any sensible reform of the law relating to claims for personal injury or death arising out of negligence should include limitation rules that, as far as possible, are of general application and have nationwide effect.

6.9 Our Terms of Reference require us to 'consider … the relationship with limitation periods for other forms of action, for example arising under contract or statute'. As we have pointed out in the Introduction to this Report, actions for negligently-caused personal injury and death can be brought under contract, statute and various other causes of action, as well as under the tort of negligence. It is desirable that the limitation periods relating to all actions of this kind, irrespective of the formal causes of action on which they are based, should be the same. This effect will be achieved if the Proposed Act makes it plain that all claims for negligently caused personal injury or death are governed by the limitation provisions proposed in this chapter.

Recommendation 23

The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.

The date when the limitation period should commence

6.10 There are four principal options in regard to the date from which the limitation period should run, namely:

(a) The date of the event(s) that resulted in the personal injury or death;

(b) The date of the accrual of the cause of action;

(c) The date when damage occurred; and

(d) The date of discoverability.

6.11 Whichever option is adopted, it will need to cater for many different kinds of damage. Different considerations arise depending upon whether damage is suffered in consequence of an accident that causes trauma or whether it is suffered in consequence of the contraction of a disease. In the case of an accident, the damage is usually (but not always) suffered immediately or soon after the accident. However, there are cases, such as those involving certain kinds of post-traumatic stress disorder, where the damage can manifest itself many years after an accident. In the case of a disease (such as mesothelioma, for instance), damage may also manifest itself many years after negligent conduct. Damage may occur progressively, with the result that a plaintiff may only realise after many years of being subjected to wrongful conduct that significant damage has been sustained (for example, in the case of industrial deafness). There are some kinds of damage which manifest themselves late and which are not capable of ready classification. An example is the delayed psychological effect of sexual or other physical abuse.

6.12 The date from which the limitation period commences should deal fairly with all these various kinds of damage.

Date of event

6.13 In statutes dealing with situations where the damage almost invariably arises at the date of the relevant event, it may be reasonable to provide that the date of the event will be the commencement date of the limitation period. Motor accident statutes are an example of this class of statutes[3]. But this approach would lead to injustice if applied in statutes dealing with claims for personal injury and death, generally. That is because, as we have explained, there are many instances when damage will occur many months or even years after the event. It would be unjust to provide for limitation periods to run before claimants have suffered damage or know that they have suffered damage.

3 See the *Motor Accidents Compensation Act 1999* (NSW) and the *Motor Accidents (Compensation) Act (NT).*

Date of accrual of cause of action

6.14 There is a basic problem in using the date of accrual of the cause of action as the commencing date. The package of reforms recommended by the Panel rests on the premise that, regardless of the cause of action, there should be only one set of rules that govern claims for personal injury or death resulting from negligence. The nature of the cause of action should have no legal significance. That being so, it would be illogical and inconsistent to tie the commencement date to the cause of action.

Date when damage occurred

6.15 The next option to be considered is the date on which the damage occurred. There are basic problems with this option as well. First, it does not cater adequately for those cases where damage can only be detected long after it occurs. Claims of that kind may easily become statute-barred before the injured party becomes aware of having suffered damage. Secondly, it does not cater adequately for those cases where the plaintiff has no reason to know, at the time the damage occurs, that it was caused by the negligence of another. In such cases, time would run against plaintiffs who had no reason to know that they had a claim.

6.16 Nevertheless, there are many limitation statutes that use the date of the occurrence of damage as the commencement date. Generally, they attempt to cope with the problems referred to in the preceding paragraph by conferring a discretionary power on the court to extend the limitation period at any time, or at any time within a fixed period.

6.17 These attempts to resolve the difficulties are inherently unsatisfactory. The discretionary provisions are often not adequate to cater fairly for cases of latent disease and cases where damage only manifests itself long after the wrongful act. This gives rise to the need for additional special legislation to cover such cases, and the objective of consistency and uniformity is harmed. Moreover, the existence of a discretion to extend the limitation period in every case is a source of expensive and, in the Panel's view, unnecessary, litigation.

The date of discoverability

6.18 The date of discoverability is the Panel's preferred option[4].

6.19 The date of discoverability means the date on which the plaintiff knew, or ought to have known, that personal injury or death:

(a) Had occurred; and

(b) Was attributable to negligent conduct of the defendant; and

(c) In the case of personal injury, was sufficiently significant to warrant bringing proceedings.

6.20 The purpose of the requirement of knowledge that the personal injury was sufficiently significant to warrant bringing proceedings is to deal fairly with those cases where serious injury is sustained progressively over a period.

6.21 Adoption of the date of discoverability resolves all of the problems inherent in the other commencing dates we have discussed, although it brings with it problems of a different kind. In the Panel's view, however, these different problems can be resolved fairly and easily.

6.22 It is first necessary to explain how adopting the date of discoverability as the commencement date of the limitation period resolves the difficulties inherent in the other commencement dates.

6.23 One element of determining the date of discoverability is the time when the plaintiff could reasonably be expected to have discovered that damage had occurred. This means that it provides a fair way of dealing with those cases

4 The date of discoverability is used in the Limitations Act 1935 (WA) s 38A, and the Limitation of Actions Act 1958 (Vic) s 5. It has also been adopted in the Limitations Act 1996 (Alta) s 3, Limitation Act 1980 (UK) s 11 and s 14, Statute of Limitations Amendment Act 1991 (Ire), Prescription and Limitation (Scotland) Act 1973 (UK) s 11, Limitation Act 1979 (BC) s 3, Consumer Protection Act 1987 (UK) s 6, and Uniform Limitations Act 1982 (Canada) s 13. Adoption of the date of discoverability has been recommended by the Law Reform Commission of Western Australia, *Limitation and Notice of Actions* (1997), the Alberta Law Reform Institute, *Limitations* (1989), the Newfoundland Law Reform Commission, *Report on Limitation of Actions* (1986), the Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989), the Scottish Law Reform Commission, *Report on Prescription and Limitation of Actions (Latent Damage and Other related issues)* (1987), the Irish Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (1987) and the English Law Commission, *Limitation of Actions* (2001).

where damage manifests itself long after the event, or in a form difficult to detect.

6.24 In the same way, adopting the date of discoverability provides a fair way of dealing with those cases where it takes many years for a plaintiff to discover that his or her condition was caused by the negligence of another.

6.25 Because adopting the date of discoverability deals fairly with a wide range of cases, it avoids the need for separate legislation to cover those cases where damage manifests itself long after the event, or in a form difficult to detect. It promotes the cause of consistency and uniformity.

6.26 Adoption of the date of discoverability also allows an important requirement of the Term of Reference discussed in this Chapter to be met, namely that a limitation period of 3 years be applicable to all claims. The Panel is of the view that if time begins to run from the date of discoverability, the limitation period need be no longer than 3 years. Once the plaintiff knows or ought to know both of the damage sustained and the fact that it was attributable to the negligent conduct of the defendant, 3 years is a reasonable period within which to commence proceedings.

6.27 The Panel is also of the view that if time begins to run from the date of discoverability, it is unnecessary and indeed undesirable to give the court a discretion to extend the limitation period. Once the plaintiff knows or ought to know the facts necessary to enable an action to be commenced, a period of 3 years provides a reasonable time for this to be done.[5]

6.28 The fact that the test proposed for determining the date of discoverability is objective will make it easier to prove when the date for commencement of the limitation period occurs. The date of discoverability is not when the claimant in fact discovered the damage and that the damage was caused by the negligence of another, but rather when a reasonable person in the claimant's position should have made the discovery. Accordingly, the evidence about what individual plaintiffs knew will carry less weight, as the date of discoverability will depend on what a reasonable person in the plaintiff's position would have known, and not what the plaintiff personally knew.

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5 Examples of limitation statutes that do not confer power to extend the limitation period are the Work Health Act 1986 (NT), the Trade Practices Act 1974 (Cwth), and the Civil Aviation (Carriers Liability) Act 1959 (Cwth).

The long-stop provision and the discretionary power to extend

6.29 We now turn to the difficulties that may be caused by adoption of the date of discoverability as the date for commencement of the limitation period.

6.30 These potential difficulties stem from the fact that the date of discoverability is not a fixed date, capable of ready determination. In cases where damage manifests itself long after the event, or in a form difficult to detect, the date of discoverability could extend interminably into the future.

6.31 Thus, unlike the date of the damage-causing event, or the date of accrual of the cause of action, or the date the damage occurred (which are all potentially unfair to plaintiffs), the date of discoverability is potentially unfair to defendants. The unfairness arises because, in cases where the date of discoverability may not occur until many years after the damage-causing event, witnesses may die or be difficult to find, memory may be impaired and records may be lost. In that event, the defendants could be hampered in the preparation of their defence and the fairness of the trial may be prejudiced.

6.32 Cases of the kind that lead to delay sufficiently long as to result, potentially, in an unfair trial are likely to be relatively few in number (although important in themselves). In the Panel's view, these cases could fairly be dealt with by what is termed an ‘ultimate bar’ or ‘long-stop provision’, coupled with a discretionary power on the part of the court, exercisable at any time, to extend the long-stop period.

6.33 The purpose of a long-stop period is to fix a date on which an action will become statute-barred, irrespective of whether the date of discoverability has occurred. In other words, under the proposed system, a claim will become statute-barred on the expiry of the limitation period or the long-stop period, **whichever is the earlier.**

6.34 In the Panel's view, the long-stop period should run from the date on which the allegedly negligent conduct took place.

6.35 As the long-stop period is designed to cater for cases where damage manifests itself long after the event, or in a form difficult to detect, it has to be a relatively lengthy period. Various periods, ranging from 10 to 30 years, have been suggested as appropriate long-stop periods. The longer the long-stop period, the greater the danger of unfairness in the trial process.

6.36 The choice of the long-stop period is necessarily arbitrary. The Panel has concluded that the period should be 12 years from the date the allegedly negligent conduct occurred. In our view, this strikes a reasonable balance between the need to cater for cases in which damage manifests itself late and the need to ensure a fair trial. The Panel is aware that in some cases, damage will not manifest itself until after the expiry of the 12-year period. But plaintiffs who suffer such damage will be protected by the discretion to extend the long-stop period referred to in paragraph 6.37.

6.37 The Panel has previously noted that it is desirable to avoid providing for a discretionary extension of the limitation period. When it comes to the long-stop period, however, justice requires a discretionary power to extend in order to provide fairly for cases (including cases of diseases with a long latency period) in which damage is not discoverable until after the expiry of the long-stop period.

6.38 The long-stop coupled with the discretion to extend also caters for the legitimate interests of defendants. It does this by requiring a plaintiff who wishes to commence an action after the expiry of the long-stop period to seek the permission of the court. At this point the court is able to take account of the defendant's interest in securing a fair trial of the claim.

6.39 Because the date of discoverability will occur after the expiry of the long-stop period in only relatively few cases, occasions for the exercise of the discretion to extend the long-stop period will arise much less often than if the limitation period could be extended. For this reason, it will be less creative of uncertainty than a discretion to extend the limitation period would be.

6.40 A prospective plaintiff should be entitled to apply at any time before the expiry of 3 years after the date of discoverability for an extension of the long-stop period. The court should have the power to extend the long-stop period to the expiry of that 3-year period.

Recommendation 24

The Proposed Act should embody the following principles:

(a) The limitation period commences on the date of discoverability.

(b) The date of discoverability is the date when the plaintiff knew or ought to have known that personal injury or death:

(i) had occurred; and

(ii) was attributable to negligent conduct of the defendant; and

(iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

(c) The limitation period is 3 years from the date of discoverability.

(d) Subject to (e), claims become statute-barred on the expiry of the earlier of :

(i) the limitation period; and

(ii) a long-stop period of 12 years after the events on which the claim is based ("the long-stop period").

(e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.

(f) In exercising its discretion, the court must have regard to the justice of the case, and in particular:

(i) whether the passage of time has prejudiced a fair trial of the claim.

(ii) the nature and extent of the plaintiff's loss.

(iii) the nature of the defendant's conduct.

Suspension of the limitation period: minors and incapacitated persons

6.41 The Panel has heard persuasive evidence from several sources about difficulties that are experienced by reason of the rule that limitation periods do not run against minors and mentally incapacitated persons. We shall give two examples of categories of persons who experience such difficulties.

6.42 The first is public liability and professional indemnity insurers. Their problems are caused by uncertainty in forecasting claims by minors and incapacitated persons. They emphasise the phenomenon that the older the claim, the more likely it is that the law will have changed substantially since the time the risk was underwritten. This gives rise to major difficulties in

assessing premiums. This, in turn, gives rise to problems for defendants and, hence, is a consideration the Panel is required to take into account.

6.43 The second affected group consists of persons whose business or profession it is to deal with young children or incapacitated persons. Obstetricians are the obvious example of persons who fall into this category. The main problem for obstetricians is the possibility of being faced with claims, sometimes 20 years or more after the relevant event. Claims may be made years after the obstetrician has retired. The Panel was told, on the basis of anecdotal evidence, that this has led to shortage of obstetricians in some areas as a result of some ceasing to practise as such.

6.44 The Panel is not in a position to verify this assertion, but many people clearly perceive it to be correct. We have also been told that this perception is adversely affecting the availability of insurance at reasonable premiums. Having regard to our Terms of Reference, the Panel is required to take account of the perception.

6.45 One view, reflected in the limitation legislation in most jurisdictions, is that it is unjust to provide for the running of limitation periods against children and incapacitated persons. Generally, limitation periods are suspended in favour of minors and incapacitated persons.

6.46 Another view that has been expressed to the Panel is that society can reasonably expect parents and guardians, and those who care for incapacitated persons, to take necessary steps on behalf of their charges to initiate claims within the time limits imposed on the rest of the community.

6.47 Existing legislation in some jurisdictions is consistent with this view. Limitation periods run against minors in Tasmania[6] and against minors and the mentally incapacitated under the *Motor Accident Compensation Act 1999* (NSW). The TPA has been construed[7] to mean that the limitation period in s 82 of the Act runs against minors and incapacitated persons.

6.48 After giving the issue careful consideration,[8] the Panel is satisfied that it is in the overall interests of the community as a whole that, as a general rule, the limitation period should run against minors and incapacitated persons. The Panel is accordingly of the view that the limitation and long-stop periods

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6 Limitation Act 1974 (Tas) s 26.

7 TPA s 82 see *Re: Vink And: Schering Pty Ltd* (1991) ATPR 41-073.

8 The Panel has relied heavily in this respect on the work of the Western Australian Law Reform Commission in its *Report on Limitation and Notice of Actions* (1997), paras 17.45-17.65.

should run against minors except for periods when the minor is not in the custody of a parent or guardian, and against incapacitated persons except for periods during which no administrator has been appointed in respect of the person.

6.49 Minors who are not in the custody of a parent or guardian, minors who are in the custody of parents or guardians who are themselves under a disability, and incapacitated persons in respect of whom an administrator has not been appointed, should be regarded as persons under a disability. In those instances, the limitation period should not run against the minor or incapacitated person.

6.50 In cases where the plaintiff becomes a person under a disability after time has commenced running, the limitation period should be suspended for any period during which the plaintiff is under a disability.

6.51 In cases where a minor or incapacitated person is not under a disability, for the purposes of determining when the limitation period commences, the relevant knowledge would be that of the parent, guardian or administrator, as the case may be, and not that of the minor or incapacitated person.

6.52 There will also be cases where a parent or guardian of a minor, or a person in a close relationship with the parent or guardian, is the potential defendant. A close relationship is a relationship such that

(a) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or

(b) the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage.

6.53 Special rules should be laid down for such cases.

6.54 In cases where the parent, guardian, or a person in a close relationship with the parent or guardian, is the potential defendant, the Panel recommends that the limitation period commence only when the plaintiff turns 25 years of age. This will give plaintiffs a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings. The Panel also recommends that the limitation period in such cases (which will be referred to as ‘the close-relationship limitation period’) should be 3 years.

6.55 In some cases of this sort, the date of discoverability may not occur until after the expiry of the close-relationship limitation period. Therefore, the Panel recommends that in such cases the court should have a discretion, exercisable at any time, to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

6.56 In most limitation statutes, the limitation period is suspended where the plaintiff is prevented from knowing of the claim by reason of fraud or concealment on the part of the defendant. Such a provision is unnecessary under the system proposed as the principle of time running from the date of discoverability caters for this.

Recommendation 25

The Proposed Act should embody the following principles:

(a) The running of the limitation period is suspended during any period of time during which the plaintiff is a person under a disability.

(b) 'Person under a disability' means:

(i) a minor who is not in the custody of a parent or guardian;

(ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his or her affairs) in respect of whom no administrator has been appointed.[9]

(iii) a minor whose custodial parent or guardian is a person under a disability.

9 Recommendation 25 is based on recommendation 69 of the Western Australian Law Reform Commission *Report on Limitation and Notice of Actions* (1997), discussed in paras 22.17-22.24.

(c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case may be.

(d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.

(e) A close relationship is a relationship such that:

(i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or

(ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.

(f) In cases dealt with in (d), the court has a discretion at any time to extend the close-relationship limitation period to the expiry of a period of 3 years from the date of discoverability.

Survival of actions[10]

Recommendation 26

The Proposed Act should embody the following principles:

10 Recommendation 26 is based on paragraph 22.23 of the Law Reform Commission of Western Australia Report.

(a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.

(b) In such a case, the limitation period should begin at the earliest of the following times:

(i) when the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than 3 years before death;

(ii) when the personal representative was appointed, if he or she had the necessary knowledge at that time;

(iii) when the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed.

Contribution between tortfeasors

Recommendation 27

The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.

Early notification system

6.57 The Panel received submissions about a system for early notification of claims. Such systems currently exist in virtually all motor accident and workers compensation schemes in Australia, and in particular the *Personal Injuries Proceedings Act 2002* (Qld). The Panel has been informed that early notification systems are beneficial for effective injury-management and early resolution of claims. Given the time constraints on the Panel, it is not able to comment on these systems. The Panel does suggest, however, that this is an issue that warrants further investigation.

7. Foreseeability, Standard of Care, Causation and Remoteness of Damage

Term of Reference

1. Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury and death, including:

(a) the formulation of … standards of care;

(b) causation;

(c) the foreseeability of harm;

(d) the remoteness of risk.

General introduction

7.1 In approaching these aspects of the Terms of Reference, it is first necessary to give some consideration to the Panel's overarching recommendation (Recommendation 2) that all actions for personal injury and death resulting from negligence should be subject to a single legal regime regardless of whether they are brought in contract, tort, under a statute, or under any other cause of action.

7.2 This Term of Reference has been formulated around the elements of the tort of negligence, namely duty of care, breach of duty (that is, standard of care), causation and remoteness of damage. The elements of standard of care, causation and remoteness of damage are relevant to any claim for negligently-caused personal injury and death regardless of the cause of action in which it is brought. On the other hand, the concept of 'duty of care' is a feature of the tort of negligence, which is only one of the causes of action in which a claim for negligently-caused personal injury or death can be brought. If such a claim is brought in contract, the question will not be simply whether the defendant owed the plaintiff a duty of care, but rather whether the contract contained an express or implied term to the effect that the defendant would perform the contract with reasonable care. If the action is brought under a statute, the question will be whether the statute contains a provision that expressly or impliedly imposes a duty to take reasonable care.

7.3 The Panel will not make any recommendations in this Report about when contractual duties to take reasonable care should arise. Liability for breach of statutory duties is dealt with in Chapter 10 of this Report (paragraphs 10.40-10.41).

7.4 So far as concerns the duty of care in the tort of negligence, the basic principle is that a person owes a duty of care to another if the person can reasonably be expected to have foreseen that if they did not take care, the other would suffer personal injury or death. Foreseeability is also relevant to standard of care (that is, to the question of whether a duty of care has been breached) and to remoteness of damage. Remoteness of damage is often thought of as an aspect of causation, and we will consider it in that context. Standard of care is dealt with in paragraphs 7.5-7.24. Causation and remoteness of damage are dealt with in paragraphs 7.25-7.51.

Standard of care

7.5 Certain aspects of this topic are dealt with in Chapter 3. In Recommendation 4 we proposed a legislative restatement of the current law to the effect that in cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to what could reasonably be expected of a person professing that skill, judged at the date of the alleged negligence. In Recommendation 3 we proposed a special rule about the standard of care that can reasonably be expected of medical practitioners in treating patients. And in Recommendations 6 and 7 we proposed a legislative statement of certain principles relating to medical practitioners' duties to take care in giving information to patients.

7.6 All of these recommendations concern particular applications of the general principles of standard of care. It is with these general principles that we are concerned in this Chapter. 'Negligence', in the sense in which it is used in this context and in our overarching recommendation, means failure to meet the standard of care to avoid harm that is laid down by the law. The standard of care is often couched in terms of the reasonable person: it is negligent to do what the reasonable person would not do, and not to do what the reasonable person would do.

7.7 Under current Australian law, the concept of negligence has two components: foreseeability of the risk of harm and the so-called 'negligence calculus'. Foreseeability of the risk of harm is relevant to answering the

question of whether the reasonable person would have taken any precautions at all against the risk and, hence, whether the defendant can reasonably be expected to have taken any precautions. It would not be fair to impose liability on a person for failure to take precautions against a risk of which they had neither knowledge nor means of knowledge. Foreseeability is a precondition of a finding of negligence: a person cannot be liable for failing to take precautions against an unforeseeable risk. But the fact that a person ought to have foreseen a risk does not, by itself, justify a conclusion that the person was negligent in failing to take precautions against it.

7.8 Once it has been determined that the risk in question was foreseeable, the negligence calculus provides a framework for deciding what precautions the reasonable person would have taken to avoid the harm that has occurred and, hence, what precautions the defendant can reasonably be expected to have taken. The calculus has four components:

(a) the probability that the harm would occur if care was not taken;

(b) the likely seriousness of that harm;

(c) the burden of taking precautions to avoid the harm; and

(d) the social utility of the risk-creating activity[1].

7.9 The calculus involves weighing (a) and (b) against (c) and (d). In most personal injury cases decided by courts, the various elements of the calculus are not considered individually. Rather, the court simply asks (in the light of these factors) what the reasonable person in the position of the defendant would have done or not done in order to avoid harm to the plaintiff.

7.10 Whereas probability is a scientific concept, foreseeability is a matter of knowledge and inference. For instance, no matter how likely it is that something will occur, it is foreseeable by a person only if that person knows or ought to know that it might occur. (Knowledge must be judged as at the date of the alleged negligence and not at a later date; that is, without the benefit of hindsight and ignoring subsequent increases in knowledge about the risk and

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1 Some activities are more worth taking risks for than others — a plaintiff may be required to submit to a risk for the sake of some greater good that they would not be expected to accept if some lesser interest were at stake. A common situation in which precautions that would normally be thought reasonable need not be taken is where an emergency vehicle is speeding an injured or sick person to hospital. As Denning LJ said in *Watt v Hertfordshire County Council* [1954] 2 All ER 368, 371 it is one thing to take risks when driving for some commercial purpose with no emergency, but quite another to take risks for life and limb.

its consequences.) On the other hand, an event that is of a very low probability may be foreseeable by a person if, for instance, the person knows or ought to know it has occurred in the past.[2] For the purposes of the law of negligence, whether a person ought to have foreseen a particular event is not a matter of what they knew, but of what the 'reasonable person' in their position would have known. Hence the law speaks of '*reasonable* foreseeability'.

7.11 The statement that a risk is 'reasonably foreseeable' is often used to convey the idea that the risk is not so improbable that the reasonable person would ignore it. This usage confuses the concepts of foreseeability, probability and reasonableness of precautions. A risk of very high probability will not be foreseeable unless it is known; and, conversely, a risk of very low probability will be foreseeable if it is known. The concept of reasonableness in the phrase 'reasonably foreseeable' is concerned with how much knowledge about risks it is reasonable to attribute to people. It does not follow from the fact that *someone* knows about a risk that it would be reasonable to expect everyone to know about the risk and be able to foresee it.

7.12 The fact that events of very low probability can be reasonably foreseeable creates a problem. While it seems acceptable to say that a person should not be liable for failure to take precautions against unforeseeable risks, it may not be reasonable to expect a person to take precautions against a risk of very low probability simply because it was foreseeable. In order to overcome this problem, the High Court in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 held, in effect, that a person cannot be held liable for failure to take precautions against a risk that could be described as 'far-fetched or fanciful', even if it was foreseeable. What this amounts to saying is that there are some risks that are of such low probability that the reasonable person would ignore them, regardless of the balance of the other considerations in the negligence calculus — that is, no matter how serious the harm was likely to be if the risk materialised, no matter how cheap or easy it would have been to take precautions that would have prevented the risk materialising, and no matter how socially worthless the risk-creating activity was.

7.13 It is extremely important to note, however, that the mere fact that a foreseeable risk was not far-fetched or fanciful says nothing about whether precautions to prevent the risk materialising ought reasonably to have been taken, and if so, what precautions. These issues are resolved by asking what precautions the reasonable person would have taken, and this question is

2 As Dixon J said in *Chapman v Hearse* (1961) 106 CLR 112, 115, 'I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.'

answered in terms of all four elements of the calculus. The probability of the risk — however low or high it might be — is only one element in the calculation.

7.14 It is clear to the Panel, as a result of its consultations and research, and the experience of its members, that the decision in *Shirt* is widely perceived to have created a situation in which lower courts may be in danger of ignoring this point. In other words, there is a danger that *Shirt* may be used to justify a conclusion — on the basis that a foreseeable risk was not far-fetched or fanciful — that it was negligent not to take precautions to prevent the risk materialising, and to do this without giving due weight to the other elements of the negligence calculus.[3] It is also widely believed that this approach has brought the law of negligence into disrepute, and that it may have contributed to current difficulties in the field of public liability insurance.

7.15 One suggestion that has been made for dealing with this problem is to modify the formula laid down in *Shirt* by replacing the phrase 'not far-fetched or fanciful' with some phrase indicating a risk that carries a higher degree of probability of harm. Various phrases have been suggested. The Panel favours the phrase 'not insignificant'.[4] The effect of this change would be that a person could be held liable for failure to take precautions against a risk only if the risk was 'not insignificant'. The phrase 'not insignificant' is intended to indicate a risk that is of a higher probability than is indicated by the phrase 'not far-fetched or fanciful', but not so high as might be indicated by a phrase such as 'a substantial risk'. The choice of a double negative is deliberate. We do not intend the phrase to be a synonym for 'significant'.[5] 'Significant' is apt to indicate a higher degree of probability than we intend.

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3 This point was made by McHugh J in his discussion of foreseeability in *Tame v New South Wales* [2002] HCA 35, [96]-[108].

4 In *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* (1963) 63 SR (NSW), 948, 958-9 Walsh J used the phrase 'a practical possibility'. This phrase was rejected by the Privy Council in favour of 'a real risk' in the sense of a risk that would not be brushed aside as 'far-fetched': *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617, 643. We did consider using the term 'realistic' but rejected it on the basis that it was too close to 'real', which might be thought too closely associated with the *Shirt* formula. We decided not to adopt the term 'practical' because of the danger that it might be interpreted as describing, not a degree of probability, but rather the sort of risk against which the 'practical' or 'reasonable' person would take precautions. If it were interpreted in this latter way, it could not operate as we intend, namely as a precondition of the application of the negligence calculus (see paragraph 7.16).

5 Compare Barwick CJ's discussion of 'not unlikely' in *Caterson v Commissioner of Railways* (1973) 128 CLR 99, 102.

7.16 In the opinion of the Panel, this proposal addresses part of the perceived problem we have identified. But by itself, it does not address the danger that a court will conclude that *because* a risk can be described as 'not insignificant,' it would be negligent not to take precautions against it. In other words, there remains a danger that a court might use a finding that a risk was 'not insignificant' as a substitute for applying the negligence calculus, rather than as merely imposing a (necessary but not sufficient) condition of liability for negligence, namely that there can be no liability for failing to take precautions against risks that cannot be described as 'not insignificant'.

7.17 For this reason, the Panel is of the opinion that modifying the *Shirt* formula in the way suggested is not sufficient on its own. There should also be a statutory provision to the effect that whether failing to take precautions, against a not insignificant risk of personal injury or death to another, was negligent depends on whether, in the opinion of the court, the reasonable person would have taken precautions against the risk. We also think that it would be helpful to embody the negligence calculus in a statutory provision. This might encourage judges to address their minds more directly to the issue of whether it would be reasonable to require precautions to be taken against a particular risk.

7.18 There is, however, another danger, perceptible in some judicial pronouncements, that the concepts of foreseeability and probability may be conflated. The problem with this is that a court may jump from the proposition that a risk is foreseeable as a not insignificant possibility, to the conclusion that the reasonable person would have taken precautions against it. But as explained in 7.7, foreseeability is merely a precondition of liability for negligence. The fact that a risk is foreseeable (even as a not insignificant possibility) does not, *by itself*, justify the conclusion that the reasonable person would have taken precautions against it. For this reason, the Panel considers that there should be a statutory provision to the effect that a person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).

Recommendation 28

The Proposed Act should embody the following principles:

(a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).

(b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as 'not insignificant'.

(c) A person is not negligent by reason of failing to take precautions against a risk that can be described as 'not insignificant' unless, under the circumstances, the reasonable person in that person's position would have taken precautions against the risk.

(d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):

(i) the probability that the harm would occur if care was not taken;

(ii) the likely seriousness of that harm;

(iii) the burden of taking precautions to avoid the harm; and

(iv) the social utility of the risk-creating activity.

7.19 Although the Proposed Act applies only to claims for negligently-caused personal injury and death, the principles in Recommendation 28 are relevant to any claim for negligently-caused harm, whatever sort of harm is in issue. The Panel's considered opinion is that these principles are suitable to be applied to all claims for negligently-caused harm.

Emergency services and the standard of care

7.20 In paragraph 3.84, the Panel identified three issues relevant to Term of Reference 3(d). One of these was '[T]he standard of care applicable in circumstances where a medical practitioner or other health-care professional voluntarily renders aid to injured persons in an emergency'.

7.21 The Panel understands that health-care professionals have long expressed a sense of anxiety about the possibility of legal liability for negligence arising from the giving of assistance in emergency situations. However, the Panel is not aware, from its researches or from submissions received by it, of any Australian case in which a good Samaritan (a person who gives assistance in an emergency) has been sued by a person claiming that the actions of the good Samaritan were negligent. Nor are we aware of any insurance-related difficulties in this area.

7.22 Under current law, the fact that a person (including a health-care professional) was acting in an emergency situation is relevant to deciding whether the person acted negligently. It may be reasonable in an emergency situation to take a risk that it would not be reasonable to take if there was no emergency, provided that precautions appropriate to the circumstances are taken to prevent the risk materialising.

7.23 Also relevant to the issue of negligence is the skill that the good Samaritan professed to have. Suppose a passenger on an aircraft has a heart attack, and in response to a call for assistance by the cabin staff, a 60 year old specialist dermatologist goes to the passenger's aid. The standard of care expected of the doctor would be set not only taking account of the emergency nature of the situation, but also of the fact that a doctor who has practised as a dermatologist for many years could not be expected to be as well-qualified and able to provide emergency treatment for a heart-attack victim as a cardiac surgeon or even, perhaps, an active general practitioner.

7.24 The Panel's view is that because the emergency nature of the circumstances, and the skills of the good Samaritan, are currently taken into account in determining the issue of negligence, it is unnecessary and, indeed, undesirable to go further and to exempt good Samaritans entirely from the possibility of being sued for negligence. A complete exemption from liability for rendering assistance in an emergency would tip the scales of personal responsibility too heavily in favour of interveners and against the interests of those requiring assistance. In our view, there are no compelling arguments for such an exemption.

Causation and remoteness of damage

7.25 A person cannot be liable for damages for failure to take care to prevent personal injury or death unless negligent conduct on his or her part (whether act or omission) caused the harm, and unless that harm was not too 'remote' from the negligent conduct. The current law in Australia (as laid down by the High Court) appears to be that whether negligent conduct caused the harm in question is to be answered by the application of 'commonsense'. A problem with this approach is that it gives courts and parties to negligence claims very little guidance about when negligent conduct will be considered to have caused harm.

The two-pronged test of causation: factual causation

The basic rule

7.26 Despite this appeal to commonsense, it is accepted that causation has two aspects. The first — the factual aspect — is concerned with whether the negligent conduct in question played a part in bringing about the harm that is the subject of the claim. The long-accepted basic test for answering this question is whether the conduct was a necessary condition of the harm, in the sense that the harm would not have occurred but for the conduct. In one case, for example, it was held that a hospital that had turned away a patient who had been poisoned was not liable for negligent failure to treat him because even if he had been treated, he would have died anyway. Although there are some cases with which the 'but for' test does not deal satisfactorily (involving 'causal over-determination' of harm — that is, harm that is attributable to more than one sufficient condition), the law has devised rules for resolving such cases in ways that are generally considered to be satisfactory and fair. We therefore make no recommendations on this aspect of the law.

Evidentiary gaps

7.27 However, there are several issues that have arisen in this context that are currently the cause of considerable controversy. One is the problem of what have been called 'evidentiary gaps'.[6] The cases identify two types of situation in which an evidentiary gap may exist.

7.28 One involves harm which is brought about by the *cumulative* operation of two or more factors, but which is indivisible in the sense that it is not possible to determine the relative contribution of the various factors to the total harm suffered. This was the situation in the English case of *Bonnington Casting v Wardlaw*,[7] which lays down the principle that any of the contributory factors can be treated as a cause of the total harm suffered, provided it made a 'material contribution' to the harm. The effect of this rule is that a defendant may be liable for *the total harm* suffered by a plaintiff even though it cannot be said that, but for the conduct of the defendant, the plaintiff would not have

6 The Panel's consideration of and recommendations about causation have been greatly assisted by the work of Jane Stapleton, especially 'Causation and the Scope of Liability for Consequences' (2003) 119 *LQR* (forthcoming).

7 [1956] AC 613.

suffered *the total harm;* and that it can only be said that but for the conduct of the defendant the plaintiff would not have suffered *some of that harm*.

7.29 It should be noted that the term 'material contribution to harm' is often used not in the sense in which it was used in *Bonnington Castings v Wardlaw*, but merely to express the idea that a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm. In this sense, both joint and concurrent tortfeasors materially contribute to the harm resulting from their respective conduct.

7.30 A recent illustration of the second type of case in which an evidentiary gap may exist is provided by the decision of the English House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89. The plaintiffs contracted mesothelioma as a result of successive periods of exposure to asbestos while working for different employers. The scientific evidence about the aetiology of mesothelioma did not justify a conclusion, in relation to any of the plaintiffs' employers, that but for the negligence of that employer, the plaintiffs would not have contracted the disease. The court held that in such a case, proof (on the balance of probabilities) that the defendant's negligent conduct 'materially increased the risk' that the plaintiffs would contract mesothelioma, would suffice to establish a causal connection between the conduct and the harm. The status of this principle in Australian law is unclear.[8] The High Court has not yet had a chance to consider it.

7.31 The 'material contribution to harm' and 'material contribution to risk' principles both allow negligent conduct to be treated as a factual cause of harm even though it cannot be proved on the balance of probabilities that there was in fact a causal link between the conduct and the harm. In other words, in certain circumstances, it may be appropriate to 'bridge the evidentiary gap' by allowing proof that negligent conduct materially contributed to harm or the risk of harm to satisfy the requirement of proof of factual causation.

7.32 The Panel's opinion is that, in certain types of cases, bridging the evidentiary gap in this way would be widely considered to be fair and reasonable. The decisions in *Bonnington Castings* and *Fairchild* support this conclusion, as does the practice of the New South Wales Dust Diseases Tribunal which, apparently, has felt itself able to deal with such cases by taking a 'robust and pragmatic' approach to factual causation in cases where

8 In *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307, Mason P seems to have rejected it, but Stein J apparently accepted it.

the scientific evidence about causation has not provided a solid basis for finding that the 'but for' test has been satisfied.[9]

7.33 The major difficulty with the 'material contribution to harm' and 'material contribution to risk' approaches is to define those cases in which the normal requirements of proof of causation should be relaxed. It is extremely important to note that this is a normative issue[10] that depends ultimately on a value judgment about how the costs of injuries and death should be allocated. The Panel believes that detailed criteria for determining this issue should be left for common law development. Nevertheless, we consider that it would be useful to make explicit the normative character of the issue by including in the Proposed Act a provision that, in deciding whether proof that conduct that materially contributed to, or materially increased the risk of, harm should suffice as proof of causal connection, it is relevant to consider whether (and why) responsibility for the harm should be imposed on the negligent party, and whether (and why) the harm should be left to lie where it fell (that is, on the plaintiff) (see paragraph (f) of Recommendation 29).

7.34 Another way in which it has sometimes been suggested that the problem of evidentiary gaps might be dealt with is by shifting the onus of proof on the issue of factual causation from the plaintiff to the defendant once the plaintiff has established that the defendant was under a duty to take reasonable care to avoid the risk in question and failed to take the required care. In the Panel's opinion, this approach is undesirable because it does not squarely address the issue of the evidentiary gap but rather hides it. This is because in practice, the onus of proof that is shifted to the defendant will be impossible to discharge precisely because there is an evidentiary gap. For this reason, the Panel believes that it would be valuable to state legislatively that the onus of proof of any fact relevant to causation always rests on the plaintiff.

7.35 The Panel believes that this recommendation has a wider significance. In *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 420-421 Gaudron J said:

> '… generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect or that the injury would have occurred even if the duty had been

9 See, e.g. the judgment of O'Meally J in *McDonald v State Rail Authority* (1998) 16 NSWCCR 695, esp 714-717.

10 It should be noted that this is a different normative issue from that discussed in paragraph 7.41. It should also be noted the normative issue being discussed here arises in the context of factual causation.

> performed, it will be taken that the breach of the common law duty of care caused or materially contributed to the injury.'[11]

7.36 The effect of this approach is to cast the onus of proof on the issue of causation onto the defendant, once it has been established that the defendant owed the plaintiff a duty of care and breached that duty, and that the plaintiff has suffered a foreseeable injury. This principle, which has been referred to with approval by various courts in recent cases, represents a fundamental change in the traditional law about causation and proof of causation, and has the potential significantly to expand liability for negligence. The objection to the principle is that it applies regardless of whether there is an evidentiary gap, and without requiring consideration of whether there is any good reason (over and above the existence of duty, breach and damage) to relieve the plaintiff of the requirement to prove factual causation. A legislative restatement of the basic rule that the onus of proof of any fact relevant to causation always rests on the plaintiff may discourage courts from adopting this approach. This will promote the objectives of the Terms of Reference.

Cases in which causal link depends on the plaintiff's hypothetical reaction

7.37 A second issue[12] that needs to be considered in this context concerns situations in which the question, of whether the harm would have occurred but for the negligent conduct, cannot be answered without asking a further question about what the plaintiff would have done if the defendant had not been negligent.[13] Suppose, for example, that an employer unreasonably fails to provide its employee with a particular safety device that would have

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11 Cited with approval in *Rosenberg v Percival* (2001) 205 CLR 434, 461 per Gummow J; *Chappel v Hart* (1998) 195 CLR 232, 240 per Gaudron J, 257 per Gummow J, 273 per Kirby J; *Naxakis v Western General Hospital* (1999) 197 CLR 269, 279 per Gaudron J.

12 This was one of the three issues raised in paragraph 3.85. Another issue raised there was 'the proper basis of assessment of damages in cases of breach of a duty to inform' by a medical practitioner. Suppose that a surgeon negligently fails to warn a patient of a risk of harm inherent in an operation, that the patient would not have had the operation if the warning had been given, and that the risk materialises despite the exercise of all reasonable care by the surgeon in performing the operation. The possibility we had in mind was that damages in such a case might be assessed, not by reference to the physical harm suffered by the plaintiff, but rather by reference to the impairment of the plaintiff's decision-making autonomy as a result of the negligent failure to warn. Having given this matter further consideration (concerning the Panel's timetable of work see paragraphs 1.44-1.46), our view is that the proper basis for assessment of damages in such cases is the harm suffered. As this is the position under the current law, we make no recommendation on this topic.

13 The same issue arises where the question is what a third party would have done if the defendant had not been negligent.

prevented the harm suffered by the plaintiff if it had been used. Suppose further, however, that the employer alleges that even if it had been provided, the employee would not have used it. Or take as another example the leading Australian case of *Chappel v Hart* (1998) 195 CLR 232, in which it was held that a doctor had failed to fulfil the reactive duty to inform a patient of an inherent risk of a surgical operation which materialised, thus harming the patient. The plaintiff alleged that she would not have had the operation, at the hands of the defendant or at the time it was performed, and hence would almost certainly not have suffered harm, if she had been warned of the risk.

7.38 In both of these cases, the question of what the plaintiff would have done if the defendant had not behaved negligently could be decided either 'subjectively' or 'objectively'. The subjective approach depends on asking what the plaintiff would actually have done if the defendant had not been negligent, whereas the objective approach depends on asking what the reasonable person in the plaintiff's position would have done if the defendant had not been negligent. A serious problem that affects the subjective approach is that, once the harm has been suffered, it is unrealistic to expect the plaintiff to testify that he or she would have had the operation (or not used the safety device) even if he or she had been given the relevant information. The objective test overcomes this problem. But in the medical context, at least, it is open to several serious objections. First, it might be thought to put too little weight on the patient's interest in making decisions about his or her own health. Secondly, it threatens to undermine the reactive duty to inform. That duty requires the doctor to give the patient information that the doctor knows or ought to know the patient wants, regardless of whether the reasonable patient would want the information. If the doctor fails to give such information, it would seem inconsistent to answer the question, of how the patient would have acted if the information had been given, on the basis that the patient was a reasonable person. Rather, the question to be asked is what *that patient* would have done if the information had been given. Thirdly, the objective test provides an answer to the non-causal question, 'what should have happened', not the causal question, 'what would have happened', if the defendant had not been negligent.

7.39 Australian law currently adopts the subjective approach, whereas in medical negligence cases (but not in other cases), Canadian law adopts a version of the objective approach under which the question to be answered is not simply what a reasonable person would have done, but rather, what the reasonable person *in the plaintiff's position and with the plaintiff's beliefs and fears* would have done. A problem with this approach is that it may require an

answer to the nonsensical question of what a reasonable person with unreasonable views would have done.

7.40 Our view is that the arguments against the objective test are much stronger than those in its favour, and that Australian law is right to adopt the subjective test. On the other hand, the Panel is also of the view that the question of what the plaintiff would have done if the defendant had not been negligent should be decided on the basis of the circumstances of the case and without regard to the plaintiff's own testimony about what they would have done. The enormous difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge's view of the plaintiff's credibility is likely to be determinative, regardless of relevant circumstantial evidence. As a result, such decisions tend to be very difficult to challenge successfully on appeal. We therefore recommend that in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible.[14]

The two-pronged test of causation: liability for consequences

7.41 As we have noted, the first aspect of the causation issue concerns the factual question of whether the allegedly negligent conduct played a part in bringing about the harm in question, in the sense that it was a necessary condition of the occurrence of the harm. Answering this question positively is not enough to justify the imposition of liability for negligence because every event has an infinite number of necessary conditions, and there is an important sense in which all necessary conditions are of equal salience in explaining how the harm came about. But the ultimate question to be answered in relation to a negligence claim is not the factual one of whether the allegedly negligent conduct played a part in bringing about the harm, but rather a normative one[15] about whether the defendant ought to be held liable to pay damages for that harm. In other words, the question is: should the defendant be held liable for any of the harmful consequences of the negligence and if so, for which? These questions can be said to concern the appropriate 'scope of liability' for the consequences of negligence.

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14 This recommendation could be extended to cover any case in which the issue of causation depends on what a person — whether the plaintiff or a third party — would have done if the defendant had not been negligent.

15 It should be noted that this is a different normative issue from that discussed in paragraph 7.33.

7.42 It is the Panel's considered opinion that at least some of the confusion and uncertainty in this area of the law is a result of failure to distinguish clearly between the factual question, of whether the negligence was a necessary condition of the harm, and the normative question about which consequences of the negligence the defendant should be held liable for. A danger here is that a finding that the negligent conduct was a necessary condition of the harm may, by itself, be thought to justify a conclusion that the defendant ought to be held liable for the consequences of the negligence. The point is not that imposition of liability may not be justified, but only that a finding that the negligence was a necessary condition of the harm is not, by itself, sufficient to support that conclusion, because there is an infinite number of necessary conditions of every event. For this reason, the Panel recommends a legislative statement to the effect that the issue of causation has two elements — factual causation and scope of liability — both of which need to be addressed.

7.43 It is in the context of the second element — namely scope of liability for consequences — that the statement that causation is a matter of commonsense is most often made. However, courts use various other terms and phrases to describe the sort of connection between negligent conduct and harm that can justify the imposition of legal liability to pay damages. These include 'real cause' and 'effective cause'. It is also said that if another necessary condition 'intervenes' between the defendant's conduct and the harm and 'breaks the chain of causation', the defendant will not be liable for the harm.

7.44 The concept of foreseeability is used in this context as well. A basic rule of negligence law is that a negligent person will not be held liable for unforeseeable consequences of their negligence (although there are important qualifications to this rule — such as the principle that the victim of negligently-caused harm must be 'taken as found' — that need not be discussed in detail here). A point that should be noted is that the rule laid down in the *Shirt* case (discussed in paragraph 7.12 above), that a person cannot be liable for failing to take precautions against a far-fetched or fanciful (albeit foreseeable) risk of harm, does not apply in this context. Once a person is held to have behaved negligently, they can, in theory at least, be held liable for foreseeable consequences of that negligence, even if they were of a very low probability.

7.45 None of these terms and phrases provides very much guidance as to the likely outcome of individual cases, and the question of 'the scope of liability for consequences' tends to be seen as one that has to be answered case-by-case rather than by the application of detailed rules or principles. This is not to say that there are no relevant guidelines in the law. For instance, it is

said that a person is not liable for 'coincidental' consequences of their negligence. Suppose that a driver negligently injures a pedestrian, who is further injured when the ambulance in which she is being taken to hospital is involved in a collision as a result of negligence on the part of the ambulance driver. The first driver would not be held liable for the injury resulting from the second accident, because the sequence of events would be considered a 'coincidence', even though the first driver's negligence was a necessary condition of the harm suffered in the second accident. On the basis of this example, it is easy to see the appeal of the 'coincidence principle' as an outworking of ideas about personal responsibility.

7.46 However, this principle of 'no liability for coincidences' is not of universal application. For instance, in *Chappel v Hart*, the failure of the defendant to warn the plaintiff was accepted to have been a necessary condition of the materialisation of the risk because the plaintiff would not have had the operation, at the defendant's hands or when it was performed, if she had been warned; and in that case she would almost certainly not have suffered the harm. But the fact that the risk materialised despite the exercise of reasonable care by the defendant could be called a coincidence. The best explanation of the difference between this case and the example discussed in paragraph 7.45 is not that the doctor caused the patient's harm whereas the first negligent driver did not cause the harm suffered in the second accident. Rather, the explanation would seem to lie in differing ideas about the responsibilities of doctors to their patients on the one hand, and the responsibilities of drivers to pedestrians on the other. In *Chappel v Hart*, several of the judges made this point by saying that the doctor should be liable because the risk that materialised was precisely the risk about which (in discharge of the reactive duty) he should have warned the patient.

7.47 For present purposes, the important point is that there appears to be a perception amongst various groups that courts are too willing to impose liability for consequences that are only 'remotely' connected with the defendant's conduct. In other words, there is a feeling that the net of responsibility for the consequences of negligence is being cast too widely. The question that confronts the Panel is whether there is anything that we can usefully propose by way of legislative statement that might reduce the element of uncertainty in the law and indicate to courts that issues of responsibility are directly relevant in this context.

7.48 A major difficulty here is to strike a balance between making legislative statements that are so abstract and general as to be more or less useless, and making detailed provision that denies courts the flexibility they need to deal with the infinitely various facts of individual cases. What is needed is a

provision that will suggest to courts a suitable framework in which to resolve individual cases. Terms and phrases such as 'effective cause', 'foreseeability' and 'commonsense causation' do not provide such a framework because they express a conclusion without explaining how that conclusion was reached. They discourage explicit consideration and articulation of reasons, for imposing or not imposing liability for the consequences of negligence, that are securely grounded in the circumstances of individual cases and address issues of personal responsibility.

7.49 The Panel believes that it is possible to give some helpful legislative guidance that holds out a reasonable prospect of furthering the objectives of the Terms of Reference. Such a provision would be to the effect that in determining liability for the harmful consequences of negligence (whether in such terms or in terms of 'legal cause', 'effective cause', 'commonsense causation', 'foreseeability', 'remoteness of damage' and so on), it is relevant to consider, (a) whether (and why) responsibility for the harm should be imposed on the negligent party, and (b) whether (and why) the harm should be left to lie where it fell.

Recommendation 29

The Proposed Act should embody the following principles:

Onus of proof

(a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The two elements of causation

(b) The question of whether negligence caused harm in the form of personal injury or death ('the harm') has two elements:

(i) 'factual causation', which concerns the factual issue of whether the negligence played a part in bringing about the harm; and

(ii) 'scope of liability' which concerns the normative issue of the appropriate scope of the negligent person's liability for the harm, once it has been established that the negligence was a factual cause of the harm. 'Scope of liability' covers issues, other than factual causation, referred to in terms such as 'legal cause', 'real and effective cause', 'commonsense causation', 'foreseeability' and 'remoteness of damage'.

Factual causation

(c) The basic test of 'factual causation' (the 'but for' test) is whether the negligence was a necessary condition of the harm.

(d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.

(e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.

(f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:

(i) whether (and why) responsibility for the harm should be imposed on the negligent party, and

(ii) whether (and why) the harm should be left to lie where it fell.

(g)

(i) For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff's own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible.

(ii) Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances.

Scope of liability

(h) For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:

(i) whether (and why) responsibility for the harm should be imposed on the negligent party; and

(ii) whether (and why) the harm should be left to lie where it fell.

7.50 It may be helpful to give an example of how paragraph (h) of this Recommendation (dealing with scope of liability) might be used. Consider the case of *Chappel v Hart* again. Because the plaintiff would not have had the operation, at the hands of the defendant and at the time it was performed, if she had been warned of the risk, the defendant's failure to warn played a part in bringing about the harm suffered by the plaintiff. But this conclusion does not settle the question of whether the doctor ought to have been held liable for that harm. In favour of denying liability, it could be argued that in the absence of negligence on the part of the defendant in performing the operation, the harm suffered by the plaintiff was a mere coincidence for which the defendant ought not to be liable. On the other hand, it could be argued that even though the occurrence of the harm was a coincidence, it was the very risk about which the plaintiff had inquired. For that reason, the imposition of liability would be justified in order to reinforce the doctor's reactive duty to inform and the patient's interest in freedom of choice. The provision in paragraph (h) of Recommendation 29 does not support either of these arguments against the other. Rather, it is intended to encourage courts to articulate such arguments and to discourage them from explaining decisions in terms of unhelpful phrases such as 'commonsense' or 'real and effective cause'. Articulation of principles of personal responsibility will further the objectives underlying the Terms of Reference.

7.51 As in the case of Recommendation 28, this Recommendation is of potential application not just to claims for negligently-caused personal injury and death, but to any claim in which causation is an issue. Consistently with our Terms of Reference, however, we do not propose its extension beyond personal injury law.

8. Contributory Negligence, Assumption of Risk and Duties of Protection

Terms of Reference

1. Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury and death, including:

(e) contributory negligence; and

(f) allowing individuals to assume risk.

3. In conducting this inquiry, the Panel must:

(b) develop and evaluate proposals to allow self assumption of risk to override common law principles;

(c) consider proposals to restrict the circumstances in which a person must guard against the negligence of others.

Contributory negligence

8.1 In relation to claims for negligently-caused personal injury and death, contributory negligence is failure by a person (typically the plaintiff) to take reasonable care for his or her own safety, which contributes to the harm the person suffers.

8.2 Legislation in all Australian jurisdictions provides for the 'apportionment' of damages (that is, reduction of the damages to which the plaintiff is entitled) when a person has been contributorily negligent. We shall refer to this legislation as the 'Apportionment Legislation'. Under the Apportionment Legislation, the court has a 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 for the harm suffered. Essentially, the court's discretion is exercised by comparing the degree of culpability of the defendant with that of the plaintiff. The defendant's negligence is compared to the contributory negligence of the plaintiff. Regard is had to the degree to which each departed from the requisite standard of care and to the relative causative importance of the conduct of each.

8.3 Because the apportionment of damages under the Apportionment Legislation is essentially an evaluative exercise involving a comparison of degrees of fault and causal contribution, an appeal court will not lightly interfere with the apportionment of damages decided by a trial judge or jury.[1]

8.4 In the context of this Review, the Panel considers that there are three questions about the current law relating to contributory negligence and the apportionment of damages that deserve attention:

(a) Should the standard of care applicable to contributory negligence be the same as that applicable to negligence?

(b) Should particular types of contributorily negligent conduct attract a minimum reduction of damages fixed by statute?

(c) Should the law allow apportionment for contributory negligence in such a way as to deny the contributorily negligent person any damages at all?

8.5 Although these questions arise in relation to the law of negligence generally, we shall discuss them only in the context of claims for personal injury and death.

The same standard of care

8.6 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 the reasonable person in the plaintiff's position would have taken for his or her own safety.

8.7 Should the law allow people to take less care for their own safety than it requires others to take for their safety? This question concerns the standard of care applicable to contributory negligence. Should the standard of care applicable to contributory negligence be the same as that applicable to negligence? Another way of putting this question is to ask whether the standard of care applicable to victims of the negligent conduct of others should be different from that applicable to the negligent person merely because they are victims?

1 *Liftronic Pty Limited v Unver* (2001) 179 ALR 321.

8.8 We have explained that the negligence calculus provides a framework for deciding what precautions the reasonable person would have taken to avoid harm to others and, hence, what precautions the defendant could reasonably be expected to have taken (paragraph 7.8). Although it is rarely used in this way, the calculus can also provide a framework for deciding what precautions the plaintiff could reasonably be expected to have taken for his or her own safety. The common factor is the reasonable person. This is the basis for the view that there is only one standard of care, namely that of the reasonable person, and that it is common to both negligence and contributory negligence.[2]

8.9 Nevertheless, it might also be said that the standard of care should be determined on the basis that people can reasonably expect others to take more care for their safety than those same people are expected take for their own safety. Under this approach, victims of the negligence of others are treated differently merely because they are victims.

8.10 In the opinion of the Panel, there is in the Australian community today a widely-held expectation that, in general, people will take as much care for themselves as they expect others to take for them. This is an application of the fundamental idea that people should take responsibility for their own lives and safety, and it provides powerful support for the principle that the standard of care for negligence and contributory negligence should be the same.

8.11 Leading textbook writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same.[3] There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendants. In some cases judges have expressly applied a lower standard of care for contributory negligence.[4] This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported.

8.12 It is important to note that applying the same standard of care to contributory negligence as to negligence does not entail ignoring the identity

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2 *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 per Mason J at 571-3.

3 G. Williams, *Joint Torts and Contributory Negligence* (1951), 353-4; J.G. Fleming, *The Law of Torts*, 9th edn (1998), 466.

4 *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 per Murphy J 577-8; *Cocks v Sheppard* (1979) 25 ALR 325; *Watt v Bretag* (1982) 56 ALJR 760; *Pollard v Ensor* [1969] SASR 57, *Evers v Bennett* (1982) 31 SASR 228.

of the plaintiff or the nature of the relationship between the plaintiff and the defendant. If, for instance, the defendant was an adult and the plaintiff was a child, applying the same standard of care to the plaintiff as to the defendant would not entail treating the plaintiff as an adult (any more than it would entail treating the defendant as a child). Again, if the defendant was a teacher and the plaintiff was a pupil, or the defendant was an employer and the plaintiff was an employee, it would be perfectly consistent with applying the same standard of care to both parties to take account of the fact (for instance) that there is a relationship of authority between teacher and child, or that employees typically have less control over the work environment than employers. The requirement to apply the same standard of care in dealing with the issue of contributory negligence as is applied in dealing with that of negligence means only that the plaintiff should not be treated differently from the defendant merely because the plaintiff is the person who has suffered harm. It would not, for instance, involve ignoring the fact that of the two parties, the defendant was in the better position to avoid the harm. But the mere fact that a person has suffered harm, rather than inflicted it, says nothing about that person's ability, relative to that of the inflicter of the harm, to take precautions to avoid it.

8.13 In the view of the Panel, a legislative statement setting out the approach to be followed in dealing with the issue of contributory negligence, emphasising that contributory negligence is to be measured against an objective standard of reasonable conduct, stating that the standard of care applicable to negligence and contributory negligence is the same, and establishing the negligence calculus as a suitable basis for considering contributory negligence, could discourage the tendency of courts to be overly indulgent to plaintiffs when apportioning damages for contributory negligence.

Recommendation 30

The Proposed Act should embody the following principles:

(a) The test of whether a person (the plaintiff) has been contributorily negligent is whether a reasonable person in the plaintiff's position would have taken precautions against the risk of harm to himself or herself.

(b) For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence.

(c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:

(i) The probability that the harm would occur if care was not taken.

(ii) The likely seriousness of the harm.

(iii) The burden of taking precautions to avoid the harm.

(iv) The social utility of the risk-creating activity in which the person was engaged.

(d) Whether a plaintiff has been contributorily negligent according to the criteria listed in (a) and (c) must be determined on the basis of what the plaintiff knew or ought to have known at the date of the alleged contributory negligence.

Minimum reduction of damages

8.14 It has been suggested to the Panel that the law of negligence should be changed to require a court to reduce damages by a certain minimum percentage in cases involving certain categories of conduct that constitute contributory negligence.

8.15 One such case is where the plaintiff's ability to take care for his or her own safety, at the time of death or injury, was impaired as a result of being intoxicated.[5] Another such case is where a person is injured or killed in a motor vehicle accident while not wearing a seatbelt. For example, a court might be required to reduce, by a minimum of 25 per cent, the damages payable to such a person, even if it is likely that the injury or death would still have occurred had the person not been intoxicated, unless the court is satisfied that the person's intoxication did not contribute in any way to the injury or death. Such a provision has three components: (a) a fixed minimum reduction of damages; (b) a presumption that a certain type of conduct was contributorily negligent unless the court is satisfied that it did not contribute in any way to the injury or death; and (c) a shifting of the burden of proof on the issue of contributory negligence to the plaintiff.

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5 See *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA), s 35A(j); cl 51 of the consultation draft of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW).

8.16 The Panel is of the opinion that such provisions are generally undesirable. Negligence and contributory negligence come in an infinite variety of forms. From one case to another, the respective culpability of the plaintiff and defendant, and their relative causal contributions to the death or injury may differ widely. It is impossible to fix a minimum, just and equitable apportionment of responsibility to the plaintiff applicable to cases where the plaintiff's contributory negligence involves a certain type of behaviour. In the opinion of the Panel, any such fixed reduction would be arbitrary and unprincipled, and could work injustice in some cases. The Panel considers that any fettering of judicial discretion to apportion damages for contributory negligence is undesirable.

8.17 The possibility of injustice is increased where a minimum reduction of damages is coupled with a presumption that certain types of behaviour constitute contributory negligence unless the court is satisfied that the behaviour did not in any way contribute to the plaintiff's death or injury. As has already been noted, the standard of care that the law expects of a plaintiff is that of a reasonable person in the plaintiff's position and in all the circumstances of the case. As circumstances differ from case to case, it is not possible to say in advance that certain types of behaviour will always and in all circumstances amount to contributory negligence. For example, being intoxicated will sometimes, perhaps often, amount to contributory negligence, but not necessarily always.

8.18 Furthermore, the onus of showing that the plaintiff was guilty of contributory negligence has traditionally rested on the defendant. As it cannot be presumed that certain types of behaviour will always and in all circumstances be contributorily negligent, a reversal of the onus of proof is, in the Panel's opinion, undesirable.

8.19 Accordingly, the Panel recommends that there be no provision that certain conduct by plaintiffs attracts a minimum reduction for contributory negligence. The Panel recommends that courts retain their wide discretion to apportion damages in cases of contributory negligence. The Panel further recommends that there be no provision that certain types of conduct be presumed to amount to contributory negligence unless the plaintiff can show that the conduct did not contribute in any way to the death or injury suffered by the plaintiff.

Assumption of risk and 100 per cent contributory negligence

8.20 As noted in paragraph 8.2, the Apportionment Legislation gives the court a very wide discretion to reduce the damages payable to a plaintiff who has been contributorily negligent. The only guidance the Apportionment Legislation gives to courts is that the reduction should be such as the court considers 'just and equitable'.

8.21 In exercising this discretion, courts have reduced a plaintiff's damages by as much as 90 per cent.[6] However, the High Court has held that a reduction of 100 per cent is not permissible.[7] The basis of this decision is that an apportionment of 100 per cent contributory negligence amounts to a finding that the plaintiff was wholly responsible for the damage suffered, whereas the Apportionment Legislation operates on the premise that the plaintiff suffered damage partly as a result of his or her own fault and partly of the fault of another person.[8] In one case, a reduction of the plaintiff's damages by 95 per cent was overturned on appeal on the basis that such a large reduction amounted, in effect, to a holding that the plaintiff was entirely to blame.[9] The view has been expressed that the reasons given by the High Court for not permitting a reduction in damages of 100 per cent would preclude a reduction of any more than 90 per cent because a reduction of any greater amount would necessarily mean that the defendant's fault was so negligible that it should be ignored.[10]

8.22 Despite these decisions, the Panel's view is that a provision that a court is entitled to reduce a contributorily negligent plaintiff's damages by 100 per cent would be a desirable reform of the law of negligence. Our reason rests on our understanding of the relationship between the defences of contributory negligence and voluntary assumption of risk in the light of Terms of Reference 1(f) and 3(b).

8.23 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. Since the introduction

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6 *Podrebersek v Australia Iron and Steel Pty Limited* (1985) 59 ALR 529.

7 *Wynbergen v Hoyts Corporation Pty Limited* (1997) 149 ALR 25.

8 *Wynbergen v Hoyts Corporation Pty Limited* at 29-30 per Hayne J.

9 *Civic v Glastonbury Steel Fabrications Pty Limited* (1985) Aust Torts Reports 80-746.

10 *Kelly v Carroll* [2002] NSWCA 9, [37] per Heydon JA.

of the defence of contributory negligence, the defence of voluntary assumption of risk has become more or less defunct. This is because any conduct that could amount to voluntary assumption of risk would also amount to contributory negligence. Courts prefer the defence of contributory negligence because it enables them to apportion damages between the parties, thus allowing the plaintiff to recover something, even in cases where the plaintiff bears a very significant share of responsibility for the harm suffered.

8.24 It is important to note that, like the defence of contributory negligence, the defence of voluntary assumption of risk is only applicable once it has been decided that the defendant was negligent and that the harm suffered by the plaintiff was a result of that negligence. This shows that denying the plaintiff any damages need not be viewed as inconsistent with a finding that the defendant was negligent. In other words, there may be cases 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. It is important to remember that apportionment of damages is concerned with the issue of appropriate remedy, not with liability. It does not follow from a decision that the plaintiff should be denied any damages at all that the defendant was not at fault. Such a decision only means that as between the two parties at fault, the plaintiff should bear full legal responsibility for the harm suffered.

8.25 Our view is that while the cases in which it will be appropriate to reduce the damages payable to a contributorily negligent plaintiff by more than 90 per cent will be very rare, there may be cases in which such an outcome would be appropriate in terms of the statutory instruction to reduce the damages to such an extent as the court considers 'just and equitable'. The sort of case we have in mind is where the risk created by the defendant is patently obvious and could have been avoided by the exercise of reasonable care on the part of the plaintiff. Dealing with such cases in this way is, in the Panel's opinion, preferable to creating a general 'obvious risk' defence, wider than that contained in Recommendation 11, because it is more flexible than an obvious risk defence would be, thus allowing the court to take proper account of the interests of both plaintiff and defendant. In our view, such a provision, coupled, with those contained in Recommendations 7, 11 and 14, would promote the objective underlying Terms of Reference 1(f) and 3(b) in a significant and justifiable way.

8.26 Such a provision might also give a signal to judges in the ordinary run of cases that it is appropriate to hold plaintiffs responsible for their own negligence on the same basis as defendants are held responsible for theirs.

8.27 Accordingly, the Panel recommends that the Proposed Act provide that under the Apportionment Legislation, a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.

Recommendation 31

The Proposed Act should embody the following principle:

Under the Apportionment Legislation (that is, legislation providing for the apportionment of damages for contributory negligence) a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.

Assumption of risk

8.28 As noted in 8.23, the defence of assumption of risk has become more or less defunct since the introduction of apportionment for contributory negligence. Three techniques have been used to this end: first, courts are very unwilling to hold that the plaintiff actually knew of the risk. In order to establish the defence of assumption of risk, it is not enough that the plaintiff ought to have known of the risk. The plaintiff must actually have been aware of the risk. Secondly, courts are unwilling to hold that the plaintiff freely and voluntarily accepted the risk. This is the main reason why the defence has long been effectively unavailable in relation to work risks. Because most decisions to take risks are made subject to some external pressure or influence, it is usually possible to attribute to such pressure the effect of rendering the decision non-voluntary. Thirdly, in this context, courts tend to define risks narrowly and at a relatively high level of detail. The more narrowly a risk is defined, the less likely it is that a person will have been aware of it. For instance, a person may be aware of the risk of suffering bodily injury as a result of engaging in a particular activity. But the person may not be aware of the risk of suffering bodily injury in a particular way.

8.29 Making it easier to establish the defence of assumption of risk would obviously promote objectives underlying the Terms of Reference, and it would do so more directly than the proposal contained in Recommendation 31. The Panel's opinion is that there are two ways in which the law could be changed that might encourage greater use by courts of the defence of assumption of risk.

8.30 The first would be to reverse the burden of proof on the issue of awareness of risk in relation to obvious risks as defined in Recommendation 12. This could be done by a provision to the effect that for the purposes of the defence of assumption of risk, it would be presumed that the person against whom the defence is pleaded was actually aware of an obvious risk unless that person could prove, on the balance of probabilities, that he or she was actually not aware of the risk.

8.31 The second possible change would be to provide that for the purposes of the defence of assumption of risk, the test of whether a person was aware of a risk is whether he or she was aware of a risk of the type or kind of risk and not of its precise nature, extent or manner of occurrence.

8.32 The Panel recommends provisions embodying these principles. We would not recommend any provision dealing with the issue of voluntariness. Whether or not a risk was taken voluntarily is ultimately an evaluative question about which it would be difficult to make general provision.

Recommendation 32

The Proposed Act should embody the following principles:

For the purposes of the defence of assumption of risk:

(a) where the risk in question was obvious, the person against whom the defence is pleaded (the plaintiff) is presumed to have been actually aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.

(b) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

(c) The test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk, not its precise nature, extent or manner of occurrence.

Duties of protection

8.33 Term of Reference 3(c) could be interpreted as referring to situations in which a person (the defendant) has a duty to take care to provide protection against the negligence of another. Such a duty might require the defendant to take care to protect the plaintiff against their own (contributory) negligence, or it may require the defendant to protect the plaintiff against the negligence of a third party. Parents, in theory at least, owe both protective duties to their children. Prison authorities are under a duty to take care to protect prisoners from suffering harm at the hands of other prisoners, and even at their own hands. A duty to protect another from suffering negligently-caused harm will also extend to providing protection from being deliberately harmed. The potential breadth of this protective duty is illustrated by a recent decision of the English House of Lords in which a prison authority was held liable for failing to protect a prisoner (who was of sound mind) from the risk that he would take his own life.[11]

8.34 A duty to protect another from harm (or, in other words, to prevent the other suffering harm) must be distinguished from a duty not to inflict harm on another. The law is generally less willing to impose duties of protection than it is to impose duties not to harm.[12] In the abstract, a duty to protect A will normally be imposed on B only if there is a 'special relationship' between A and B. Relationships such as that of parent and child, employer and employee, and prison authority and prisoner, are examples of such special relationships on which duties of protection can be built. Even if A and B are not in one of these established 'protective relationships', a special relationship may also be found to exist where, for instance, B has undertaken to look after A.

8.35 In cases where the relevant duty is to protect the plaintiff against failure by the plaintiff to take reasonable care for his or her own safety, the imposition of a duty of protection is obviously relevant to the question of contributory negligence. The imposition of a duty of protection entails that the plaintiff is entitled to look to the defendant for protection and, to that extent, is not required to take care for his or her own safety. But the mere fact that a plaintiff is owed such a duty of protection does not mean that the plaintiff is not required to take reasonable care for his or her own safety. All it means is that in applying the standard of the reasonable person to the conduct of the

11 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

12 This point is made clearly by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 478.

plaintiff, the fact that the plaintiff was owed a duty of protection (as opposed to a duty not to inflict harm) must be taken into account (see paragraph 8.12).

8.36 Duties of protection play a very important part in the law in safeguarding the interests of vulnerable members of society. We think that this area of the law is best left for development by the courts. We think that it is neither necessary nor desirable for us to make any general recommendation about the incidence of protective relationships.

8.37 We are reinforced in this conclusion by the clear impression we have gained from our consultations and research that in general, this area of the law is not a source of controversy or of practical problems. The only context in which difficulties have been identified is that of the liability of occupiers of land to visitors. In order to discharge the duty owed to visitors, an occupier may be required to take reasonable precautions to protect visitors from their own negligence or that of third parties — although the occupier is unlikely to be required to afford such protection to a trespasser as opposed to a lawful visitor.

8.38 One way of limiting the protective obligations of occupiers might be to provide that an occupier could not be held liable for failure to take reasonable precautions to prevent a visitor suffering harm as a result of the materialisation of a risk that would have been obvious to the reasonable person in the visitor's position. In relation to a protective duty, the risk in question would be either the risk that the visitor would fail to take care for his or her own safety, or a risk that a third party would fail to take reasonable care for the visitor's safety. It is not clear in what sense it could ever be said that the risk of a visitor failing to take care for his or her own safety ought to have been 'obvious' to the visitor.

8.39 It is certainly possible to imagine cases in which it might be said that a risk of suffering harm as a result of the negligence of a third party would have been obvious to the reasonable person in the visitor's position. The Panel's view, however, is that there should be no 'obvious risk defence' wider than that proposed in Recommendation 11. It must be remembered that the damages payable to the visitor in such a case would almost certainly be reduced for contributory negligence; and Recommendation 31 is designed to encourage courts to be more willing than they may have been in the past to give proper weight, in apportioning damages for contributory negligence, to the principle that people should take reasonable care for their own safety.

8.40 It should also be noted that Recommendation 14 (no liability for failure to warn of an obvious risk), Recommendation 32 (about assumption of risk)

and Recommendation 39 (providing public authorities with a policy defence) make an important contribution to promoting the principle that people should take reasonable care for their own safety. In the Panel's view, these and other recommendations in this Report make unnecessary proposals specifically designed to limit liability for failure to prevent harm occurring.

9. Mental Harm

Term of Reference

1. Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury and death, including:

(a) the formulation of duties and standards of care;

Types of mental harm

9.1 The basic rule for determining whether a person owes another a duty to take care to avoid personal injury or death is whether the person can reasonably be expected to have foreseen that the other would suffer harm if care was not taken (paragraph 7.4).

9.2 Personal injury may be either physical or mental. Mental harm may be consequential on physical injury (as where depression is suffered as a result of an injury to the body), or it may stand alone (as where a person suffers anxiety as a result of witnessing traumatic events). In this Report, harm of the former type is called 'consequential mental harm' and harm of the latter type is called 'pure mental harm'.

9.3 Under current law, if a person suffers negligently-caused physical harm for which another is held liable, the person may also recover damages for mental harm consequential on the physical harm. In effect, the test of liability for consequential mental harm is the same as the test of liability for the physical harm on which it is consequential.

9.4 For various reasons, the law has made it harder for people to recover damages for negligently-caused pure mental harm than for negligently-caused physical harm (and consequential mental harm). Perhaps the most important of these reasons are: (a) the existence and extent of mental harm may be difficult to diagnose objectively and to prove for legal purposes; (b) the number of people who may suffer pure mental harm as a result of a single act of negligence may be greater and less easy to foresee than the number of people who may suffer physical harm as a result of a single act of negligence; and (c) because resources are limited, it is more important to compensate people for physical harm than for pure mental harm.

Pure mental harm

Recognised psychiatric illness

9.5 There is another very important difference between the current law's treatment of consequential mental harm on the one hand, and pure mental harm on the other. The law adopts a more restrictive definition of mental harm for the purposes of compensating for pure mental harm than for the purposes of compensating for consequential mental harm. The rule is that pure mental harm will attract compensation only if the harmed person has suffered a 'recognised psychiatric illness' (or 'condition'). This rule has the effect that expert evidence is normally required to establish whether damages are recoverable for pure mental harm. (We will return to this issue in paragraphs 9.40-9.41.) By contrast, any mental harm may attract compensation if it is consequential on physical harm. (We will return to this issue in paragraphs 9.34-9.39.)

9.6 The law draws the distinction between psychiatric illness and other mental harm because, it is said, medicine also draws that distinction. However, current law gives no guidance as to how it is to be established, for legal purposes, that a person is suffering from a psychiatric illness. It often seems to be assumed that whether someone is suffering from a mental illness is a purely medical question. However, the concept of illness is, to some extent, a social construction, and the catalogue of mental illnesses is not closed. For instance, post-traumatic stress disorder has been recognised as a mental illness only for about the past 25 years. A diagnostic tool that is frequently used in legal contexts is DSMIV — the *Diagnostic and Statistical Manual of Mental Disorders*. However, this publication was intended as a tool for use in clinical contexts, and not for forensic purposes. Indeed, the introduction to the *Manual* warns against its use in legal contexts.[1]

9.7 As a result of its consultations, the Panel has reached the conclusion that the lack of suitable forensic criteria of mental illness is a serious cause of dissatisfaction with the current law amongst various interested groups. For this reason, the Panel recommends that a panel of experts, including experts in forensic psychiatry and psychology, be appointed to develop a set of guidelines, for use in legal contexts, for the assessing whether a person has suffered a recognised psychiatric illness. These guidelines should be given formally-recognised status.

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1 There is a useful discussion of this issue in the judgment of Hayne J in *Tame v New South Wales* [2002] HCA 35, [285]-[297].

Recommendation 33

A panel of experts (including experts in forensic psychiatry and psychology) should be appointed to develop guidelines, for use in legal contexts, for assessing whether a person has suffered a recognised psychiatric illness.

The duty to take care to avoid causing pure mental harm

9.8 The rules governing liability to pay damages for negligently-caused pure mental harm have changed considerably in the past century as medical understanding of the mind has developed and as social attitudes to mental illness have changed. For present purposes, it is not necessary to trace these changes. It is only necessary to discuss current Australian law on this topic. The High Court has very recently given detailed consideration to this area of the law in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* [2002] HCA 35, which were both claims for pure mental harm.

9.9 One of the claims (*Tame*) concerned a woman who suffered pure mental harm as a result of learning of a false statement in a police report to the effect that she had been driving under the influence of alcohol. The other claim (*Annetts)* involved parents who suffered mental harm as a result of learning, after a long wait for reliable information, that their 16-year old son had died in tragic circumstances.

9.10 The claim in *Tame* failed for three main reasons: first, (in the words of Gummow and Kirby JJ), the plaintiff's reaction was 'extreme and idiosyncratic' (para [233]) and not such as a person of 'normal fortitude' would have suffered; secondly, the possibility of conflict between the duty of police to investigate crime and a common law duty not to cause suspects mental harm by making false statements; and, thirdly, the imposition of liability for negligence in such a situation would generate incoherence between the law of negligence and the law of defamation.

9.11 The claim in *Annetts* succeeded. The Court observed that the parents were in a 'special relationship' with the defendant based on an undertaking made by the defendant (the son's employer) to the parents to take quasi-parental care of their son. It was foreseeable, so the Court held, that persons of normal fortitude would suffer mental harm as a result of what the parents had been through.

9.12 It is important to note that the issue in these cases was whether the defendant owed a duty to the plaintiff to take care not to cause the plaintiff mental harm. The issue was not whether the defendant had taken reasonable

care, nor did it concern the extent of liability for mental harm. If a person owes no duty to take care to avoid causing another mental harm, the person cannot be liable for mental harm caused to the other even if it was the result of the person's negligence. As noted earlier, the basic rule is that a person owes a duty to take care to avoid causing another personal injury (including consequential mental harm) or death if the person could reasonably be expected to have foreseen that if care was not taken, the other might be injured. However, traditionally this rule has not applied to pure mental harm. At various times, the law has said that a duty to avoid causing mental harm would be imposed only in relation to harm caused by 'shock'; that this duty was owed only to persons who were physically near to the scene of the 'shocking' events at the time they occurred, or who witnessed their 'immediate aftermath'; and that the duty was owed only to those who witnessed the shocking events or their aftermath with 'their own unaided senses'. All of these preconditions for the existence of a duty to take care to avoid causing mental harm were jettisoned, *as preconditions,* in *Tame/Annetts*.

9.13 The fundamental proposition which *Tame/Annetts* seems to establish is that reasonable foreseeability of mental harm is the only *precondition* of the existence of a duty of care. It also establishes, however, that a duty of care to avoid mental harm will be owed to the plaintiff only 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. This test does not require the plaintiff to be a person of normal fortitude in order to be owed a duty of care. It only requires it to be foreseeable that a person of normal fortitude in the plaintiff's position might suffer mental harm. In this sense, being a person of normal fortitude is not a precondition of being owed a duty of care.

9.14 The phrase 'the circumstances of the case' includes matters such as whether or not the mental harm was suffered as the result of a sudden shock; whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath; whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses; whether or not there was a pre-existing relationship between the plaintiff and the defendant (as in *Annetts)*; the nature of the relationship between the plaintiff and any person killed, injured or put in peril; and so on. None of these factors represents a precondition of being owed a duty of care. But they are all relevant to deciding whether the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if care was not taken. That is, they are relevant to whether the defendant owed the plaintiff a duty of care.

9.15 The basic idea underlying the approach of the High Court in *Tame/Annetts* is that people vary in terms of psychological vulnerability, and

that as a general rule, it is unreasonable to expect others to take greater precautions than would be necessary to protect the normally vulnerable (that is, people of 'normal fortitude'). It is essential to understand that while the incidence of various mental illnesses in the general population may be relevant to the concept of 'normal fortitude', this concept is ultimately a legal, not a scientific, one. It is no more scientific than the concept of the reasonable person. It has a significant evaluative element, and its function is to allocate legal responsibility for mental harm rather than to assist in the diagnosis of mental illness for clinical or epidemiological purposes.

9.16 In fact, the law takes the same attitude to physical vulnerability. People vary in terms of physical vulnerability, but a person (the defendant) will owe another (the plaintiff) a duty to take care not to cause the plaintiff physical harm only if the defendant ought to have foreseen that a person of normal physical vulnerability might suffer harm if care was not taken.[2]

9.17 Physical and mental harm are treated similarly in another respect, too. In a well-known English case a motor mechanic who had sight in only one eye lost the sight of the other eye when a piece of metal flew into it.[3] The issue was whether the plaintiff's employer was negligent in not providing him with goggles. The employer knew that the plaintiff had the sight of only one eye; and it was held that even if it would not have been negligent not to provide goggles for a worker who had the sight of both eyes, it was negligent not to provide them for a worker who was known to have sight in only one eye. This was because loss of the sight of an eye is a much more serious harm to a person with sight in only one eye than to a person who has the sight of both eyes. In determining how serious the consequences of the materialisation of a risk might be for a particular person, it is obviously relevant to consider how vulnerable the person is. The reasonable person cannot normally be expected to take precautions to protect the abnormally vulnerable. But it may be reasonable to expect such precautions of a person who knows (or ought to know) about the vulnerability. In *Tame/Annetts* it was similarly said that a person might owe a duty of care to someone who was abnormally vulnerable psychologically, even if no duty would be owed to a normally vulnerable person, if the person knew that the other was abnormally vulnerable.

9.18 The law about liability for mental harm on the one hand, and physical harm on the other, is similar in a third important respect. In determining the extent of liability for harm caused by negligence in breach of a duty of care, the

2 *Levi v Colgate-Palmolive Pty Ltd* (1941) 41 SR (NSW) 48.

3 *Paris v Stepney Borough Council* [1951] AC 367.

rule is that the defendant must 'take the plaintiff as found'. This means that the defendant is liable for all the harm suffered by the plaintiff even if it is greater than would have been suffered by a person of normal physical or mental vulnerability. In relation to physical harm, this rule is sometimes called the 'egg-shell skull rule'; and in relation to mental harm, the 'egg-shell personality rule'. The High Court in *Tame/Annetts* confirmed that the 'take-as-found' rule applies to liability for mental harm. In other words, a plaintiff's abnormal vulnerability is taken into account in determining the extent of liability even though it is ignored both in relation to duty of care (as in *Tame*) and standard of care (as in *Paris v Stepney Borough Council*),[4] unless it was known (or ought to have been known) to the defendant. This means that provided a duty was owed to an abnormally vulnerable person and the duty was breached, the person may recover damages for harm which the normally vulnerable person would not have suffered.

Should there be further restrictions on liability for pure mental harm?

9.19 It would seem, therefore, that Australian law has now reached the point where the basic principles governing liability for mental harm are essentially the same as those governing liability for physical harm. The common underlying idea is that what people can reasonably be expected to foresee, and the care that they can reasonably be expected to take, must be judged relative to the normally vulnerable plaintiff. The abnormally vulnerable are entitled only to the same care as the normally vulnerable unless the defendant knew (or ought to have known) that the plaintiff in particular was abnormally vulnerable. The question that this raises in the context of the Panel's Terms of Reference is whether the current state of the common law imposes satisfactory limits on liability for mental harm. In practical terms, the question is whether liability for pure mental harm should be subject to preconditions of the sort that existed before *Tame/Annetts* was decided.

9.20 Under s 4 of the New South Wales *Law Reform (Miscellaneous Provisions) Act 1944* (and similar legislation in the Australian Capital Territory and the Northern Territory), a parent or spouse of a person killed, injured or put in peril by the wrong of another may recover for 'mental or nervous shock' resulting from the wrong. In addition, any other member of the person's 'family' may recover if the person was killed, injured or put in peril 'within the sight and hearing' of the family member. At the time it was enacted, this provision probably extended, rather than restricted, the scope of common law

4 [1951] AC 367.

liability for mental harm. Now, however, the common law is wider than this provision in important respects.

9.21 Under s 141 of the New South Wales *Motor Accidents Compensation Act 1999*, damages for pure mental harm can be awarded 'in respect of a motor accident' only in favour of (a) a person who suffered 'injury' in the accident *and* was either the driver of or a passenger in a car 'involved in the accident' or was present at the scene when the accident occurred; or (b) a parent, spouse, brother, sister or child of a person killed or injured in the accident.

9.22 More recently, it has been proposed (in clause 69 of a consultation draft of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)) that in relation to an incident in which a person is killed or injured through the fault of another, only a 'bystander' or a 'close relative of the victim' may recover damages for pure mental harm.

9.23 It should be noted that these provisions only deal with cases where pure mental harm is suffered by one person as a result of the imperilling, injuring or killing of another. They do not deal, for instance, with the sort of case that was the subject of the claim in *Tame* (as opposed to *Annetts)* or with 'workplace stress' claims. There are no existing statutory provisions that impose limitations, additional to those developed in *Tame/Annetts*, on liability for pure mental harm in cases of work-related stress (for instance).

9.24 Leaving this issue aside, in assessing such provisions it needs to be borne in mind that an important reason why such limitations on liability have been abandoned by the common law is that they appear to many to be arbitrary and unprincipled, and that their only aim and effect is to limit the potential number of claims for pure mental harm. This is a particular problem when the limitations in question are imposed by the common law which, it is widely thought, should be based on 'reason' and 'principle', not pragmatism or political considerations. It is just such a principled basis of liability for pure mental harm that the High Court sought and found in *Tame/Annetts*. The problem of 'arbitrariness' is not so great when such limitations are imposed by statute because they can be justified on grounds of distributive and social justice to which courts generally are wary of appealing. But this may not remove the perception that such limitations are essentially arbitrary and, to that extent, unfair.

9.25 Nevertheless, it would be possible further to limit liability for pure mental harm, in cases where harm is suffered by one person as a result of another being imperilled, injured or killed, by requiring the former to be in a particular relationship with the latter, such as that of parent, child or spouse. A

difficulty with this approach (from the point of view of principle) is that it may not be possible to specify all the desired relationships in terms of existing legal definitions and without resorting to an evaluative concept such as 'close relationship'. Such evaluative concepts are undesirable in this context because they necessitate the forensic examination and assessment of the nature and quality of intimate human relationships in a way that may bring the law into disrepute.

9.26 It might also be argued that the 'list of eligible relationships' approach imposes unnecessarily restrictive limitations on liability for pure mental harm in light of the emphasis that is now placed by the common law on the concept of the person of normal fortitude, coupled with the increased emphasis on reasonableness in Recommendation 28 (about standard of care). These should have the effect of significantly limiting the scope of liability for mental harm in a way that is both principled and consistent with the objectives of the Terms of Reference.

9.27 Because of the difficulty of justifying a list of relationships in a principled way, the Panel does not recommend such a list. However, we understand that governments may think that legislation enacting such a list would be desirable. For that purpose, we suggest that the following list might be appropriate to specify the required relationship between the person imperilled, injured or killed and the person who suffered pure mental harm as a result of that person being imperilled, injured or killed:

(a) A parent, or a person who stands *in loco parentis*, to the person imperilled, injured or killed.

(b) The husband or wife of, or any person living on a *bona fide* domestic basis with, the person imperilled, injured or killed at the time of the relevant events.

(c) A natural, half or step sister or brother of the person imperilled, injured or killed.

(d) A natural, adopted or step son or daughter of the person imperilled, injured or killed.

9.28 Whether or not a legislative list of relationships is enacted for cases in which a person suffers pure mental harm as a result of another being imperilled, injured or killed, the Panel is of the opinion that the objectives of the Terms of Reference would be promoted by a legislative statement of what we consider to be the current state of the law about when a duty is owed to

take care to avoid causing pure mental harm. That statement would embody the following principles:

(a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.

(b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless 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.

(c) For the purposes of (b), the circumstances of the case include matters such as:

(i) whether or not the mental harm was suffered as the result of a sudden shock;

(ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;

(iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;

(iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and

(v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

Recommendation 34

The Proposed Act should embody the following principles:

(a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.

(b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless 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.

(c) For the purposes of (b), the circumstances of the case include matters such as:

(i) whether or not the mental harm was suffered as the result of a sudden shock;

(ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;

(iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;

(iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and

(v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

Mental harm resulting from breach of a contractual duty

9.29 In *Annetts*, one of the factors that weighed in favour of the imposition of a duty of care was that the incidents that gave rise to the mental harm took place against the background of a pre-existing relationship between the plaintiffs and the defendant. This partly explained the parents' reaction and justified the finding that the defendant ought to have foreseen that parents of normal fortitude might suffer a recognised psychiatric illness if the employer did not take care of their son as the employer had undertaken to do. The relationship in this case was not contractual; but a contract can provide the

basis for imposing on one contracting party a duty to take care not to cause pure mental harm to the other contractor. Claims for pure mental harm resulting from workplace stress fall into this category: the duty of care owed by the employer to the employee to take care to avoid causing the employee pure mental harm is one aspect of the employer's general duty of care to employees.

9.30 An important question that was left open in *Annetts* is whether the normal fortitude test applies in cases where the duty to take care to avoid causing the other contracting party pure mental harm is contractual. In the United Kingdom it has been held that special rules that limit liability for pure mental harm do not apply to cases where an employee sues the employer for pure mental harm resulting from a breach of the employer's contractual duty of care.[5] In the Panel's view, this position is undesirable and hard to justify as a matter of principle. Consistently with Recommendation 2, we can see no reason why plaintiffs who can found their claims for damages for negligently-caused pure mental harm on a contract should be better off in this respect than plaintiffs who must found their claims on a non-contractual duty. We therefore recommend that it be expressly provided that the rules about when a duty of care to avoid pure mental harm arises are the same regardless of whether the claim for damages for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

Recommendation 35

The Proposed Act should embody the following principle:

The rules about when a duty to take reasonable care to avoid pure mental harm arises are the same regardless of whether the claim for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

The nature of the claim for pure mental harm

9.31 The claim for pure mental harm is an independent claim. Even in cases in which the harm occurs as a result of the imperilling, injuring or killing of another and where the claim in respect of mental harm is made against the person who was responsible for the injury, death or peril, the liability for mental harm is based on a duty owed to the person who suffers the mental

5 *Sutherland v Hatton* [2002] IRLR 263.

harm. It is not dependent or built on a duty owed to the person injured, killed or imperilled.

9.32 Nevertheless, it has been proposed (in sub-clause 69(3) of the consultation draft of the Civil Liability Amendment (Responsibility) Bill 2002 (NSW)) that, where a plaintiff claims damages for pure mental harm arising out of an incident in which another was injured (or killed) — and where any damages awarded to the injured person (or his or her estate) would be reduced for contributory negligence on the ground that the person injured or killed was intoxicated — any damages awarded to the plaintiff for mental harm should be reduced by the same proportion.

9.33 Although this provision might seem hard to justify from the point of view of the person claiming damages for pure mental harm, from the defendant's point of view it might be thought only fair. Why should the defendant be required to pay full compensation for the mental harm suffered by the plaintiff when it can be said to be partly the fault of the person imperilled, injured or killed? The Panel therefore recommends a general provision to the effect that in a claim for damages for pure mental harm arising out of an incident in which a person was injured, killed or put in peril, any damages awarded should be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Recommendation 36

The Proposed Act should embody the following principle:

In an action for damages for negligently-caused pure mental harm arising out of an incident in which a person was injured, killed or put in peril as a result of negligence of the defendant, any damages awarded shall be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Consequential mental harm

9.34 The current law is that if a person suffers mental harm consequential on physical harm, damages for the mental harm may be recovered regardless of whether the mental harm amounts to a recognised psychiatric illness, provided the defendant owed the plaintiff a duty to take care to avoid causing *physical harm*. In many cases, consequential mental harm gives rise only to a claim, and an award of damages, for non-economic loss (typically 'pain and suffering and

loss of amenities'). We are not concerned with such cases here. We will consider such awards in our examination of the assessment of damages for personal injury in Chapter 13. Here we focus on cases where consequential mental harm gives rise to a claim for damages for economic loss, such as loss of income and the cost of care.

9.35 The fundamental issue to which such claims for special damages for consequential mental harm give rise is whether they should be subject to the same requirements as attach to claims for damages for pure mental harm, namely that (a) the mental harm must constitute a recognised psychiatric illness; and (b) the circumstances of the case must be such that the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if reasonable care was not taken. The importance of this issue is most obvious in cases where the plaintiff suffers no permanent physical impairment — that is, where the only continuing effects of the negligence are mental rather than physical. Cases involving soft-tissue injuries provide widely-cited examples.

9.36 The Panel's considered opinion is that (a) damages for economic loss resulting from the negligent infliction of mental harm should be awarded only in respect of recognised psychiatric illness, even if the mental harm is consequential on physical injury; and (b) such damages should be recoverable only if 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 our view, the distinction between damages for non-economic loss and damages for economic loss is very important in this context. It seems unfair that a person who suffers consequential mental harm should be able to recover potentially very large amounts of damages for economic as well as non-economic loss, when a person who suffers precisely the same harm but without the accompanying physical harm should recover nothing for economic loss. The link between mental and physical harm does not seem sufficient to support this difference of treatment, especially in cases where the physical harm causes no permanent physical impairment.

9.37 It is important to note that the effect of our proposal is that in order to recover economic-loss damages for consequential mental harm, the plaintiff must establish that the defendant owed the plaintiff a duty to take care to avoid inflicting mental harm, as well as a duty to avoid inflicting physical harm. This duty in relation to mental harm is separate from, and independent of, the duty in relation to physical harm.

9.38 The question whether the defendant owed the plaintiff an independent duty to take care to avoid inflicting consequential mental harm would be

determined by reference to all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff.[6] That is, the question to be asked is: was it foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm?

Recommendation 37

The Proposed Act should embody the following principles:

(a) Damages for economic loss resulting from negligently-caused consequential mental harm are recoverable only if:

(i) the mental harm consists of a recognised psychiatric illness; and

(ii) 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

(b) In determining the question of foreseeability in (a)(ii), the test is whether it was foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm.

9.39 If this Recommendation is implemented, it will promote the objectives of the Terms of Reference in a very significant way. Damages for economic loss resulting from consequential mental harm can be very large, even in cases where the plaintiff has suffered no permanent physical impairment. It is important, in the Panel's opinion, that claims for consequential mental harm should not be treated as parasitic on the associated claim for physical harm, and thereby be freed from the constraints that attach to other claims for mental harm. As a matter of principle, the Panel believes that the distinction drawn between physical and mental harm should be applied to consequential as well as to pure mental harm.

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6 Similarly, in determining whether the defendant owed the plaintiff a duty to take care to avoid inflicting pure mental harm as a result of imperilling, injuring or killing another, the question of foreseeability of mental harm has to be assessed in the light of all relevant circumstances including the nature of the actual events from which the mental harm allegedly resulted. To this extent, the existence of a duty of care is decided with the benefit of hindsight.

Expert Evidence

9.40 To the extent that the law awards damages for mental harm only if it constitutes a recognised psychiatric illness, expert evidence is needed to determine whether the mental harm suffered satisfies this criterion. In any case in which damages are claimed for negligently-caused mental harm, expert evidence may also be needed in order to determine whether the harm was in fact a result of the negligence. Our consultations suggest that there is considerable dissatisfaction in relation to expert evidence relating to mental harm. We have recommended the establishment of an expert panel to develop guidelines for the assessment of mental illness in legal contexts. This will address some of the dissatisfaction. However, the general concerns about the quality and impartiality of expert evidence, which were addressed in paragraphs 3.70-3.79, have been voiced by some with increased force in this context.

9.41 We noted, in paragraph 9.6, the reservations expressed in the introduction to DSMIV based on the distinction between clinical and forensic psychiatry. The Panel's considered opinion is that this distinction is of great importance in the context of ensuring that expert psychiatric evidence is of high quality and relevance. We therefore recommend that the expert panel appointed to develop guidelines for the assessment of mental illness should also be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

Recommendation 38

The expert panel referred to in Recommendation 33 should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

10. Public Authorities

Term of Reference

3 In conducting this inquiry, the Panel must:

(a) address the principles applied in negligence to limit the liability of public authorities.

The problem addressed

10.1 The problem to which this Chapter is primarily addressed can be illustrated by reference to two types of cases.

Allocating resources

10.2 The first type of case is where, for instance, a public authority (such as a highway or national park authority) is the target of a claim for personal injury or death based on alleged failure to take care to make a place, over which the authority has control, reasonably safe for users (such as motorists or picnickers).

10.3 The problem arises from the fact that the authority will have a limited budget at its disposal for the performance of its functions, and will have various calls on that budget. For this reason, it may want to argue, in answer to a negligence claim, that it made conscious, carefully considered decisions about the allocation of the budget between its various functions, and that without allocating more to the function in question, it could not have made the relevant place any safer than it was. On the basis of our consultations, the Panel understands that there is a widespread view amongst local councils (in particular) that the law of negligence is being applied in such a way as to allow decisions, made in good faith, about the allocation of scarce resources between competing activities, to provide the basis for findings of liability against public authorities; and that this is having a detrimental impact on the ability of public authorities to perform their functions in the public interest.

10.4 There is evidence to suggest that this problem has become particularly acute since the decision of the High Court in *Brodie v Singleton Shire Council*[1]

1 (2001) 206 CLR 512.

where the High Court abolished the rule that a highway authority is not liable for injury or damage resulting from 'non-feasance' (as opposed to 'misfeasance') in the performance of its functions as a highway authority.

10.5 Submissions have been made to the Panel to the effect that the decision in *Brodie* should be reversed and the non-feasance rule restored. The Panel, however, is not persuaded that this should be done. The judgments of the majority in *Brodie* provide compelling justification for the abolition of the non-feasance rule. In particular, the rule was subject to many qualifications which were difficult to apply or to justify in a principled way.

10.6 The Panel, however, is satisfied that the decision in *Brodie* has given rise to some undesirable consequences that need to be addressed. According to *Brodie*, 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 not only when the authority knows of the danger but also when, if it had taken reasonable care to inspect the highway, it would have known of the danger.

10.7 In determining whether the public authority took reasonable steps to remove the risk, regard must be had to 'competing or conflicting responsibilities or commitments of the authority'.[2] The result — particularly in some jurisdictions and, potentially, in all — has been that increasing amounts of time are spent in the course of trials considering whether the authority's conduct in relation to the risk in question was reasonable given the other demands on the resources available to the authority.

10.8 For example, a court may be called upon to decide whether it was reasonable for the defendant authority to allocate its resources in such a way that it could not afford to put in place a programme of highway inspection that would have brought the risk in question to its attention. In some instances, individual councillors may be called to testify why they voted for a budget that allocated funds in such a way — why, for instance, more was not voted for roads at the expense of nursery schools.

2 *Brodie*, [151] per Gaudron, McHugh and Gummow JJ.

Making social policy

10.9 An example of the second type of case, that illustrates the problem to which this Chapter is primarily addressed is based on the decision of the English House of Lords in *Home Office v Dorset Yacht Co.*[3] Suppose a prisoner escapes from an open, low-security prison and, in the course of the escape, causes damage to nearby property. Suppose further that the property owner sues the prison authority for negligence on the basis that the authority's practice of building and maintaining open facilities was negligent. In answer to that claim, the prison authority might want to argue that its open-prison programme was based on the demands of political and social policy, and was the result of a conscious and good-faith weighing by the authority of the competing interests of the various groups affected by the programme.

10.10 Or suppose that an inner-city resident sues an air-traffic control authority, alleging that as a result of its negligent decision about the location of an airport approach flight-path, she suffered hearing impairment caused by aircraft noise.[4] The authority might want to argue that its decision about where to locate the flight-path was based on social and political considerations, and on a conscious and good-faith assessment of the competing interests of the various groups affected by the decision.

10.11 In the view of the Panel, the canvassing in a negligence action of the sorts of issues raised in these examples is undesirable in at least three respects. First, courts are not well qualified, either in terms of expertise or procedure, to adjudicate upon the reasonableness of decisions that are essentially political in nature. Secondly, courts are inappropriate bodies to consider the reasonableness of such decisions because they are neither politically representative nor politically responsible. Thirdly, proper consideration of the reasonableness of such decisions may be very expensive and time-consuming.

A policy defence

10.12 As a general rule, it is no answer to a negligence claim for a defendant to say that its failure to remove the risk in question was based on 'financial, economic, political or social factors or constraints'.[5] If, on the basis of the negligence calculus (see paragraph 7.8), it can be said that the defendant ought

3 [1970] AC 1004.

4 This example is based on *Air Services Australia v Zarb* NSWCA, unreported, 26 August 1998.

5 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 469 *per* Mason J.

to have taken precautions to avoid the materialisation of the risk, it is no answer for the defendant to say that financial, economic, political or social considerations justified its decision not to do so.

10.13 The question that arises in the types of case illustrated by our examples is whether and when a defendant should be allowed to answer a negligence claim by pleading that although it failed to take reasonable care, this was the result of a conscious and considered decision, made in good faith, on the basis of financial, economic, political or social considerations. (In this Chapter we will refer to such a plea as 'the policy defence'.)

10.14 This question raises three issues. First, are there arguments of principle that could justify a rule allowing a defendant to plead the policy defence? If so, (secondly), when should such a defence be available? And thirdly, what effect should such a defence have on the liability of the defendant?

An argument of principle for the policy defence

10.15 Pursuing the illustration discussed in paragraphs 10.2-10.8, an argument for allowing a highway or park authority to plead the policy defence could be based on the proposition that while the authority owes a duty of care to users of public roads and parks, in performing that duty it has to balance the interests of individual road users against the interests of the wider public to whom, as a public authority, it is politically responsible. In addition to weighing the interests of individuals against those of the public, the authority may also have to weigh various interests of individuals and groups in deciding how to spend its budget. For instance, an authority may be responsible not only for the safety of road users, but also for aspects of the health and education of the residents of its area. In deciding how much to spend on road safety, health services and education respectively, the authority must necessarily make decisions that may have adverse consequences for individuals and groups, even though they may seem perfectly justifiable when viewed from a wider public-interest perspective.

10.16 As noted in 10.12, it is generally no answer to a negligence claim to plead lack of resources (for instance). There are two recognised exceptions to this principle. One is where a trespasser makes a negligence claim against an occupier of land, and the other is where a claim is made in respect of alleged failure by an occupier of land to take care to prevent a natural hazard on the land causing harm to visitors or neighbours. The factor that these two types of case share is the fact that in an important sense, the landowner is not

responsible for the dangerous situation — in the former case because the trespasser (by definition) enters the land without the consent of the occupier, and in the second case because the hazard (in the nature of the case) was not created by the occupier. In all other cases, however, although the cost of precautions is relevant to determining whether the defendant ought to have taken them, the defendant's ability to pay that cost is not. These rules, allowing resources to be taken into account, operate for the benefit of occupiers of land who are public authorities as much as for the benefit of ordinary citizens.

10.17 This discussion supports the case for the policy defence because there is an important sense in which a public highway or park authority is not free to abandon its functions. Although it may, for instance, be permissible and feasible for a highway authority to close a section of road for a period, and it may be possible for a park authority temporarily or indefinitely to bar access to certain areas under its control, such authorities are not (in practice, at least) in a position to protect themselves from incurring liability for harm by withdrawing entirely from the activity of highway provision or park management. This is because such authorities have a responsibility to the public to perform the functions they have been given.

10.18 The same can be said of the other type of case we have considered. For instance, although a prison authority might be free to decide not to locate a prison in a particular place, or to adopt one prison design rather than another, or even to close or build no more prisons, the authority would not be free to avoid the risk that prisoners might escape and cause harm by withdrawing entirely from 'the prison business'. Similarly, an air-traffic control authority may have a great deal of discretion about how to exercise its regulatory functions; but it is certainly not free to avoid the risks attendant on the performance of those functions by refusing entirely to perform them.

10.19 In the Panel's view, such arguments provide a sound basis for allowing the policy defence to be pleaded in certain situations in which it is not, and should not be, normally available in answer to a negligence claim.

When should the policy defence be available?

10.20 The next question concerns when the policy defence should be available. One possibility would be to provide that it should be available in any case in which the defendant to a claim for negligently-caused personal injury or death is a 'public authority'. The Panel does not support this option. Cases can easily be imagined in which the arguments developed in the

previous section, in favour of the policy defence, would not apply to such a claim. For example, there seems no good reason why public authorities should not be responsible for taking care that motor vehicles owned by them are safe, in precisely the same way and to precisely the same extent as a private individual would be. It should not be open to a public authority — any more than it would be open to a private individual — to say that it should not be held negligent because its failure to maintain its vehicles in a safe condition was the result of a conscious decision based on financial, economic, political or social considerations.

10.21 Much the same objection would apply to a provision that the policy defence should be available in answer to any claim 'for negligence in the performance of a statutory function'. Suppose, for example, that an employee of a public authority causes a road accident by driving negligently in the course of performing some statutory function of the authority. The mere fact that the accident occurred in the course of the performance of a statutory function should not displace the operation of the ordinary rules of liability and allow the policy defence to be pleaded.

10.22 The argument in paragraphs 10.20-10.21 suggests that the cases in which the policy defence should be available are those in which the alleged negligence consisted of the performance or non-performance of a 'public function' — that is, a function that required the defendant to balance the interests of individuals against a wider public interest, or to take account of competing demands on its resources. It is extremely important to understand that whether any particular function is 'public' in this sense is not a matter of fact or observation but a value judgment which ultimately a court must make. In other words, functions are not public or non-public by their very nature, but because they are treated as such. So, for instance, although it would be possible for a public authority to decide to neglect the maintenance of its fleet of motor vehicles in order to free up resources for some other activity, or for some other political or social reason, maintenance of motor vehicles would not be considered an appropriate activity to be treated in this way. It would, therefore, normally not be appropriate to treat maintenance of a public authority's vehicle fleet as a public function.

10.23 Because the decision whether a function is public or not involves a value-judgment, the Panel considers that it would not be appropriate for it to propose any definition of 'public function'. This should be left for common law development.

10.24 An important corollary of adopting performance of a 'public function' as the criterion for the availability of the policy defence is that a defendant may

be able to plead the defence even if it is not a public authority, provided that the alleged negligence arose out of the performance or non-performance of a public function. This is an important point in the context of the corporatisation and outsourcing of the performance of governmental functions, and of regimes of industry and professional self-regulation. A result of such practices is that bodies other than public authorities, as this term is generally understood, may perform public functions.

The effect of the policy defence

10.25 Our proposal is, then, that in a claim for negligently-caused personal injury or death where the alleged negligence arises out of the exercise or non-exercise of a public function, the functionary (that is, the person or body performing the public function) should be able to plead the policy defence. This raises the question of what the effect of that defence would be.

10.26 It has sometimes been suggested that certain policy decisions (such as 'quasi-legislative' or 'regulatory' decisions)[6] are 'non-justiciable'. This means that the decision cannot be challenged in a court or provide the basis for legal liability. The Panel's firm view is that the policy defence should not operate in this way to give immunity from liability. Rather, we think that Australian law should follow the lead of English law in this respect (see *Stovin v Wise*[7]) by providing that in a claim for negligently-caused personal injury or death against a public functionary, where the alleged negligence consists of the exercise or non-exercise of a public function, and the public functionary pleads that the failure to take precautions to avoid the relevant risk was the result of a decision about the allocation of scarce resources or was based on some other political or social consideration, liability can be imposed only if the decision was so unreasonable that no reasonable authority in the defendant's position could have made it.

10.27 This test of 'unreasonableness' is taken from public law where it is known as the test of '*Wednesbury* unreasonableness' after the case in which Lord Greene MR invented it.[8] The effect of the test is to lower the standard of care. It does not provide the defendant with an immunity against liability, but it does give the defendant more leeway for choice in deciding how to exercise

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6 See for example, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 500 *per* Deane J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 37 *per* McHugh J.

7 [1996] AC 923.

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.

its functions than would the normal definition of negligence (in terms of reasonable care).

Recommendation 39

The Proposed Act should embody the following principle:

In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.

10.28 It should be noted that under Recommendation 39, the policy defence is available only in cases where a public functionary has made a (policy) decision about the performance or non-performance of a public function. The defence would not be available in a case where the functionary did not consider whether or not to perform the function.

10.29 For the sake of clarity, it should be stated that the term 'public functionary' covers both corporate bodies and natural persons.

Recommendation 40

In the Proposed Act, the term 'public functionary' should be defined to cover both corporate bodies and natural persons.

10.30 As noted in 10.28, the effect of the provision in Recommendation 39 would not be to withdraw the issue of policy entirely from the court's consideration. It would still be open for the court to adjudicate upon whether the policy decision was so unreasonable that no reasonable functionary could have made it. But it will significantly restrict the ambit of disputes about policy issues because the court will not be required to express a view as to whether a particular decision was negligent in the sense in which this word is normally used in negligence law. The question will merely be whether the decision was one that could not have been made by any reasonable public authority in the position of the defendant. In principle at least, this is a far more stringent test for the plaintiff to satisfy.

10.31 An example will illustrate the way the principles contained in Recommendation 39 are intended to operate. Assume that a public authority is

sued for negligently failing to repair a pothole that caused a motor accident in which the plaintiff was injured. Assume that the authority leads evidence to the effect that:

(a) it did not know about the pothole, and hence did not repair it;

(b) it maintains 10,000 kilometres of roads, and inspects its roads on a six-monthly cycle;

(c) given the budget allocation for roads, approved by a resolution of councillors, it could not afford a more frequent inspection cycle; and

(d) the pothole developed after the last inspection.

10.32 On these facts, it would not be open to the court to find that the budget decision constituted negligent conduct on the part of the defendant, unless the decision was one that no reasonable public authority in the position of the defendant could have made. The inquiry into this issue is likely to be relatively brief. If the court decided that the decision in question was not so unreasonable that no reasonable public functionary could have made it, the plaintiff's claim would probably fail.

10.33 Assume, however, that the plaintiff establishes that three months before the accident, the defendant was informed that the pothole was dangerous and should be repaired. Assume, further, that the defendant decided to do nothing, or inspected the pothole and wrongly decided that it was not dangerous. In such circumstances, a court would be unlikely to hold that the non-repair was the result of a decision based on financial, economic, political or social factors or constraints. The defendant would then not be able to rely on the policy defence, and the plaintiff's claim would be decided according to ordinary principles of negligence. The question would be whether, in failing to repair the pothole, the defendant had exercised due care according to the law of negligence. On the posited facts, the plaintiff would be likely to succeed. In addition, the plaintiff would be likely to succeed on the alternative ground that the defendant's conduct in ignoring a known danger was unreasonable in the strong *Wednesbury* sense because, in the case posited, the cost of taking precautions would be relatively very small.

Compatibility

10.34 Most public functions are conferred by statute. It follows that in most cases where the policy defence will be available, the alleged negligence will consist of the performance or non-performance of a statutory function.

10.35 In such cases in English law, the *Wednesbury*-unreasonableness approach is used in combination with a rule that an action for damages for negligence in the performance or non-performance of a statutory function will be available only if, in the opinion of the court, allowing such an action would be compatible with the provisions and policy of the statute.

10.36 This idea — that an action for breach of a common law duty of care committed in the performance or non-performance of a statutory function will be available only if allowing such an action would be compatible with the provisions and policy of the statute — also played an important part in the reasoning in the recent High Court decisions of *Sullivan v Moody & Ors*[9] and *Tame v New South Wales*[10]. In the former case, for instance, it was held that imposing a common law duty on a school authority to take care in conducting a disciplinary investigation about the conduct of a head teacher would be incompatible with the authority's statutory obligations in conducting the inquiry.

10.37 The Panel recommends that the Proposed Act should contain an express statement of the compatibility principle.

Recommendation 41

The Proposed Act should embody the following principle:

A public functionary can be liable for damages for personal injury or death caused by the negligent exercise or non-exercise of a statutory public function only if the provisions and policy of the relevant statute are compatible with the existence of such liability.

10.38 The effect of this principle is to enable a court to deny liability for the exercise or non-exercise of a statutory function regardless of whether the relevant decision was negligent or even unreasonable in the *Wednesbury* sense. In other words, unlike the policy defence, this provision affords complete immunity from liability. It will, thus, provide significant protection to public

9 (2001) 183 ALR 404.
10 [2002] HCA 35.

functionaries, especially in relation to decisions that raise complex issues of social policy, and the weighing and balancing of the interests of individuals against a wider social interest, or of competing interests of various individuals or social groups. These are the sorts of decisions that courts are most unwilling to review in a negligence action, and this principle provides a basis for declining to do so.

10.39 The combined effect of Recommendations 39 and 41 is that courts will have two ways of affording a degree of protection from liability to defendants exercising statutory public functions. Depending on the facts of the case and the provisions of the relevant statute, the court may be able either to afford the defendant complete immunity from liability under the incompatibility principle, or uphold the policy defence.

Breach of statutory duty

10.40 A consequential issue that needs to be considered in this context concerns liability for breach of statutory duty. There are various possible approaches to liability for damages for personal injury or death resulting from breach of a statutory duty. One approach (adopted widely in United States jurisdictions) is that breach of a statutory duty constitutes 'negligence *per se*'. This means that for the purposes of a negligence claim, breach of a statutory duty is conclusively treated as negligent conduct regardless of whether the statutory duty is one to take reasonable care. A second approach, adopted by Canadian law, is to treat breach of statutory duty as evidence of negligence, but never as anything more than evidence of negligence.

10.41 A third approach is that adopted by Australian (and English) law. Under this approach, breach of statutory duty may be adduced as evidence of negligence in a claim based on breach of a non-statutory (that is, common law) duty of care. However, breach of a statutory duty may, in certain cases, alternatively and independently give rise to a claim for damages based directly on the breach of the statute. Such a claim is not strictly a claim for negligence and so would not fall within the terms of Recommendation 2 unless (at least) the statutory duty were formulated as a duty to take reasonable care.

10.42 In principle, whether a claim for damages for personal injury or death can be based directly on the breach of a statutory duty depends on the 'intention of the legislature' as expressed or (necessarily) implied in the relevant statute. However, the relevant legislation typically makes no provision, either expressly or impliedly, about the availability of an action for

damages for breach of its provisions. In that case, it has been accepted by courts for a very long time that the decision whether or not to allow a claim for damages to be based directly on breach of a statute is one of policy for the court to make in the light of the relevant provisions and total scheme of the statute, and of what appear to be its purposes. In effect, an independent action for breach of statutory duty will be allowed only if, in the opinion of the court, doing so would be compatible with the terms and purposes of the statute.

10.43 There are various principles of statutory interpretation that the courts use in deciding whether to allow an independent action for breach of statutory duty. But it is widely accepted that these rules and principles provide very little guidance in individual cases. This is partly because, for every principle that points in favour of allowing an action, there is typically a counter-principle that points in the opposite direction. In practice, the only type of statutory duties that are held, with any consistency or regularity, to give rise to an independent action for damages are those concerned with occupational health and safety.

10.44 Although the law in this area is widely considered to be in an unsatisfactory state, this is not a matter that has been specifically raised in the Panel's Terms of Reference, and we have no reason to think that there is significant community pressure to reform the law. However, there is one consideration that leads the Panel to think that there may be a case for change. If Recommendation 39 is accepted and implemented, it may encourage plaintiffs to seek to evade its effect by making an independent claim for breach of statutory duty against a public functionary, and arguing that the claim does not fall within the scope of the provision envisaged by Recommendation 2 and, therefore, that the policy defence is not available to the public functionary. Even if such an argument would be unlikely to succeed, it seems to the Panel desirable to block this possibility for evasion of the provision in Recommendation 39.

10.45 A way of doing this would be to provide that in the absence of express provision to the contrary in the relevant statute, any claim for damages for negligently-caused personal injury or death made in the form of a claim for breach of a statutory duty would be subject to the provisions of the Proposed Act. The Panel recommends the enactment of such a provision.

Recommendation 42

The Proposed Act should embody the following principle:

In the absence of express provision to the contrary in the relevant statute, any action for damages for negligently-caused personal injury or death made in the form of a claim for breach of statutory duty is subject to the provisions of this Act.

11. Non-Delegable Duties and Vicarious Liability

Term of Reference

1 Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death including:

(a) the formulation of duties … of care.

What are non-delegable duties?

11.1 The concept of a non-delegable duty is used to justify the imposition of 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.

11.2 This concept is related to that of vicarious liability. Vicarious liability has two essential characteristics. First, it is liability for the negligence (or other wrong) of another. Secondly, it is 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 the other.

11.3 The basic 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 employment'. The law about the meaning of the concepts of 'employee' and 'course of employment' is complex, but it is not necessary to review it here.

11.4 It is important to note that the vicarious liability of the employer is additional to the 'primary' liability of the employee for negligence. Both are liable — 'jointly and severally', as it is put. The common law implies into the contract of employment a term to the effect that the employee will perform the contract with reasonable care. On the basis of this term, the employer is entitled to recover from the employee a contribution to any damages which the employer is liable to pay to the person injured or killed. If the employer was not negligent at all, it will be entitled to be fully indemnified by the employee. In some Australian jurisdictions, there is legislation that provides (in certain

types of case) that only the employer is liable, not the employee.[1] In some jurisdictions there are also statutory provisions that remove the right of the employer (in certain types of case) to recover contribution or an indemnity from the employee.[2]

11.5 In terms of personal responsibility, the most widely accepted justification for vicarious liability is that, because the employer takes the benefit of the business being conducted, the employer should also be required to bear risks attendant on the business. However, this justification is hard to reconcile with the employer's right to contribution or an indemnity. For this reason, many view vicarious liability simply as a form of liability insurance, intended primarily for the protection of plaintiffs, and not based on principles of personal responsibility.

11.6 Apart from the relationship of employer and employee, vicarious liability can also arise out of the relationship between 'principal' and 'agent'. The concept of 'agency' is a vague one, but it rests on the idea that a person who does something at the request, and for the benefit, of another does it as agent for that person.

11.7 A corollary of the general rule that employers are vicariously liable for the negligence of employees is that an employer is not vicariously liable for the negligence of independent contractors. The way the law distinguishes between employees and independent contractors is very complex, and need not be reviewed here.

11.8 Various exceptions have been developed to the rule that an employer is not vicariously liable for the negligence of independent contractors. The concept of a non-delegable duty is, in effect, a technique for creating such exceptions. So, for instance, it is now well-established that a hospital is vicariously liable for the negligence of those who provide health-care services in its name, regardless of whether the provider is an employee or an independent contractor of the hospital.[3]

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1 For example, *Police Act 1952 (SA)*, s 51A; *Police Regulation Act 1898 (Tas)*, s 52.

2 F. Trindade and P. Cane, *The Law of Torts in Australia*, 3rd edn (1999), 744.

3 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

The problem with non-delegable duties

11.9 In order to understand the problem posed by non-delegable duties, it is necessary to attempt to understand their nature and characteristics.

11.10 The first point to make is this. Although the precise nature of a non-delegable duty is a matter of controversy and uncertainty, one thing is clear: a non-delegable duty is not a duty to take reasonable care.[4] For this reason, liability for breach of a non-delegable duty will not fall within the terms of the provision contained in our overarching Recommendation 2.

11.11 A second thing that is clear about non-delegable duties is that although they are a technique for imposing vicarious liability — that is, strict liability for the negligence of another — they are typically not thought of as a form of strict liability. It is often said, for instance, that although a non-delegable duty is not a duty of care, it is a duty 'to see that care is taken'. The implication of this statement is that there are steps (typically not specified) that can be taken to discharge a non-delegable duty. By contrast, there is nothing that an employer can do to prevent being subject to vicarious liability for the negligence of its employees. This is because it is a form of liability that attaches automatically to the relationship of employer and employee, and not to anything done by the employer in the course of that relationship. The only way of avoiding vicarious liability is not to be an employer.

11.12 The problem that this situation creates is that courts often give the impression, when they impose a non-delegable duty, that they are not imposing a form of strict liability but rather a form of liability for breach of a duty committed by the employer in the course of being an employer. In other words, although it is clear that a non-delegable duty is not a duty of care, courts often seem to think that a non-delegable duty can only be breached by conduct on the part of the employer that is *in some sense faulty*. As a result, courts do not think that they need to justify the imposition of a non-delegable duty in terms of the justifications for the imposition of strict vicarious liability. Rather, they appear to think that justification is to be found in arguments for imposing liability for 'fault' (in some sense).

11.13 Thirdly, it is important to understand that a non-delegable duty is a duty imposed on the employer alone. The worker is not, and cannot be, under the duty. The worker's duty is an ordinary duty to take reasonable care. And even though liability for breach of a non-delegable duty is functionally

4 *Kondis v State Transport Authority* (1984) 154 CLR 672, 687 per Mason J.

equivalent to vicarious liability, it is (unlike vicarious liability) liability for breach of a duty resting on the employer. In other words, whereas vicarious liability is secondary or derivative liability (in the sense that it is based on the liability of the negligent worker), liability for breach of a non-delegable duty is, in theory at least, a primary, non-derivative liability of the employer.

11.14 The fundamental problem that this discussion exposes can be put most clearly by referring back to Recommendation 2 and assuming that the Proposed Act has been enacted. Suppose that a worker fails to take reasonable care to avoid causing injury or death to another (the plaintiff). The primary liability of the worker to the plaintiff will be determined in accordance with the rules (intended to limit liability and damages for negligence) contained in the Proposed Act. If the plaintiff makes a claim against the employer based on vicarious liability, that liability will be limited in the same way, and to the same extent, as the employee's primary liability because the employer's vicarious liability is derivative of the employee's primary liability. However, if the employer is not vicariously liable for the negligence of the worker (because, most importantly, the worker was an independent contractor rather than an employee) and the plaintiff claims against the employer on the basis of a breach of a non-delegable duty, the limitations of liability and damages contained in the Proposed Act will not apply to that liability.

11.15 This outcome is undesirable because the employer's liability for breach of a non-delegable duty is functionally equivalent to vicarious liability for the negligence of the worker. In the Panel's view, it would be unsatisfactory if plaintiffs could evade the application of the provisions of the Proposed Act by inviting a court to impose a non-delegable duty on a defendant employer that would not be subject to the provisions of the Proposed Act when, if they claimed against the negligent worker, the claim would be subject to the provisions of the Proposed Act.

11.16 In the opinion of the Panel, this problem could be addressed by the enactment of a provision to the effect that for the purposes of the Proposed Act, liability for breach of a non-delegable duty shall be treated as equivalent to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.

Recommendation 43

The Proposed Act should embody the following principle:

Liability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.

11.17 One reason why this recommendation is important is that Australian courts, including the High Court, have in recent years been searching for general principles underlying the concept of non-delegable duty. Instead of treating non-delegable duties as a means of extending the scope of vicarious liability, concepts such as 'control' over the work or the place where the work was being done (referring to the employer) and 'vulnerability' (referring to the plaintiff) have been suggested as general grounds for recognising new non-delegable duties. For instance, in *Burnie Port Authority v General Jones Pty Ltd*[5] the High Court assimilated the rule in *Rylands v Fletcher*[6] into the general law of negligence, but at the same time held that a person in occupation or control of land owes a non-delegable duty, in respect of negligent conduct by another of dangerous operations on the land, regardless of whether the occupier is vicariously liable for the person conducting the operations.

11.18 The development of such general principles may provide encouragement to people looking for ways to evade the provisions of the Proposed Act. Recommendation 43 is not intended to limit the recognition of new non-delegable duties. Its only purpose is to prevent non-delegable duties (both those that currently exist and any new duties that may be recognised in the future) being used as a way of evading the provisions of the Proposed Act.

11.19 It was suggested to us that we should make proposals intended to rationalise the current law and to limit or stop the future recognition of new non-delegable duties by specifying a list of situations in which a non-delegable duty will arise. Our view is that this would be undesirable. The incidence of non-delegable duties and the scope of vicarious liability is a matter best left for development by the courts.

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5 (1994) 179 CLR 520.

6 (1866) LR 1 Ex 265.

Volunteers

11.20 Two issues arise here: (a) should volunteers (understood as people who do community work on a voluntary basis) be exempted from liability for negligence in certain circumstances? and (b) should community organisations be liable for the negligence of volunteers working for them?

Should volunteers be exempted from liability?

11.21 The Panel is not aware of any significant volume of negligence claims against volunteers in relation to voluntary work, or that people are being discouraged from doing voluntary work by the fear of incurring negligence liability. The Panel has decided to make no recommendation to provide volunteers as such with protection against negligence liability.

Should community organisations be liable?

11.22 Section 4 of the *Volunteers Protection Act 2001* (SA) protects volunteers from personal liability in certain circumstances. S 5 provides that the liability that would, but for s 4, rest on the volunteer, attaches instead to the community organisation for which the volunteer works. The effect of section 5 is to create an exception to the basic rule that vicarious liability attaches to the relationship of employer and employee. Volunteers are not employees of the organisations for which they work because there is no contract of service between them. In some situations, the common law imposes vicarious liability for the negligence of independent contractors. Likewise, voluntary workers are not independent contractors of the community organisations for which they work because there is no contract for services between them. The common law sometimes imposes vicarious liability on the basis that the negligent person was an 'agent' of the person held vicariously liable. Typically, voluntary workers would not be agents (in the relevant sense) of community organisations for which they work.

11.23 It follows that a recommendation by the Panel that community organisations should be vicariously liable for the negligence of volunteers who work for them would be in conflict with the objectives of the Terms of Reference because it would expand rather than limit liability for negligence (in this case, the negligence of others). In particular, such a recommendation would adversely affect the interests of not-for-profit community organisations,

contrary to the clear intent of Term of Reference 3(f) (dealt with in Chapter 4). We therefore make no recommendation on this issue.[7]

7 For a similar reason, we do not recommend the abolition of the doctrine of 'independent discretion' and the reversal of the rule in *Enever v R* (1906) 3 CLR 969. See F. Trindade and P. Cane, *The Law of Torts in Australia*, 3rd edn (1999), 720-1; ALRC Report 92, *The Judicial Power ofthe Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (2001), paras 25.7-25.20.

12. Proportionate Liability

Term of Reference

3 In conducting this inquiry, the Panel must:

(e) develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant is only partially responsible for damage, they do not have to bear the whole loss.

12.1 This Term of Reference could be interpreted as requiring the Panel to make recommendations for the replacement of 'joint and several' liability for negligently-caused personal injury and death with a system of proportionate liability. The Panel has not considered itself to be constrained in this way. We have been asked to review the law of negligence generally, and it is not possible to do this properly without giving careful consideration to, and evaluating options for, the reform of this important area of the law. In our view, the Terms of Reference should be so construed.

12.2 After careful consideration, we have come to the firm view that personal injury law should not be reformed by the introduction of a system of proportionate liability. We have not considered or assessed options for the introduction of a regime of proportionate liability in relation to property damage and pure economic loss, and we make no comment or recommendation in that respect.

The concepts of joint and several liability and proportionate liability

12.3 This area of the law is concerned with situations in which the same damage is caused by negligence (or other legal wrong) on the part of more than one person. Historically, it was important to distinguish between two different types of case. One involved what was called 'joint' wrongdoing and the other 'concurrent' wrongdoing. Joint wrongdoing occurs where two or more people act together, and their concerted action causes harm to another. Concurrent wrongdoing occurs where two or more people act independently of one another, but their various independent actions cause harm — the same harm — to another. As a result of statutory provisions and decisions of the courts over the past 60 years or so, the distinction between joint and concurrent

wrongdoing is now largely irrelevant. For present purposes, we can use the term 'multiple wrongdoers' to cover both types of case.

12.4 Multiple wrongdoers are 'severally liable'. This means that each can be held liable for the full amount of any damages awarded to the plaintiff, and the plaintiff is entitled to seek to recover the full amount of those damages from any of the people held liable. Of course, the plaintiff can only recover once, but is free to get as much of the total amount due as it is possible to get from any of the persons held liable. This maximises the plaintiff's chance of full recovery. If, for instance, there were two wrongdoers and one of them is solvent and the other is insolvent, the plaintiff is entitled to recover the full amount of the damages from the solvent wrongdoer. This phenomenon is sometimes referred to as 'solidary liability' (as opposed to 'proportionate liability').

12.5 The basic justification for solidary liability is that because the wrongful conduct of each of the wrongdoers was a necessary condition of the harm suffered by the plaintiff, it should not be open to any of the wrongdoers to resist — as against the plaintiff — the imposition of liability for the whole of the harm suffered.

12.6 Any and every one of a number of multiple wrongdoers is entitled to recover 'contribution' from the others towards any amounts paid to the plaintiff. Under the statutes dealing with contribution, the court has a very wide discretion to 'apportion' the liability between the various wrongdoers in such proportions as the court thinks just. The most important practical consequence of solidary liability is that the risk that one or more of the multiple wrongdoers will not be available to be sued or will not be able to pay the damages awarded, rests on the other wrongdoers rather than on the plaintiff. The justification for this is that as between the various wrongdoers and an innocent plaintiff, it is unfair that the risk that one or more of the wrongdoers will be unavailable to be sued or will be insolvent should rest on the plaintiff. This reasoning explains suggestions made from time to time that the rule of solidary liability should be reformed, but only in cases where the plaintiff was contributorily negligent.

12.7 Contrasted with solidary liability is proportionate liability. Under a regime of proportionate liability, liability for the harm caused (jointly or concurrently) by the multiple wrongdoers is divided (or 'apportioned') between them according to their respective shares of responsibility. A plaintiff can recover from any particular wrongdoer only the proportion of the total damages awarded for which that wrongdoer is held liable, assessed by reference to the wrongdoer's comparative degree of responsibility (defined in terms of some statutory criterion or criteria). The main practical effect of

proportionate liability is that the risk that one or more of the multiple wrongdoers will be unavailable to be sued, or will be insolvent, rests on the person who suffers the harm.

Law reform, academic and legislative opinions regarding the issue

12.8 Many law reform bodies, both in Australia and overseas, have considered the question of whether solidary liability should be replaced by a system of proportionate liability.[1] Some have concluded that in cases of pure economic loss, that is, loss not consequent upon personal injury or death, proportionate liability should be introduced.[2] As mentioned, we make no comment on this aspect of proportionate liability. The Panel is not aware of any law reform report that has recommended the introduction of a system of proportionate liability in relation to claims for personal injury or death.

12.9 The strong weight of academic opinion is also that solidary liability is preferable to proportionate liability in cases of personal injury or death.

12.10 This preponderance of opinion is reflected in legislation. There is no statutory enactment in Australia that provides for proportionate liability in cases involving personal injury or death. There are certain statutory provisions in the States and Territories that establish a system of proportionate liability, but none apply to claims for personal injury or death.[3]

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1 For example, NSW Law Reform Commission, Contribution Among Wrongdoers: Interim Report on Solidary Liability, LRC 65; NSW Law Reform Commission, Contribution Between Parties Liable for the Same Damage, Report 89 (1999); Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3 (1998); New Zealand Law Commission, Apportionment of Civil Liability Report 47 (1998); Canada Standing Committee on Banking, Trade and Commerce, Joint and Several Liability and Professional Defendants (Report, 1998); JLR Davis, Inquiry into the Law of Joint and Several Liability: Report of Stage 2 (Commonwealth of Australia, 1995).

2 The Commonwealth Government's Corporate Law Economic Reform Program Phase 9 (CLERP 9) proposes that the present rule of joint and several liability in relation to pure economic loss and property damage be replaced by a proportionate liability regime.

3 Development Act 1993 (SA); Building Act 1993 (Vic); Building Act 1993 (NT). See also Civil Liability Amendment (Personal Responsibility) Bill 2002, Part 6 (NSW).

Arguments advanced against solidary liability

12.11 Some have argued that solidary liability is unfair and makes it difficult for insurers properly to assess the insured risk. Several reasons are given to support this conclusion:

(a) Under a system of solidary liability, an insured may be liable for a loss in circumstances where its 'contribution to the loss' is relatively small and its right of contribution against other wrongdoers is worthless because they are either impecunious or not available to be sued. Consequently, it is said, a plaintiff's loss is 'distributed' by reference to the relative ability of the various wrongdoers to pay, rather than their respective contributions to the loss.

(b) Under a system of solidary liability, an insurer must set premiums on the basis that its insured will be completely liable for a plaintiff's loss, even though the insured's contribution to the loss may be relatively small and the balance of the loss may not be recoverable because the other wrongdoers are impecunious or unavailable to be sued.

(c) Under a system of solidary liability, 'deep pocket' defendants (for example, public authorities or professionals with insurance) tend to be targeted in preference to other wrongdoers regardless of their relative responsibility for the harm. This, it is said, is unfair because such defendants may have little control over the conduct of other concurrent wrongdoers.

(d) A system of solidary liability may discourage the development of risk-management procedures because defendants who invest in such procedures may find themselves being held fully liable, while other wrongdoers who did not make such investments may get off scot-free.

12.12 As regards the person who suffered harm, the argument that solidary liability is unfair can be met by pointing out that the conduct of each of the multiple wrongdoers was a necessary condition of the harm suffered; and in this sense, each of the multiple wrongdoers is fully responsible for it. From the plaintiff's point of view, it would seem very difficult to justify a situation in which a person who was harmed by more than one wrongdoer (only one of

whom was solvent and available to be sued) could be worse off than a person who was harmed by only one wrongdoer who was solvent and available to be sued.

12.13 As between multiple wrongdoers, the possibility of recovering contribution can be seen simply as a piece of good luck. If a wrongdoer negligently causes harm to another, that person is liable for it regardless of the degree of fault their conduct displayed. The fact that the degree of a particular wrongdoer's fault is small does not, by itself, provide a reason for reducing that person's liability to the harmed person. In this light, the fact that a wrongdoer whose fault was slight may be unable to recover contribution from another wrongdoer whose fault was greater, provides no reason to reduce the liability of the former simply because the former was only one of a number of wrongdoers responsible for the same harm. Nor does it result in the plaintiff's loss being distributed by reference to ability to pay, rather than responsibility for the loss. Rather, it is distributed by reference to the principle that a person who negligently causes harm to another must pay for it.

12.14 When premiums are set, an insurer must necessarily assess the risk on the assumption that the insured will be liable for the full amount of any harm. This is so regardless of whether the law provides for solidary or proportional liability because at the time the premium is set, the insurer must allow for the possibility that the insured will be a sole wrongdoer. It seems unlikely that the difference between being held liable proportionately as opposed to having a (possibly worthless) right to recover contribution from other wrongdoers could have any significant impact on the setting of premiums. At all events, provided the law is clear (as it is), the fact that it establishes solidary liability will not make the setting of premiums any more difficult than it would be under a system of proportionate liability. The mere fact that premiums might be higher under a system of solidary liability than they would be under a system of proportionate liability provides, by itself, no argument against the former if it is considered, on other grounds, to be fair.

12.15 Once it is accepted that each of a number of multiple tortfeasors is responsible for the harm, and that the right to claim contribution from the others does not alter this fact, there is nothing unfair in 'deep pocket' defendants being targeted.

12.16 The argument that a system of solidary liability reduces incentives for risk management is fallacious. In deciding what risk-management measures to take, a person must necessarily assume that their activities may be the sole cause of harm without any contribution from other people.

The problem with proportionate liability

12.17 In the Panel's view, although no significant practical problems would arise as a result of the introduction of a system of proportionate liability in relation to negligently-caused personal injury or death, there is a major problem of principle that weighs conclusively against any proposal for such a system.

12.18 Under a system of proportionate liability, the plaintiff bears the risk that one of a number of multiple wrongdoers will be impecunious or unavailable to be sued. If there are two wrongdoers, D1 and D2, each of whom is 50 per cent responsible for the same harm, and D2 is impecunious or unavailable to be sued, under a system of proportionate liability the plaintiff will only recover 50 per cent of their loss (from D1). This is so regardless of whether the plaintiff was also in any way at fault. In the result, a person who is harmed by two people may be worse off than a person who is harmed by one. Conversely, a person who negligently causes harm to another will be better off merely because someone else also caused the person harm. This is difficult to justify.

12.19 For this reason, the Panel is firmly of the view that it should make no recommendation to replace joint and several liability with proportionate liability.

Recommendation 44

In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability.

An option for proportionate liability

12.20 Consistently with the task of the Panel to identify options for reform and, despite Recommendation 44, the Panel considers that the proposal set out in the next paragraph would be a suitable basis for legislation to replace joint and several liability for negligently-caused personal injury and death with proportionate liability.

Option for proportionate liability

12.21 In any claim for negligently-caused personal injury or death, the following principles will apply:

12.22 Any damages awarded to a plaintiff against a defendant are limited to such proportion of the total amount claimed as the court considers just having regard to the defendant's responsibility for the harm.

12.23 The court may not give judgment against the defendant for more than that amount.

(a) In any case where more than one person is liable in respect of the same damage, none may recover contribution from any of the others towards any damages that the person is liable to pay.

12.24 This proposal does not distinguish between cases involving a single wrongdoer and cases involving multiple tortfeasors. This is because under a system of proportionate liability, it is always open to a wrongdoer to claim that he or she was not a sole wrongdoer. Paragraph (a) allows the court to hold the defendant 100 per cent liable if it concludes that the defendant was the only wrongdoer who bore responsibility for the harm. Under a system of proportionate liability, there are, necessarily, no rights to contribution. Paragraph (c) is, therefore, strictly unnecessary.

Contribution between parties liable for the same harm

12.25 Under a regime of proportionate liability, the plaintiff can recover damages, from each party liable for the same harm, only for that proportion of the harm for which each was held responsible. It follows that no liable party has a right to recover contribution from any other liable party towards the damages which the former has to pay. By contrast, under a regime of solidary liability, the plaintiff can recover, from each party liable for the same harm, damages for the total harm suffered; and each liable party has a right to recover from the other liable party (or parties) a contribution towards those damages proportionate to the latter party's responsibility for the harm.

12.26 The law of contribution in Australia is extremely complex, and it varies in significant respects from one jurisdiction to another. In the time available to us, we have not been able to give the law of contribution the consideration it needs and deserves. Our view is that if our Recommendation is accepted that the existing regime of solidary liability be retained in relation to personal

injury and death claims, there should be a review of the law of contribution with the aim of introducing a uniform national regime of rules to govern contribution.

13. Damages

Term of Reference

2. Develop and evaluate principled options to limit liability and quantum of award for damages.

The Panel's approach to this Term of Reference

13.1 There are very many options — in the form, for instance, of thresholds and caps — that could be considered for limiting the quantum of awards of damages for negligently-caused personal injury and death. While the Terms of Reference make it clear that the Panel is to develop and evaluate proposals to limit the quantum of damages, we do not think that changes in the law should be recommended merely for the sake of reform or to reduce liability. As elsewhere in this Report (and as required by our Terms of Reference), we have sought to identify changes that can be justified in terms of principle.

13.2 A number of general principles have guided our deliberations in this area. First, we have taken the view that the resources devoted to compensation for negligently-caused personal injury and death should be allocated in such a way as to provide support and assistance where it is most needed. There is reason to think that, under personal injury law, the less seriously injured tend to be treated relatively more generously than the more seriously injured. In our view, if any group is to be treated relatively better than any other, it should be the more seriously injured.

13.3 Secondly, the basic principle underlying the assessment of damages for personal injury and death is the 'full compensation principle'. This principle applies most straightforwardly to damages for economic losses; and it requires that all such losses should be compensated for to their full extent. In relation to damages for non-economic losses, the principle is the basis for the idea that although such losses are non-economic, they are nevertheless 'real' losses that should be fairly compensated for. Although the full compensation principle is fundamental to personal injury law, it is often merely assumed to be the appropriate basis for the assessment of damages. The Panel does not believe that the full compensation principle is sacrosanct or that it should be beyond reconsideration and revision. The very many statutory provisions in various Australian jurisdictions that effectively qualify the full compensation principle reflect community attitudes that are supportive of such an approach.

13.4 Thirdly, the full compensation principle was first laid down before the welfare state developed. As was noted in paragraphs 1.29 and 1.30, only a very small proportion of disabled people recover compensation under personal injury law. Very many are more or less dependent on the social security system. Benefits for the disabled under the social security system are much lower than those available to people with similar disabilities under the full compensation principle of personal injury law, even taking account of statutory modifications of that principle. It is sometimes said that this differential properly reflects the fact that people who recover compensation under personal injury law have been injured by someone else's fault. But there is much evidence to suggest that only a relatively small proportion of those injured by the fault of others recover compensation under personal injury law.[1] Furthermore, it may be doubted that the fault factor justifies the potentially huge disparities between the treatment of the disabled under the social security system and personal injury law respectively.[2] It is the view of the Panel that in considering the quantum of damages available under personal injury law, it is relevant to consider the fact that only a very small proportion of disabled people receive the relatively generous levels of compensation that personal injury law allows and requires.

13.5 Fourthly, it is well known that in general, the smaller the personal injury claim, the higher the proportion of the total cost of meeting the claim attributable to legal expenses. For instance, the Trowbridge Report to the Insurance Issues Working Group of Heads of Treasuries, *Public Liability Insurance: Practical Proposals for Reform* (30 May 2002) ('the Trowbridge Report') estimates that for public liability claims of between $20,000 and $100,000, legal expenses account for about 35 per cent of the total cost of claims; whereas for claims over $500,000 they account for about 20 per cent of the total cost. We also know that overall, the administrative costs of the personal injury compensation system are very much higher than those of other compensation systems, in particular the social security system. These facts support the conclusion that reducing the number, and the cost of resolving, smaller claims could make a significant contribution to reducing the overall cost of the system without disadvantaging those most in need of support and assistance.

13.6 Fifthly, without in any way denying or casting doubt on the suffering and impairment of quality of life experienced by victims of personal injury (and by relatives in the case of death), the Panel considers that it is more

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1 H. Luntz and D. Hambly, *Torts: Cases and Commentary*, 5th edn (2002), 6-9; P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (1999), 169-181.

2 For instance, the social security system provides no benefits on account of non-economic losses.

important to make sure that people's financial needs are met than that they are compensated for intangible and non-economic harm. In this respect, we are mindful of the fact that the social security system provides no compensation to disabled people for non-economic harm. This principle complements our fourth principle because it is clear from the research conducted for the Trowbridge Report that the smaller the claim, the higher the proportion of the compensation recovered attributable to non-economic loss (colloquially known as 'general damages').

13.7 Sixthly, the Panel has been told that one of the factors affecting the cost and availability of public liability insurance, especially to smaller organisations, is the risk of incurring a very large claim arising out of catastrophic injuries. While we consider that available resources should be concentrated in areas of greatest need, we are also mindful of the fact that compensation for loss of earning capacity can represent a very significant proportion of the total compensation payable in serious cases. We also note that while the full compensation principle supports fully earnings-related income replacement, the social security system operates under the principle of means-tested income support. In the view of the Panel, it would be consistent with the other principles we have adopted to expect high earners to take steps to protect themselves against the risk of severe impairment of their earning capacity.

The need for national consistency

13.8 In paragraph 1.9 we expressed unqualified support for the aspiration that the law relating to negligence should be brought as far as possible into conformity in all Australian jurisdictions. In no area is the law more diverse, and (we are convinced) in no area is conformity more desirable, than in regard to the quantum of damages.

13.9 The law relating to compensation for personal injury and death is different in every State and Territory of Australia. Not only are there significant differences between jurisdictions, but also within jurisdictions there are different regimes of assessment of damages for different classes of personal injury claims. Typically, there will be separate statutes dealing with motor accidents, civil liability generally, and workers compensation. Some jurisdictions have statutes that deal with other classes of claims.

13.10 As a result, in any particular jurisdiction, a claimant may receive a different award for the same injury depending upon whether the injury was

sustained at work, in a motor accident, or in the course of some other activity. Then, again, a different award may be made for similar injuries depending upon the State or Territory in which the injury was sustained. The various statutory legal regimes for assessment of damages in the various Australian jurisdictions make up a highly complex mosaic, with many inconsistencies and unprincipled variations.

13.11 In addition to differences in statutory provisions, there are differences resulting from courts, in the various jurisdictions, not adopting a uniform approach to the assessment of damages. These judicial divergences of approach can produce significant variations in the amounts of damages awarded in similar cases, sometimes involving hundreds of thousands of dollars.

13.12 Insurers have made it clear to the Panel that the lack of national consistency in the law relating to quantum of damages makes it more difficult for them to predict reliably the likely extent of liability of insureds. This translates into difficulties in setting premiums (and, probably, results in higher premiums).

13.13 The differences between the law applicable in the various jurisdictions also give rise to perceptions of injustice. There is no principled reason, for example, why a person should receive less damages for an injury sustained in a motor accident than for one suffered while on holiday at the beach. There is also no principled reason why there should be large differences in damages awards from one jurisdiction to another.

13.14 Perceptions of injustice may also be caused by the fact that personal injury claims are decided according to the law of the State or Territory in which the negligent conduct occurred. Thus, if a person resident in WA is negligently injured while in NSW, the award of damages is likely to be different (and significantly higher) than it would be if the negligence had occurred in WA. Conversely, if a person resident in NSW were injured in WA, the damages recoverable would probably be considerably less than they would be if the negligence had occurred in NSW. The way to overcome this problem is the adoption of nationally uniform (or, at least, consistent) laws for the assessment of damages in personal injury cases. To this end, the Panel has attempted to formulate Recommendations relating to the assessment of damages that may be acceptable in all Australian jurisdictions and in relation to all categories of claims for personal injuries and death.

Legal costs of smaller claims

13.15 It has been said that a key driver of the recent growth of public liability insurance costs is an increase of smaller claims in the range $20,000 to $50,000.[3] Figures in the Trowbridge Report suggest that claims of between $20,000 and $100,000 account for more than a third of the total cost of the personal injury compensation system. We have already noted that the smaller the claim, the greater the proportion of the cost attributable to legal expenses on the one hand, and damages for non-economic loss on the other.

13.16 The Panel's view is that proposals for limiting the number and cost of personal injury claims worth less than $50,000 offer a good prospect of promoting objectives of the Terms of Reference consistently with the principles discussed in paragraphs 13.2-13.7. Such proposals would also be consistent with various existing statutory provisions around the country that are directed to reducing the number and cost of smaller claims.

13.17 Under legislation in Queensland[4], an order that the defendant pay the plaintiff's legal costs may not be made in any case where the damages awarded are less than $30,000. In cases where the damages awarded are between $30,000 and $50,000, the plaintiff may recover from the defendant no more than $2,500 in legal costs. The Victorian Government has announced that legislation to like effect will be passed. The *Civil Liability Act 2002* (NSW) limits legal costs according to a more complex formula. It applies to awards of damages up to $100,000. The Civil Law (Wrongs) Bill 2002 (ACT) adopts a variation of the NSW model.

13.18 In the Panel's view, the Queensland scheme is preferable because it is simple and it deals with the category of cases that the Panel thinks deserve special attention in this context, namely claims for $50,000 or less. We therefore recommend the national adoption of this scheme.

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3 D. Finnis, *Review of Cumpston Sarjeant Report to the Law Council of Australia — Draft III* (27 May 2002), http://www.ica.com.au/hotissues/Finnisreport.asp.

4 *Personal Injuries Proceedings Act 2002* (Qld).

Recommendation 45

The Proposed Act should embody the following principles:

(a) No order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than $30,000.

(b) In any case where the award of damages is between $30,000 and $50,000, the plaintiff may recover from the defendant no more than $2,500 on account of legal costs.

General (or non-economic) damages

A tariff system

13.19 General damages are damages for non-economic loss, including pain, suffering, loss of amenities, and loss of expectation of life. Underlying the award of damages for non-economic loss is the idea that money can provide the plaintiff with some consolation for having been injured.

13.20 Pain and suffering is a matter 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. Loss of expectation of life is awarded for loss of prospective happiness resulting from reduction of an injured person's life expectancy.

13.21 Of all the different heads of damage, general damages, by their nature, are the most difficult to assess. There is no market for pain and suffering, loss of amenities or loss of expectation of life. The statement made by Professor Atiyah in 1970[5] remains as valid as ever:

> There appears to be simply no way of working out any relationship between the value of money — what it will buy — and damages awarded for pain and suffering and disabilities. All such damages awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today.

5 *Accidents, Compensation and the Law*, 1st edn, (1970), 204.

13.22 The fact that there is no obvious way of assessing damages for non-economic loss perhaps partly explains why the levels of damages under this head vary significantly from one jurisdiction to another.

13.23 Variation in the levels of awards of general damages has been exacerbated by the 1968 decision of the High Court in *Planet Fisheries Pty Ltd v La Rosa*.[6] This decision prevents counsel from referring to awards of general damages in earlier cases involving similar injuries in an attempt to establish an appropriate award for the case in hand. Importantly, *Planet Fisheries* has prevented the development of a system of tariffs — that is, conventional amounts (or ranges of amounts) for different types of injury — based on court decisions.

13.24 The absence of such a tariff system makes it more difficult for lawyers to advise their clients about the amount of general damages likely to be awarded. It makes the outcome of cases less predictable and hinders the settlement of claims.

13.25 The position in Australia is to be contrasted with that in England. There, the Judicial Studies Board sponsors a publication known as *Guidelines for the Assessment of General Damages in Personal Injury Cases*. The *Guidelines* contain upper and lower limits of awards of general damages in relation to many types of injuries. According to the *Guidelines*, these indicative amounts broadly reflect current consensus about appropriate awards for different types of injury. They indicate the awards likely to be made, on the basis of past practice, in the ordinary run of case.[7] The *Guidelines* facilitate settlements and promote consistency and certainty in the assessment of general damages in individual cases. By all accounts, the *Guidelines* have been markedly successful.

13.26 The Panel is strongly of the opinion, and recommends, that the decision in *Planet Fisheries* should be reversed. Moreover, the Panel is of the view that the Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the Judicial Studies Board's *Guidelines*. The Panel considers that the Australian version of the *Guidelines* will eventually bring about far greater consistency in general damages awards throughout the country, and will achieve here what the English publication has brought about in that country. At first, the guidelines will more or less reflect current practice, including disparities between awards in the various

6 (1968) 119 CLR 118.

7 Foreword to 4th edn (1998) by Henry LJ, quoting Sir Thomas Bingham.

jurisdictions. But provided it is regularly updated — preferably every year — the establishment of minimum and maximum figures for various injuries should, over time, considerably narrow the gap between minimum and maximum awards for particular injuries.

Recommendation 46

The Proposed Act should embody the following principles:

(a) In assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it.

(b) Counsel may bring to the court's attention awards of general damages in such earlier cases.

(c) The Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the English Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases.*

A threshold for general damages

13.27 According to the Trowbridge Report, 'if a jurisdiction wishes to make a significant difference to the costs of claims through tort reform then reform to general damages will have the greatest impact among the range of reasonable reforms'.[8] The Report shows that general damages account for 45 per cent of the total cost of public liability personal injury claims between $20,000 and $100,000.[9]

13.28 From this the Panel concludes that imposing a threshold[10] for awards of general damages would be an effective and appropriate way of significantly reducing the number and cost of smaller claims.

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8 The Trowbridge Report, 13.

9 The Trowbridge Report, 85.

10 A threshold should be distinguished from a deductible. For instance, imposing a deductible of $10,000 would mean that no compensation would be payable for the first $10,000 of any claim (for general damages). But a threshold of $10,000 would have the effect that no compensation would be payable in respect of any claim (for general damages) worth less than $10,000.

The appropriate threshold

13.29 In considering what threshold to impose on claims for general damages, it is necessary first to examine relevant provisions in existing legislation relating to claims for personal injury and death in the States and Territories. We will confine our discussion to civil liability and motor accident legislation, which deal primarily with claims for negligence. We will not deal with workers compensation legislation because workers compensation is a no-fault system, and for that reason less relevant to this Review.

13.30 Tables 1 and 2, respectively, summarise the effect of relevant statutory provisions in civil liability and motor accident schemes in the various States and Territories.

Table 1: State and Territory civil liability schemes — general damages

Jurisdiction	Cap	Threshold
New South Wales *Civil Liability Act 2002* (NSW)	$350,000*: s 16(2)	15% of a most extreme case: s 16(1)
Victoria Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	$371,380*: s 28G	No threshold
Queensland *Personal Injuries Proceedings Act 2002* (Qld)	No cap	No threshold
Western Australia Civil Liability Bill 2002 (WA)	No cap	General damages at least $12,000*: ss 9(1) and 10(1)
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	$240,000* (weighted scale, 0—60 x $1,710*: ss 24B(2)(a), (b)	7 day impairment: s 24B(1)(a); or $2,750* in medical costs: ss 24, 24B(1)(b)
Australian Capital Territory Civil Law (Wrongs) Bill 2002 (ACT)	No cap	No threshold
Northern Territory Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	$250,000*: s 24(a)	$15,000*: s 25(a)

* Indexed

Table 2: State and Territory motor accident schemes — general damages

Jurisdiction	Cap	Threshold
New South Wales *Motor Accidents (Compensation) Act 1999* (NSW)	$296,000*: s 134	> 10% permanent impairment: s 131
Victoria ** *Transport Accident Act 1986* (Vic)	$360,000*: s 93(7)(b)	> 30% permanent impairment: s 93(3)
Queensland *Motor Accident Insurance Act 1994* (Qld)	No cap	No threshold
Western Australia *Motor Vehicle (Third Party Insurance) Act 1943* (WA)	$232,000*: s 3C	$11,500* (5% of maximum amount), deductible phases to nil to $46,500* (20% of maximum amount): s 3C
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	$240,000* (weighted scale, 0—60 x $1,710*): s 24B(2)(a)	7 day impairment: s 24B(1)(a); or $2,750* in medical costs: ss 24, 24B(1)(b)
Tasmania ** *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas)	No cap	No threshold
Australian Capital Territory *Road Transport (General) Act 1999* (ACT)	No cap	No threshold
Northern Territory *** *Motor Accident (Compensation) Act 1979* (NT)	208 x AWE*: s 17(3) [AWE = full-time adult persons, weekly ordinary time earnings for NT]	5% permanent impairment: s 17(1)(c); reduced awards apply if the degree of impairment is < 15%: s 17(2)

* Indexed
** No-fault scheme
*** No-fault for residents of the Northern Territory only

13.31 As Table 1 shows, there are no thresholds for general damages in the civil liability schemes proposed or in operation in Victoria, Queensland, and the ACT. There is no such scheme proposed in Tasmania.

13.32 In NSW the threshold is 15 per cent of a most extreme case, in WA a monetary amount of $12,000, in the NT a monetary amount of $15,000, and in SA a seven-day period of impairment or $2,750 in medical costs.

13.33 Dealing next with the motor accident schemes (Table 2), it is to be noted that those in Tasmania and the NT[11] are no-fault schemes.

13.34 Under the Victorian scheme a claimant who has suffered more than 10 per cent whole body permanent impairment is eligible to receive *no-fault* benefits for non-economic loss. A claimant, who has suffered at least

11 For Northern Territory residents only.

30 per cent whole body permanent impairment and whose injury is deemed to be a 'serious injury' (defined in the Act), can, alternatively, bring a common law negligence claim, provided the claimant was not at fault in respect of the accident.

13.35 Under the Victorian scheme, impairment is assessed in accordance with the 'American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, 1995' ('the AMA 4 Guides'). The degree of impairment is determined by an independent medical assessor, approved by the Victorian Transport Accident Authority (TAC).

13.36 The New South Wales Motor Accident Authority (MAA) administers a similar (fault-based) scheme for assessing impairment. Under this scheme, the threshold for general damages is 10 per cent whole body permanent impairment. If there is a dispute as to the degree of impairment, the injured person must be assessed by a medical practitioner approved by the MAA. If the person is assessed as less than 10 per cent permanently impaired, the decision may be reviewed by the MAA Medical Assessment Service (MAS) (an internal review mechanism, comprising a panel of three doctors).

13.37 The MAA bases its methodology on the 'Guidelines for the Assessment of Permanent Impairment of a Person Injured as the Result of a Motor Accident' ('the MAA Guidelines'). The MAA Guidelines are issued pursuant to s 44(1)(c) of the *Motor Accidents Compensation Act 1999* (NSW). The MAA Guidelines are based on the AMA 4 Guides, but modified to take account of Australian clinical practice and the purposes of the Act.

13.38 The Panel has been advised that the Victorian and the New South Wales schemes (described in paragraphs 13.32-13.35) are particularly effective, largely because of the independence and expertise of the medical assessor and the objective nature of the criteria used.

13.39 However, the NSW system described in paragraphs 13.34-13.35 has not been adopted in the *Civil Liability Act 2002* (NSW). In that Act, the threshold is 15 per cent of 'a most extreme case' as assessed by the court. The Panel understands that the reason why the former method of assessment was not adopted in the *Civil Liability Act 2002* (NSW) is that it was considered too costly and cumbersome.

13.40 Table 2 shows that the other types of thresholds in force in the States and Territories under the fault-based motor accident schemes include a period

of impairment (SA — seven days), a monetary amount of medical costs (SA — $2,750), and a monetary amount (WA — $11,500).[12]

13.41 There are no thresholds for general damages in the motor accident schemes in Queensland, the ACT and Tasmania.

13.42 The Panel's view is that of all the threshold options, one based on a system of independent assessment of impairment using objective criteria is the best because it is likely to produce the most reliable and consistent results. However, the Panel does not recommend the adoption of such a system. The NSW motor accident scheme is the only fault-based scheme that uses such a system; and (as we have noted) it has not been adopted in the *Civil Liability Act 2002* (NSW). As a result, there seems little prospect of a Recommendation based on such a system achieving the uniform support and implementation that is desirable. The independent medical assessment system, however, is an option that should be considered carefully, if not now then at some appropriate future time.

13.43 The other two options most worth considering are a monetary amount and assessment in terms of a percentage of a most extreme case. In assessing the appropriateness of the former for adoption as a nationally uniform provision, it must be remembered that the level of general damages varies from jurisdiction to jurisdiction, and that awards in NSW and Victoria are far higher than in other States. The Panel's view is that if Recommendation 46 is implemented, differences in the level of general damages between jurisdictions will, in time, be substantially reduced (see paragraph 13.26). Once this happens, a national threshold based on a monetary amount may be feasible and preferable to one based on a percentage assessment in terms of a percentage of a most serious case. But that stage has not yet been reached.

13.44 Therefore, the Panel recommends the adoption of a threshold for general damages in terms of 15 per cent of a most extreme case. Such a threshold provision has been the subject of judicial interpretation in NSW,[13] and the Panel understands that it is now well understood in practice and is regarded as reasonably fair.

13.45 The Panel has been informed that, in practice, cases that are assessed as below the threshold of 15 per cent of a most extreme case are typically cases of soft-tissue injury, which heals relatively rapidly. We understand that such

12 This is a deductible rather than a threshold.

13 *Southgate v Waterford* (1990) 21 NSWLR 427; *Dell v Dalton* (1991) 23 NSWLR 528; *Malah v Keti* (1999) 46 NSWLR 291.

cases tend to be those in which the total compensation claim is the region of $50,000. In this category of cases, general damages represent a very significant proportion of the total amount recovered (as do legal costs), and damages for economic loss a small proportion. Thus the effect of the threshold in practice will probably be to cut out of the compensation system cases where the injuries sustained are relatively minor and where the economic loss, if any, is relatively insignificant. The Panel therefore supports a threshold for general damages of 15 per cent of a most extreme case.

13.46 One drawback of a threshold of this kind — as opposed to one based on assessment by an independent medical practitioner according to objective medical criteria of impairment — is that it depends on subjective assessment on the basis of expert evidence. This brings into focus the Panel's concerns with expert evidence generally as expressed in paragraphs 3.70-3.80. Some who have given evidence before the Panel have warned that thresholds not based on independent assessment according to objective criteria of impairment are subject to a creeping effect. That is to say, regardless of the level of the threshold, sympathy with plaintiffs encourages the assessment of marginal cases as being above rather than below the threshold.

13.47 While the Panel recognises the force of these warnings, it considers that at the present time, a threshold based on 15 per cent of a most extreme case is more likely to be adopted and effectively implemented in all jurisdictions than one based either on a monetary amount or on a system of objective assessment of impairment.

Recommendation 47

The Proposed Act should impose a threshold for general damages based on 15 per cent of a most extreme case.

A cap on general damages

13.48 From the evidence given to the Panel, it seems capping general damages would not have as significant effect on the cost of claims as would the imposition of an appropriate threshold. Nevertheless, for the following three reasons, the Panel considers that it is desirable that general damages be capped on a national basis.

13.49 Firstly, levels of awards of general damages in NSW and Victoria are far higher than in the other States and the Territories. The highest awards in these two States are at least $100,000 more than elsewhere. This appears to be the result of the very litigious culture in these two States. Whatever the reason

for the difference, it is undesirable. A strong argument can be made that levels of compensation for pain and suffering and loss of the amenities of life should be more or less uniform throughout the country. 'Pain is pain whether it is endured in Darwin, Townsville, Burnie or Sydney'.

13.50 Secondly, a cap would have the effect of bringing down the level of general damages in all cases proportionately, thus promoting an objective of the Terms of Reference.

13.51 Thirdly, the Panel will recommend that other heads of damage should be capped. As a result, it is likely that pressure will develop for offsetting increases in the levels of general damages. A cap on general damages will forestall such increases.

The appropriate cap

13.52 The caps under existing motor accident schemes (see Table 2) are disparate indeed: $360,000 in Victoria, $296,000 in NSW, $240,000 in SA, $232,000 in WA, and four years worth of average weekly earnings in the NT. On the other hand, there are no caps in Queensland, the ACT and Tasmania.

13.53 The caps under the civil liability schemes (see Table 1) are also disparate: $371,380 in Victoria, $350,000 in NSW, $250,000 in the NT, and $240,000 in SA. There are no caps elsewhere.

13.54 Lawyers from States other than Victoria and NSW have told the Panel (and the Panel accepts) that a cap at the level of the caps in those two States would have the effect of significantly raising awards for general damages in their States.

13.55 In the light of the variety of caps that exist and the disparity in the levels of awards in the various jurisdictions, it might be thought impractical, at this stage, to recommend a national cap fixing a single monetary amount for all States and Territories. On the other hand, because of the absence of any measurable correlation between money, on the one hand, and pain, suffering, loss of amenities and loss of expectation of life, on the other, a reasonable cap on damages could not be said to be unprincipled.

13.56 In the Panel's view, an appropriate cap would be $250,000. The implementation of such a cap would go a long way to achieving national consistency in awards of general damages, and would have the additional merit of reducing awards most in the two States with the greatest amount of personal injury litigation.

13.57 If this Recommendation proves not to be acceptable, the Panel would merely recommend that each State and Territory have its own cap (which should be consistently applied in all relevant legislation within each particular jurisdiction) and those States and Territories which do not have caps should introduce caps. Should that occur, the Panel suggests that consideration be given at some later time (if Recommendation 46 is implemented) to introducing a nationally uniform cap on general damages.

Recommendation 48

(a) The Proposed Act should provide for a cap on general damages of $250,000.

(b) If such a provision is not enacted, each State and Territory should enact legislation providing for a single cap on general damages that will apply to all claims for personal injury and death.

Damages for loss of earning capacity

13.58 Tables 3 and 4, respectively, summarise the effect of relevant statutory provisions in civil liability and motor accident schemes in the various States and Territories.

13.59 The SA civil liability scheme provides, in effect, for a deductible from damages for loss of earning capacity of earnings lost in the first week of incapacity for work.[14] No other civil liability scheme provides for such a deductible, and none provides legislation for a threshold in respect of damages for loss of earning capacity.

13.60 As appears from Table 3, NSW, Victoria, Queensland, WA, the ACT and the NT have legislated in their civil liability schemes, or proposed a cap on claims for loss of earning capacity of three times average weekly earnings. SA has an overall cap of $2,200,000 on the global award for loss of earning capacity.

14 *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s 24D.

Table 3: State and Territory civil liability schemes — loss of earnings

Jurisdiction	Cap	Threshold
New South Wales *Civil Liability Act 2002 (NSW)*	3 x AWE*: ss 12(2), (3) [AWE of all employees in NSW]	No threshold
Victoria Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	3 x AWE*: s 28F(2) [AWE of all employees in Victoria]	No threshold
Queensland *Personal Injuries Proceedings Act 2002* (Qld)	3 x AWE*: ss 51(1), (2) [AWE = Qld full-time adult persons ordinary time]	No threshold
Western Australia Civil Liability Bill 2002 (WA)	3 x AWE*: s 11(1) [AWE for full-time adult employees in WA]	No threshold
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	$2,200,000*: ss 24, 24D	No damages for first week of work lost through incapacity: s 24D(1)
Australian Capital Territory Civil Law (Wrongs) Bill 2002 (ACT)	3 x AWE*: ss 38(1), (2) [AWE = all male total earnings in ACT]	No threshold
Northern Territory Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	3 x AWE*: s 20(1) [AWE = full time adult persons, weekly ordinary time earnings for the NT]	No threshold

* Indexed

Table 4: State and Territory motor accident schemes — loss of earnings

Jurisdiction	Cap	Threshold
New South Wales *Motor Accidents (Compensation) Act 1999* (NSW)	$2,712pw*: s 125	No damages for first 5 days of incapacity: s 124
Victoria ** *Transport Accident Act 1986* (Vic)	80% of pre-accident earnings up to $781* pw: s 44	No damages for first 5 days of incapacity: s 43
Queensland *Motor Accident Insurance Act 1994* (Qld)	3 x AWE*: s 55A [AWE = Qld full-time adult persons ordinary time]	No threshold
Western Australia *Motor Vehicle (Third Party Insurance) Act 1943* (WA)	No cap	No threshold
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	$2 200 000*: ss 24, 24D	No damages for first week of work lost through incapacity: s 24D(1)
Tasmania ** *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas)	4.25 x AWE*: s 22(5) [AWE = full-time adult ordinary time earnings for Australia]	No threshold
Australian Capital Territory *Road Transport (General) Act 1999* (ACT)	No cap	No threshold
Northern Territory *** *Motor Accident (Compensation) Act 1979* (NT)	85% x AWE*: s 13(2) [AWE = full-time adult persons, weekly ordinary time earnings for NT]	No damages for the day of the accident: s 13

* Indexed
** No-fault scheme
*** No-fault for residents of the NT only

13.61 As appears from Table 4, the NSW and Victorian motor accident legislation provides for a threshold of the first five days' lost earnings. In SA and Tasmania the threshold is the first seven days' lost earnings. In the NT the threshold is earnings lost on the day of the accident. In Queensland, WA, Tasmania and the ACT there is no threshold.

13.62 As also appears from Table 4, there is no uniformity between the States and Territories as to the caps imposed on damages for loss of earning capacity under the motor accident legislation, although several jurisdictions (Queensland, SA, WA and the ACT) adopt the same threshold in both the civil liability statute and motor accident statute.

13.63 In the view of the Panel, it is neither necessary nor desirable to impose a threshold on damages for loss of earning capacity, and we propose not to make any Recommendation in this respect. We have detected little or no pressure for thresholds on this head of damages. In our view, thresholds on general damages and on damages for gratuitous services (see paragraphs 13.48-13.57 and 13.72-13.87 respectively) and related heads of damage will be a sufficient filter against smaller claims.

13.64 On the other hand, we consider it important to impose a cap on damages for loss of earning capacity. Such a cap provides high earners with a desirable incentive to insure against loss of the capacity to earn more than the amount of the cap. The views of the Panel are best explained against the background of Table 5, which is set out below.

Table 5: Loss of earnings

Description	Current ($) value per year*	Percentage of employees earning above ($) value**
3 times average weekly full-time adult ordinary time earnings (FTOTE) in Australia	135,486	1.4%
2 times average weekly FTOTE in Australia	90,324	2.4%
1.5 times average weekly FTOTE in Australia	67,743	6.4%
Average weekly FTOTE in Australia	45,162	29.1%
Federal minimum wage	22,433	72.7%
Disability support pension (single over 21)	10,966	87.7%

* ABS figures for May 2002, publication no. 6302.0.
** ABS figures for May 2000, publication no. 6306.0.

13.65 Table 5 shows that, currently, three times average annual full-time adult ordinary time earnings (FTOTE) in Australia is $135,486 and only 1.4 per cent of employees earn more than this amount. Twice FTOTE is $90,324 and only 2.4 per cent of employees earn more than this amount.

13.66 A cap of twice FTOTE would not affect a significant proportion of employees (only 2.4 per cent). In our view, persons who earn more than twice average weekly earnings can reasonably be expected to protect themselves against the effects of the proposed cap by insuring against loss of income above that amount.

13.67 It is salutary, in this regard, to note that the annual value of the disability support pension payable to a person who is totally incapacitated for work is $10,966. It is also worth noting that the annual value of unemployment benefits is $9,620. It seems to us difficult to accept that a very high earner who is totally incapacitated in circumstances that give rise to a successful negligence claim should receive fully earnings-related income replacement, while a totally incapacitated person who is not able to make a successful negligence claim may have to manage on modest means-tested income support benefits from the social security system.

Recommendation 49

The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).

Cost of care

13.68 The Australian Health Ministers Advisory Council (AHMAC) Legal Process Reform Group has recommended that provision of long-term treatment, rehabilitation and care to those seriously injured by negligence be removed from the common law compensation system and dealt with by some other mechanism. At the moment, it is unclear whether access to such provision would continue to be dependent on proof of negligence. Such a scheme is beyond our Terms of Reference, and we make no comment on it.

13.69 Under the full compensation principle of personal injury law, the injured person is entitled to recover the full cost of medical treatment, nursing care, medication (and so on) reasonably incurred in the past and likely to be incurred in the future — that is, full compensation for the cost of reasonable care, which may not be the most expensive available. The question that typically arises in this context is the appropriate benchmark against which to

assess reasonableness. Defendants usually contend that the benchmark should be use of public hospital facilities and Medicare scheduled fees (where applicable). Plaintiffs usually contend that the benchmark should be treatment in private hospitals and by practitioners who charge more than the scheduled fees.

13.70 In the view of the Panel, having regard again to the principles outlined at the beginning of this Chapter, damages for health care costs should be calculated by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable). It seems to us reasonable (and consistent with objectives underlying the Terms of Reference) to expect those who wish to use private hospital facilities, or to be treated by practitioners who charge more than Medicare scheduled fees, either to insure against the cost or to bear it themselves.

13.71 The term 'benchmark' is intended to indicate that use of public hospital facilities, and Medicare scheduled fees, are to be used only as guides to what, in a particular case, might be reasonable. Much will depend on the availability to a particular plaintiff of particular services at the benchmark. For example, if a plaintiff needs a certain medical procedure that can only be provided by a small number of medical practitioners, all of whom charge significantly more than the Medicare scheduled fee for the procedure, it would not be reasonable to apply the benchmark fee. The reason for the availability of only a small number of practitioners may be that the plaintiff resides in a country town, or it may be that the procedure is so unusual and specialised that few are qualified to undertake it. Each case will depend on its own circumstances.

Recommendation 50

The Proposed Act should embody the following principle:

For the purposes of assessing damages for health care costs, the issue of reasonableness should be determined by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable).

Gratuitous care

13.72 It is not uncommon for an injured person's need for care and assistance as a result of the injuries to be met by relatives and friends without payment or

the expectation of payment from the injured person. In *Griffiths v Kerkemeyer*[15] in 1977 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 quantum of damages under this head is the value of the services required to meet the need, and this is measured by the market value of the services. In England, damages under this head are held by the injured person 'on trust' for the carer(s). But in Australia, this has been said to be inappropriate because such damages represent the plaintiff's need for care rather than the cost to the carer of providing them.[16] Nevertheless, damages under this head recognise that negligence can generate non-financial as well as financial costs, and that such costs should be borne by those who generate them.

13.73 Damages for gratuitous services often represent a large portion of the total award. According to the Trowbridge Report,[17] damages under this head represent, on average, about 25 per cent of the total award in claims for more than $500,000.

13.74 The rule in *Griffiths v Kerkemeyer* is often criticised on the basis that it allows plaintiffs to be compensated when they have suffered, and will suffer, no actual financial loss because the relevant care is provided free-of-charge. In principle, this criticism misses the mark because compensation under this head is for loss of the capacity to care for oneself and the consequent need to be cared for by others.[18] This loss of capacity and consequent need exists regardless of whether the person who meets the need does so gratuitously. On the other hand, it is important to acknowledge that a plaintiff may recover very substantial damages under this head even though the services they relate to may never be paid for, and even if none of the damages awarded will ever be paid over to the carer.

13.75 Another criticism of the *Griffiths v Kerkemeyer* rule is 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, and often dependent not only on the level of injury but on the

15 (1977) 139 CLR 161.

16 *Kars v Kars* (1996) 187 CLR 354.

17 The Trowbridge Report, 85.

18 In *Griffiths v Kerkemeyer* (1977) 139 CLR 161 Mason J said that the relevant loss was the plaintiff's 'incapacity to look after himself as demonstrated by the need for nursing services' (192) and that the 'true loss' was 'the loss of capacity which occasions the need for the service' (193). Later High Court cases (*Van Gervan v Fenton* (1992) 175 CLR 327; *Kars v Kars* (1996) 187 CLR 354; *Grincelis v House* (2000) 201 CLR 321) have reaffirmed that the 'true basis' of the claim is the need by the plaintiff for those services.

plaintiff's age, general state of health, personality and state of mind. Typically, they will be proved not only by medical evidence, but also by the plaintiff's own testimony and that of the carer. It is often difficult for a medical practitioner to gainsay the evidence of the plaintiff as to subjective needs, particularly when the plaintiff's case is supported by testimony of the carer about the care that has in fact been provided in the past. In many cases, too, little evidence is available to refute assertions of the plaintiff and the carer. Thus, while judges may be suspicious of the validity of such claims, and may suspect that the gratuitous care that will in fact be provided in the future will be less than the need asserted, they are often required by the state of the evidence to make awards based on little more than the say-so of the plaintiff and the carer.

13.76 Notwithstanding these criticisms, there is only one statutory provision in Australia that abolishes *Griffiths v Kerkemeyer* damages,[19] and few submissions received by the Panel supported their abolition. This suggests that there is a reasonable level of acceptance within the community that some compensation should be payable for gratuitous services.

13.77 In any event, it might be counter-productive to abolish claims for gratuitous services, thus giving plaintiffs a strong incentive to retain professional carers to provide the services, and perhaps leading to an increase in total damages awards. The Panel, therefore, does not recommend that claims for loss of gratuitous services should be abolished.

19 *Common Law (Miscellaneous Actions) Act 1986* (Tas) abolishes damages for gratuitous services in motor vehicle cases.

Table 6: State and Territory civil liability schemes — gratuitous care

Jurisdiction	Cap	Threshold
New South Wales *Civil Liability Act 2002* (NSW)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 15(4), (5) [AWE of all employees in NSW]	At least 6h pw for 6 months: s 15(3)
Victoria Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	No cap	No threshold
Queensland *Personal Injuries Proceedings Act 2002* (Qld)	No cap	At least 6h pw for 6 months: s 54(2)
Western Australia Civil Liability Bill 2002 (WA)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: s 12(7) [AWE for full-time adult employees in WA]	$5,000* deductible: ss 12(3), (13)
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	4 x AWE*: s 24H [AWE of the State of SA]	No threshold
Australian Capital Territory Civil Law (Wrongs) Bill 2002 (ACT)	No cap	No threshold
Northern Territory Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 23(3), (4) [AWE for all employees in the NT]	At least 6h pw for 6 months: s 23(2)

* Indexed

Table 7: State and Territory motor accident schemes — gratuitous care

Jurisdiction	Cap	Threshold
New South Wales *Motor Accidents (Compensation) Act 1999* (NSW)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 128(4), (5) [AWE of all employees in NSW]	At least 6h pw for 6 months: s 128(3)
Victoria ** *Transport Accident Act 1986* (Vic)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: ss 174(1)(b), (d) [AWE of all employees in Victoria]	No threshold
Queensland *Motor Accident Insurance Act 1994* (Qld)	No cap	No threshold
Western Australia *Motor Vehicle (Third Party Insurance) Act 1943* (WA)	> 40h pw, 1 x AWE*; < 40h pw, hourly rate = 1/40 x AWE*: s 3D [AWE for full-time adult employees in WA]	$5,000* deductible: s 3D(7)
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	4 x AWE*: s 24H [AWE of the State of SA]	No threshold
Tasmania ** *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas)	No cap ****	No threshold ****
Australian Capital Territory *Road Transport (General) Act 1999* (ACT)	No cap	No threshold
Northern Territory *** *Motor Accident (Compensation) Act 1979* (NT)	Hourly rate 2% x AWE* not exceeding 28h pw: s 8A [AWE = full-time adult persons, weekly ordinary time earnings for NT]	Period of impairment likely to endure > 2 years: s 18A

* Indexed
** No-fault scheme
*** No-fault for residents of the Northern Territory only
**** Damages for gratuitous care abolished: *Common Law (Miscellaneous Actions) Act 1986* (Tas)

13.78 It is apparent, however, that many legislatures in the States and Territories consider that awards for gratuitous services have gone too far. This can be seen from the legislative provisions the effect of which is summarised in Tables 6 (dealing with State and Territory civil liability schemes) and 7 (dealing with State and Territory motor accident schemes).

13.79 As appears from Table 6, under the NSW and Queensland civil liability legislation there is a threshold for damages for gratuitous services based on the requirement that the services be provided for six hours per week for six months. The NT proposes a similar scheme. WA provides for a deductible of $5,000. No other State or Territory has a threshold under its civil liability legislation.

13.80 As also appears from Table 6, under the NSW civil liability legislation there is a cap on damages for gratuitous services of average weekly earnings. WA and the NT propose a similar cap. SA has a cap based on four times average weekly earnings.

13.81 Table 6 also shows that, under the NSW civil liability legislation, and proposed legislation in WA and the NT, damages under this head are to be calculated by reference to average weekly earnings on the basis of a 40 hour week.

13.82 As appears from Table 7, under the NSW motor accident legislation there is a threshold based on the requirement that the services be provided for six hours per week for six months. WA has a deductible of $5,000 and the NT has, as a threshold, the requirement that the plaintiff has a period of impairment likely to endure for a period of more than two years.

13.83 As also appears from Table 7, under the motor accident legislation in NSW, Victoria and WA there are caps based on average weekly earnings; and damages are to be calculated by reference to average weekly earnings on the basis of a 40 hour week. SA has a cap based on four times average weekly earnings. The NT has a cap based on 2 per cent of average weekly earnings.

13.84 In the Panel's view, the recent legislative developments in the area are illustrative of community dissatisfaction with aspects of the *Griffiths v Kerkemeyer* rule and its operation, based on the belief that damages for gratuitous services are sometimes excessive, particularly having regard to the fact that the plaintiff suffers no actual financial loss.

13.85 The Panel considers that there should be national uniform legislation that sets an appropriate threshold and cap for damages for gratuitous services. We recommend that the threshold presently in place under the civil liability and motor accident legislation in NSW should be adopted nationally.

13.86 We also recommend that the cap and the hourly rate presently in place under the civil liability legislation in NSW (proposed in WA and the NT), and under the motor accident legislation in NSW, Victoria and WA should be adopted nationally.

13.87 There is one other aspect of this head of damages that deserves some discussion. It seems reasonable that damages for gratuitous care should only be awarded in respect of services that have become necessary as a result of the injury. Damages should not be awarded in respect of services that were not being provided to the plaintiff before the injury was suffered (whether because

the plaintiff was caring for himself or herself, or for any other reason). On the other hand, since compensation under this head is for loss of the capacity to care for oneself it might, in principle, be thought irrelevant whether or not the plaintiff would have exercised it but for the injury. As far as we are aware, this issue has never been expressly addressed by Australian courts.[20] We therefore recommend the enactment of a provision to the effect that damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.

Recommendation 51

The Proposed Act should embody the following principles:

(a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months.

(b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.

(c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.

(d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.

Damages for loss of capacity to care for others

13.88 An injured person who has lost the capacity to care for others is entitled to compensation for that loss even in relation to care provided gratuitously.[21] In *Sullivan v Gordon*,[22] Beazley JA in the New South Wales Court of Appeal said that this head of damages is related to damages for gratuitous care awarded under the principle in *Griffiths v Kerkemeyer*.[23] This means that the loss being compensated for is loss of *capacity* rather than financial loss as such. As in the

20 It is addressed in the *Personal Injuries Proceedings Act 2002* (Qld), s 54(3).

21 *Sullivan v Gordon* (1999) 47 NSWLR 319; *Sturch v Wilmott* [1997] 2 Qd R 310; but see *Kite v Malycha* (1998) 71 SASR 321.

22 (1999) 47 NSWLR 319.

23 (1977) 139 CLR 161.

case of *Griffiths v Kerkemeyer* damages, damages under this head are measured by the value of the services.

13.89 It would also seem to follow that damages could be awarded under this head even if the plaintiff had not been performing services prior to being injured, provided it could be shown that the plaintiff would, in the future, have provided services had the injuries not been suffered. If this is correct, the Panel perceives a real danger that this head of damages may give rise to highly speculative claims that are extremely difficult to assess or challenge. The risk of speculative claims is increased if damages under this head can be awarded in respect of services that would, if the injuries had not been suffered, have been performed for *anyone*.

13.90 A way of addressing the first of these issues would be to provide that damages for loss of capacity to perform gratuitous services would be available only if it could be shown that the plaintiff was actually providing gratuitous services before he or she was injured. A way of addressing the second issue would be to limit the class of actual or potential beneficiaries of the services. Queensland has enacted legislation that limits such claims to services provided for members of the plaintiff's household.[24] Another possibility would be to limit such claims to services performed for members of the class of persons who could bring a claim for loss of support (under 'fatal accident' or 'compensation to relatives' legislation) if the plaintiff had been killed. This latter possibility is attractive because it utilises a long-standing and well-tried mechanism. The Panel recommends this approach.

13.91 We also recommend that damages under this head (unlike damages for loss of support) should be available only in respect of services that the plaintiff was actually providing before he or she was injured. Furthermore, because this head of damages is closely related to that for gratuitous services, the Panel recommends that it should be subject to similar limitations as we have recommended in relation to claims for such damages.

Recommendation 52

The Proposed Act should embody the following principles:

(a) Damages for loss of capacity to provide gratuitous services for others shall not be recoverable unless, prior to the loss of capacity, such

24 *Personal Injuries Proceedings Act 2002* (Qld), s 54(4); see also Civil Law (Wrongs) Bill 2002 (ACT), cl 39(1).

services were being provided for more than six hours per week and had been provided for more than six consecutive months.

(b) Such damages are recoverable only in relation to services that were being provided to a person who (if the provider had been killed rather than injured) would have been entitled to recover damages for loss of the deceased's services.

(c) The maximum hourly rate for calculating damages for loss of capacity to provide gratuitous services for others shall be one fortieth of average weekly FTOTE.

(d) The maximum weekly rate for calculating damages for loss of capacity to provide gratuitous services shall be average weekly FTOTE.

Property modifications

13.92 Where, as a result of injuries suffered, a plaintiff is, for instance, confined to a wheelchair, the plaintiff's home or motor vehicle may need to be altered to accommodate the plaintiff's post-injury lifestyle. The plaintiff can normally recover the difference between the actual cost of the conversion and the increased capital value of the property attributable to the improvements.

13.93 No submissions identified this area of the law to be problematic. Therefore, the Panel does not make any recommendation in regard thereto.

Expenses of visits by relatives

13.94 Occasionally, seriously injured persons being treated in hospital have a need for visits by their family. There is authority that they are entitled to compensation for that need. The compensation is measured by the reasonable costs incurred by the family members in visiting the plaintiff.

13.95 No submissions were made to the Panel suggesting that any reform was required to this head of damages and the Panel, accordingly, makes no Recommendation in respect thereof.

Discount rates

13.96 When a court awards a lump sum for future economic loss or future expenses that will be suffered or incurred periodically, it assumes that the plaintiff will invest the lump sum and receive a stream of income from the investment. As a result, to ensure that the plaintiff does not receive too much, the sum of the expected total future losses and expenses needs to be reduced by using a 'discount rate' in order to calculate its present value. That is, the court arrives at a figure for future economic loss that takes into account the capacity of the plaintiff to invest the lump sum and generate income thereby. The discount rate is a technical mechanism used to arrive at the present value of compensation for future losses and expenses.

13.97 Three significant factors need to be taken into account in determining the appropriate discount rate: likely future tax rates, the expected rate of return on investment of the lump sum and likely real growth in wages. Tax rates are relevant because although the lump sum itself is not taxable, income earned on investment of the lump sum usually will be (although the Commonwealth Government's proposed structured settlements legislation should make such payments tax-free in certain circumstances).

13.98 In 1981 the High Court set the discount rate for personal injury and death claims at 3 per cent ('the default rate').[25] The default rate still applies today (in the absence of any statutory provision to the contrary) despite various changes in inflation, wages and taxation rates over the last 30 years. In a number of jurisdictions discount rates higher than the default rate are established by statute. These are set out in Table 8 below.

25 *Todorovic v Waller* (1981) 150 CLR 402.

Table 8: Discount rates

Jurisdiction	Name of Instrument	Discount Rate
NSW	*Civil Liability Act 2002* (NSW) *Motor Accidents (Compensation) Act 1999* (NSW)	5%: s 14(2)(b) 5%: s 127
Victoria	Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic) *Transport Accident Act 1986* (Vic)	5%*: s 28I(2) 6%: s 93(13)
Queensland	*Personal Injuries Proceedings Act 2002* (Qld) *Motor Accident Insurance Act 1994* (Qld)	5%: s 52(2) 5%: s 55B
WA	*Law Reform (Miscellaneous Provisions) Act 1941* (WA)	6%: s 5
SA	*Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	5%: s 24
Tasmania	*Common Law (Miscellaneous Actions) Act 1986* (Tas)	7%: s 4
ACT	Default rate	3%
NT	Personal Injuries (Liabilities and Damages) Bill 2002 (NT) *Motor Accident (Compensation) Act 1979* (NT)	5%*: s 22(2)(b) 6%: s 5(2)(b)

* The current rate is the default rate, set at 3 per cent.

13.99 In terms of the levels of damages awards, the important point is that the higher the discount rate the smaller the lump sum awarded for future economic losses and expenses. In addition, the higher the discount rate the greater the impact on awards for people who are incapacitated at a younger age. This can be illustrated by some examples.

13.100 Assume that a 25 year old is totally and permanently incapacitated for work. This means that damages for future loss of earning capacity will be calculated to cover a 40-year period. The effect of increasing the discount rate from 3 per cent to 5 per cent would be to reduce the lump sum to 75 per cent of its 3 per cent level. Thus, an increase of 2 percentage points in the discount rate would lead to a reduction of 25 per cent in the award.

13.101 Assume that a 45 year old is totally and permanently incapacitated for work. This means that damages for future loss of earning capacity will be calculated to cover a 20-year period. The effect of increasing the discount rate from 3 per cent to 5 per cent would be a reduction in the award for future loss of earning capacity to 85 per cent of the 3 per cent figure. An increase of 2 percentage points in the discount rate leads to a reduction of 15 per cent in the award.

13.102 Table 9 gives further examples of the difference an increase in the discount rate from 3 per cent to 5 per cent would produce.

13.103 Table 9 shows that a 35 year old earning $100,000 per annum would receive $269,113 less in damages for future loss of earning capacity were the

discount rate to be increased from 3 per cent to 5 per cent; and a 45 year old would receive $151,386 less. A 35 year old earning an annual income of three times average weekly earnings would receive $347,777 less, and a 45 year old would receive $195,638 less.

Table 9: Loss of future earnings

Loss of Future Earnings — to age 65	Discount Rate	Age			
		20	35	45	55
Average Weekly Earnings Less Tax (about $35,000)					
	3%	$870,932	$696,230	$528,465	$303,002
	5%	$637,455	$551,323	$446,949	$276,935
Difference		**$233,477**	**$144,907**	**$81,516**	**$26,067**
Income $100,000 Less Tax (about $65,000)					
	3%	$1,617,445	$1,292,998	$981,434	$562,719
	5%	$1,183,845	$1,023,885	$830,048	$514,308
Difference		**$433,600**	**$269,113**	**$151,386**	**$48,411**
3 times Average Weekly Earnings Less Tax (about $84,000)					
	3%	$2,090,237	$1,670,951	$1,268,315	$727,206
	5%	$1,529,892	$1,323,174	$1,072,677	$664,611
Difference		**$560,345**	**$347,777**	**$195,638**	**$62,595**

13.104 It is obvious, therefore, that an increase in the discount rate would have a marked effect on the compensation payable. Indeed, increasing the discount rate would be the easiest and most effective way of reducing damages in cases of continuing loss and permanent impairment.

13.105 But, in the Panel's opinion, using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured. It would be inconsistent with the principles that have guided our thinking in this area to reduce the compensation recoverable by the most seriously injured by increasing the discount rate, simply because damages awards in serious cases could thereby be significantly reduced. In this context, it should be noted that although an increase in the discount rate can yield large reductions in awards in serious cases, such cases represent only a relatively small proportion of the total compensation bill.

13.106 The remaining question, therefore, is what an appropriate discount rate would be. We have seen that in 1981 the High Court, taking all the relevant factors into account, settled on a rate of 3 per cent. Table 8 shows that legislatures in recent years have chosen 5 per cent instead. However, the Panel has been informed by the Australian Government Actuary that, in his view, at present, a realistic after-tax discount rate might be in the order of 2 to 4 per cent. (Of course, as he pointed out, the discount rate is only one of many factors that need to be taken into account in an individual case when determining the present value of the particular plaintiff's economic loss.) This suggests to the Panel that 3 per cent remains a reasonable rate, and does not appear to be any good reason to go above 4 per cent. We therefore recommend a nationally uniform discount rate of 3 per cent.

13.107 Many people have emphasised to us the importance of stability and uniformity in the discount rate. This is desirable for both plaintiffs and defendants. Insurers are much more concerned that the discount rate should be stable over time than that it should be set at any particular level. In fact, recent history suggests that there is unlikely to be a strong economic case for anything more than small changes in the discount rate over the longer term. On this basis, it might be suggested that the costs of change are likely to outweigh the advantages.

13.108 However, if the discount rate is changed, this should be done only with reasonable notice so that insurers are able to adjust premiums appropriately. It has been suggested to the Panel that an appropriate notice period would be six months.

13.109 Given the complexity and technical nature of the task of setting an appropriate discount rate, the Panel's opinion is that it should be given to an appropriate regulatory body.

Recommendation 53

The Proposed Act should embody the following principles:

(a) The discount rate used in calculating damages awards for future economic loss in cases of personal injury and death is 3 per cent.

(b) An appropriate regulatory body should have the power to change the discount rate, by regulation, on six months notice.

Interest

13.110 The only submissions that the Panel received proposing reforms of the law relating to interest on damages for personal injury and death was that pre-judgment interest should not be awarded on damages for non-economic loss. The principle underlying awards of pre-judgment interest is that the plaintiff's entitlement to be compensated arises at the date the cause of action is complete (that is, the date on which compensable damage first occurs). If the plaintiff does not actually receive the compensation until some time later, she has been 'kept out of' money to which she is entitled, and so should be awarded interest to compensate her for not having had the use of the money.

13.111 Pre-judgment interest is normally awarded at a 'market' rate that includes a margin for expected future inflation. However, damages for pre-judgment non-economic loss (unlike damages for pre-judgment economic loss) are calculated according to the value of money at the date of judgment. This means that the amount awarded for pre-judgment non-economic loss automatically makes allowance for inflation in the pre-judgment period. For this reason, it is argued, the rate of interest on damages for pre-judgment non-economic loss should be the 'real' rate net of inflation, not the 'market' rate that includes allowance for inflation.

13.112 In those jurisdictions where pre-judgment interest is awarded on damages for non-economic loss, the current practice, generally, is to award interest based on a rate of 4 per cent per annum. Where the loss accrues evenly between the date of the injury and date of judgment, the rate is halved. But when the bulk of the non-economic loss is incurred at the beginning of the period, it is not.[26]

13.113 WA has abolished pre-judgment interest on non-economic loss.[27] The *Civil Liability Act 2002 (NSW)* has abolished pre-judgment interest on damages for non-economic loss in certain cases (s 18(1)). There is legislation in NSW and Victoria abolishing pre-judgment interest on damages for non-economic loss in motor accident and industrial accident cases.[28] The *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA)* (s 24F) abolishes pre-judgment interest on damages for non-economic loss.

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26 H. Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, (2002), para 11.3.15

27 *Supreme Court Act 1935 (WA)*, s 32(2).

28 *Motor Accidents Compensation Act 1999 (NSW)*, s 137(3); *Workers Compensation Act 1987*, s *151M(3); Transport Accident Act 1986 Vic*, s 93(15); *Accident Compensation Act 1985 (Vic)*, s 134AB(34).

13.114 In the Panel's view, there is force in the submission that the award of pre-judgment interest on damages for non-economic loss is inappropriate. Damages for pre-judgment non-economic loss do not represent income forgone or expenses incurred. Such awards have been abolished in several jurisdictions. In the interests of uniformity, we consider that they should be abolished everywhere.

Recommendation 54

The Proposed Act should provide that pre-judgment interest may not be awarded on damages for non-economic loss.

Damages recoverable by dependants of persons killed as a result of wrongful acts or omissions

13.115 The law governing the assessment of damages in claims by dependants of persons killed as a result of negligent acts or omissions (often called 'fatal accident claims' or 'compensation to relatives claims') is complex, and varies considerably between jurisdictions.

13.116 Nevertheless, no submissions have been made to the Panel to the effect that this is an area in which there are particular problems that need to be resolved by limiting the damages recoverable in such cases. The Panel, itself, has not identified any such problems.

13.117 In regard to collateral benefits, the Panel makes Recommendations that bear specifically upon dependants' claims.

13.118 While it is desirable that the law relating to dependants' claims should be uniform throughout the country, the task of making recommendations in this respect would be time-consuming. The Panel does not regard the task of rationalising this area of the law to be an urgent one. In view of the time constraints on the Panel, we do not consider it appropriate to embark upon it. Accordingly, we make no recommendations for reform on this topic.

13.119 However, the recommendations that the Panel has made in regard to damages generally should be adapted and applied to dependants' claims. The principles contained in Recommendation 55 embody such adaptations.

Recommendation 55

The Proposed Act should embody the following principles:

(a) In calculating damages for loss of financial support any amount by which the deceased's earnings exceeded twice average FTOTE shall be ignored.

(b) A dependant may not recover damages for the loss of gratuitous services the deceased would have provided unless such services would have been provided for more than six hours per week and for more than six consecutive months.

(c) The maximum hourly rate for calculating damages for loss of gratuitous services the deceased would have provided is one fortieth of average weekly FTOTE.

(d) The maximum weekly rate for calculating damages for loss of gratuitous services the deceased would have provided is average weekly FTOTE.

(e) A dependant shall be entitled to damages for loss only of those gratuitous services that the deceased would have provided to the dependant but for his or her death.

13.120 In all jurisdictions except Victoria and the ACT, contributory negligence on the part of the deceased has the effect of reducing the damages payable to the dependants in the same proportion as it would reduce the damages paid to the estate of the deceased suing on the deceased's cause of action after his or her death. Such a provision should be introduced nationally.

Recommendation 56

The Proposed Act should provide that in a claim by dependants for damages in respect of the death of another as a result of negligence on the part of the defendant, any damages payable to the dependants shall be reduced on account of contributory negligence on the part of the deceased by the same proportion as damages payable in an action by the estate of the deceased person would be reduced.

Structured settlements

13.121 A 'structured settlement' is a settlement agreement between a plaintiff and a defendant pursuant to which the defendant is required to pay at least part of the agreed damages periodically rather than in a single lump sum. Unlike periodical payments (such as are provided under the social security system), which are assessed from time to time, a structured settlement is based on the lump sum to which the plaintiff is entitled according to the ordinary rules for assessment of damages. Some or all of that lump sum is used to buy an annuity which generates income out of which payments are made to the plaintiff from time to time according to an agreed schedule.

13.122 In general, Australian courts may only award damages for personal injury or death in the form of a single ('once-and-for-all') lump sum. They have no power to order a defendant to pay damages periodically or to require the parties to enter into a structured settlement. In some States there has been limited legislative departure from this rule, but courts have made little or no use of the powers so conferred.[29]

13.123 The Panel received submissions concerning structured settlements from persons representing the interests of both plaintiffs and defendants. None supported a system under which a court could require the parties to enter into a structured settlement against their wishes. In the circumstances, the Panel makes no recommendation in this regard, although it does believe that careful consideration should be given to the implementation of such a system at some future time.

13.124 The Panel believes, however, that structured settlements have significant advantages over lump sum compensation, at least in serious cases. Structured settlements are in the interests of plaintiffs because the plaintiff is relieved of the need to manage their compensation. Various studies have shown that where the lump sum award covers a long period, the amount awarded often runs out before the end of that period, even if it is well and wisely invested. A structured settlement provides the plaintiff with a more secure source of income in the longer term. This is good for society generally, as well as for injured persons. It is therefore in the public interest that in cases where large sums of damages are awarded for personal injury or death, the parties have both the opportunity and incentive to conclude a structured settlement.

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29 H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn (2002), para 1.2.24.

13.125 For this reason, the Panel believes (along with many who made submissions to us) that structured settlements should be encouraged, and that incentives should be provided to overcome the apparent reluctance of both plaintiffs and defendants to enter into structured settlements.

13.126 The Panel welcomes the announcement made in September 2001 by the Federal Government to the effect that it would introduce amendments to tax legislation designed to encourage the use of structured settlements in cases of personal injury and death. Apart from tax arrangements, the other major requirement for a successful structured settlement system is adequate capacity in the insurance market to provide the annuity arrangements on which structured settlements are built. The Panel has been told that there may be problems in this area, and we suggest further investigation of this matter.

13.127 However, the Panel thinks that more could and should be done to encourage the use of structured settlements in serious personal injury cases. We recommend that there be included in rules of court in each jurisdiction a provision to the following effect:

> Before judgment is entered in any action for damages for negligently-caused personal injury or death where:
>
> (a) in a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits), loss of gratuitous services and future health-care expenses that in aggregate exceed $2 million; or
>
> (b) in a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed $2 million,
>
> the parties should be required to attend mediation proceedings with a view to securing a structured settlement.

Recommendation 57

Rules of court in every jurisdiction should contain a provision to the following effect:

Before judgment is entered in any action for damages for negligently-caused personal injury or death where:

(a) In a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits, loss

of gratuitous services and future health-care expenses) that in aggregate exceed $2 million; or

(b) In a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed $2 million,

the parties must attend mediation proceedings with a view to securing a structured settlement.

Loss of superannuation benefits

13.128 Most employees receive benefits in the form of contributions by their employers to superannuation funds. These contributions may cease if the employee is unable to work as a result of injury (or death). Therefore, compensation may be awarded for loss of future employer contributions in addition to damages for loss of future earning capacity (or for loss of support by a dependant). The compensation to be awarded is the present-day value of the loss attributable to the fact that contributions, that would have been made to the fund if the worker had not been injured or killed, were not made. There is, however, uncertainty as to the method that should be used in calculating the plaintiff's loss in such circumstances.

13.129 According to one method (the *Cremona*[30] method) the relevant loss is not just the amount of the lost contributions, but also the forgone income and capital growth that they would have generated while in the superannuation fund. The appropriate compensation is the present (discounted) value of the aggregate of the contributions, the income and the capital growth.

13.130 According to another method (the *Jongen*[31] method), the relevant loss is the present (discounted) value of the lost contributions alone without reference to forgone income or capital growth.

13.131 The *Cremona* method has been criticised on the ground that the plaintiff is effectively compensated twice over — once by being awarded damages representing not only the value of the lost contributions but also the forgone interest and capital growth that would have been derived from them; and a

30 *RTA v Cremona* [2001] NSWCA 338.
31 *Jongen v CSR Ltd* (1992) ATR 81-192.

second time by being able to invest those damages and thereby generate income and capital growth.

13.132 The Panel considers that the criticism of *Cremona* is not without substance and prefers the *Jongen* method. The Panel recognises, however, that even the *Jongen* method might be thought undesirably complex because the amount of the relevant contributions will vary from case to case. It was suggested therefore that damages for loss of superannuation contributions should be calculated as a fixed percentage of the damages for loss of earning capacity (subject to the cap on such damages). The Panel considers this to be an appropriate solution to the problem. In the view of the Panel, the fixed percentage should be the minimum level of compulsory employers' contributions stipulated under the relevant Commonwealth legislation.[32]

13.133 The advantage of this approach is that it would bring about certainty, simplify matters and reduce costs. Sophisticated calculations by accountants and actuaries would be rendered unnecessary, opportunities for disagreement between the parties would be reduced, and out-of-court settlements of claims would be facilitated.

Recommendation 58

The Proposed Act should embody the following principles:

(a) Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).

(b) The percentage should be the minimum level of compulsory employers' contributions required under the relevant Commonwealth legislation (the *Superannuation Guarantee (Administration) Act 1992 (Cwth)*).

Collateral benefits

13.134 'Collateral benefits' (money or services) are benefits received by a plaintiff, as a result of injury or death, from sources other than the defendant. Examples of collateral benefits are charitable payments, statutory entitlements under social security and health-care schemes, and contractual entitlements

32 *Superannuation Guarantee (Administration) Act 1992* (Cwth).

under employment contracts, superannuation and pension funds, and payments under insurance policies.

13.135 Certain collateral benefits are set off against the damages recoverable by the plaintiff from the defendant; others are not. From one point of view, when a collateral benefit is not set off against damages, the basic principle of the law of damages, that the plaintiff should receive full compensation but no more, is breached.

13.136 On the other hand, the effect of setting off collateral benefits is that the negligent defendant gets what might be thought an unfair advantage at the expense of the plaintiff.

13.137 The law has found it difficult to resolve the conflict between these two points of view in a consistent and logical way. As a result, the common law rules governing the offsetting of collateral benefits are complex and sometimes difficult to reconcile with each other.

13.138 Additional complexity arises from the patchwork of statutory provisions about the offsetting of various collateral benefits. The way particular benefits are dealt with may vary from one jurisdiction to another.

Death claims

13.139 In most jurisdictions, the rules governing offsetting of collateral benefits in personal injury actions are different from those applicable to death actions. The basic common law rule is that benefits accruing from the death have to be set off against loss suffered as a result of the death. But this rule has been so heavily modified by statute that it is probably true to say that there is a general statutory principle against offsetting.

13.140 In all Australian jurisdictions, any sum paid or payable on the death of the deceased under any contract of insurance is ignored in assessing damages for loss of support.[33] Sums paid or payable out of any superannuation, provident or like fund, or by way of benefit from a friendly society, benefit society, or trade union are also ignored.[34] However, where the plaintiff's loss is the benefit of the matured fund, the statute will not preclude account being taken of payments made by the fund to the plaintiff.[35]

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33 Luntz at para 9.5.2.
34 Luntz at para 9.5.7.
35 *RTA v Cremona* [2001] NSWCA 338.

13.141 While such liberality is understandable as an expression of compassion for dependants, it is arguably one of the factors that has contributed to current dissatisfaction with negligence law.

13.142 In any event, the Panel considers that the basic principle should be the same in personal injury and death cases, namely that benefits accruing from the injury or death should be set off against losses suffered. This conclusion is consistent with the principles outlined at the beginning of this Chapter, which have guided our thinking in this area.

Categories of collateral benefits

13.143 Collateral benefits may accrue from one of three sources: statutory provision (for example, social security and health-care benefits); contract (e.g. sick pay and the proceeds of insurance policies); and benevolence, i.e., charity (e.g. donations and gratuitous services).

13.144 The statutory social security and health-care benefits regime is complex. The legislation contains detailed provisions designed to prevent people recovering both damages and state benefits in respect of the same loss. No submissions recommending change in this area have been made to the Panel and, given the time constraints under which the Review has been conducted, the Panel does not make any recommendations in this regard.

13.145 Under current law, collateral benefits in the form of benevolence or charity are not set off against damages. The Panel considers that any change to the law in this regard would not be acceptable to the community and is not desirable.

13.146 It is in the area of contractual benefits that there is scope for altering the present rules and, particularly in the area of insurance and superannuation.

13.147 In considering insurance benefits, it is first necessary to note the distinction between indemnity and non-indemnity policies. If a plaintiff receives payments from an insurer under an indemnity policy, those payments are set off against damages payable by the defendant, and the insurer can recover the payments in question from the defendant by exercising its right of subrogation. On the other hand, payments received under a non-indemnity policy are not set off against damages, and the insurer has no right to recover the payments from the defendant by exercising a right of subrogation. So a plaintiff may receive both benefits under a non-indemnity insurance policy and damages in respect of one and the same loss.

13.148 The usual rationale for the rule that payments under non-indemnity policies are not offset against the plaintiff's damages is that the payments are treated as having been received by the plaintiff under a contract with the insurer whereby the plaintiff provided for the contingency of injury or death, and not as a result of injury suffered by the plaintiff as a result of the defendant's negligence. Another way it is put is that because the insurance payments were bought and paid for by the plaintiff, they are a result of foresight and thrift rather than the injury.

13.149 Personal accident insurance policies are non-indemnity policies. This means that a person who sustains personal injuries can recover payments under a personal accident policy and also damages from the wrongdoer on account of those injuries. The insurer is not subrogated to the rights of the plaintiff against the defendant. This position has been the subject of criticism. It is sufficient in this regard to point to property insurance. Because property damage insurance is classified as indemnity insurance, a property owner cannot recover both tort damages and the proceeds of a property insurance policy as a result of damage to the property. Once the insurer has paid out under the policy, it is subrogated to the owner's tort claim. The owner cannot collect both the insurance money and damages from the wrongdoer. There appears to be no principle that justifies the different ways the law treats property damage insurance on the one hand and personal accident insurance on the other.

13.150 Matters are made more complex by the fact that the distinction between indemnity and non-indemnity insurance is difficult to draw because the basis of distinction is unclear. Policies are often categorised as indemnity or non-indemnity on the basis of authority rather than analysis.

13.151 Subject to what we shall refer to as 'the like-against-like' principle, the Panel is of the view that the proceeds of personal accident and life insurance policies should be set off against damages for personal injury and death. The most important justification for this conclusion is the proposition that plaintiffs should not recover more than they have lost. This is consistent with the principles underlying this Chapter. Offsetting of insurance payments against damages will also further objectives of the Terms of Reference by reducing damages awards in some cases.

13.152 We are also of the view that superannuation payments and pensions received as a result of injury or death should be set off against damages. Generally, such benefits are ignored in the assessment of damages for essentially the same reasons that payments under non-indemnity insurance policies are ignored — namely that the plaintiff paid for the benefits personally

or earned them as part of remuneration for work done for an employer. Our reasons for thinking that they should be set off against damages are essentially the same as our reasons for supporting the setting off of payments received under non-indemnity insurance policies.

Off-setting and the 'like-against-like' principle

13.153 Once it is accepted that the proceeds of insurance policies should be set off against damages, the next issue that arises concerns how the set-off should operate. One possibility would be to set off collateral benefits against the total amount awarded under all heads of damages. By contrast, under the like-against-like principle, collateral benefits would be set off only against heads of damages of the same nature as the collateral benefit. So, for instance, insurance benefits designed to replace lost income would be set off against damages for loss of earning capacity, but not against damages for non-economic loss. Similarly, disability benefits received under an insurance policy would be set off against damages for non-economic loss, but not against damages for cost of care. Under the like-against-like principle, the nature of the head of damage for which the plaintiff seeks to be compensated must be identified. If it can be shown that the plaintiff has received or will receive, a collateral benefit of the same nature as that head of damages, the benefit may be set off, but not otherwise.

13.154 The important difference between the 'aggregate set-off' principle and the like-against-like principle is that the former may result in greater reduction of the total damages award than the latter. Under the like-against-like principle, collateral benefits are only set off against damages to the extent that they correspond to one or other head of damages. If the relevant collateral benefit is greater in amount than the corresponding head of damages, the benefit will not be set off to the extent that it exceeds the damages awarded under that head. On the other hand, under the aggregate set-off principle, the excess amount would be set off against any other damages to which the plaintiff was entitled regardless of the head under which those damages had been awarded.

13.155 Traditionally in personal injury actions, the lump sum has been considered to be a single indivisible award. Calculating the damages under separate 'heads' was considered to be merely a matter of convenience. Whether an award was correct or not depended on the size of the aggregate lump sum and not the amounts awarded under each head. Now, by contrast, lump sum awards tend to be treated as the sum of the various amounts awarded under each head of damages, and appeals against damages awards

are typically based on the way particular heads of damages were assessed rather than on the size of the total award.

13.156 For that reason, the Panel is of the view that the like-against-like principle should be adopted in preference to aggregate off-setting. We understand that, in terms of the objective of limiting damages, the aggregate set-off principle could achieve more than the like-against-like principle. However, we consider that the latter is more principled than the former and to be preferred for that reason.

Off-setting and caps

13.157 It is necessary to consider the interaction between the rules about off-setting of collateral benefits and caps on damages, especially damages for loss of earning capacity. We have pointed out in paragraph 13.64 that it would be open to high-earners to insure against loss of income in excess of the cap. Indeed, one of the reasons for imposing a cap is to encourage high-earners to buy such insurance. It follows that if the proceeds of such insurance are to be set off against damages for loss of earning capacity, they must be set off before the cap is applied, and we recommend a statutory provision to this effect.

Summary

13.158 To summarise, the Panel considers that:

(a) It is not necessary to make any recommendation about the offsetting of statutory social security or health-care benefits.

(b) Charitable benefits should not be deducted from damages.

(c) All other collateral benefits should be deducted (in cases of both personal injury and death), but only in accordance with the like-against-like principle.

(d) Collateral benefits should be set off before any damages cap is applied.

Recommendation 59

The Proposed Act should embody the following principles:

(a) In assessing damages in an action under this Act, whether for personal injury or death, all collateral benefits received or to be received by the

plaintiff as a result of the injury or death (except charitable benefits and statutory social-security and health-care benefits) should be deducted from those damages on the basis of the like-against-like principle.

(b) Collateral benefits should be set off against the relevant head of damages before any relevant damages cap is applied.

Exemplary and aggravated damages

13.159 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.

13.160 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.

13.161 The power to award exemplary damages is to be exercised with restraint.[36] Moreover, exemplary damages cannot be awarded if the defendant has been convicted and sentenced in criminal proceedings arising from the same conduct.[37]

13.162 There are many relevant legislative limitations on the power of courts to award exemplary damages. The following are examples:

(a) Exemplary or punitive damages are not available in NSW in actions for personal injury or death caused by negligence.[38]

(b) Exemplary damages are not available under the NSW and Victorian motor vehicle accident regimes.[39]

36 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448.

37 *Gray v Motor Accident Commission* (1998) 196 CLR 1.

38 *Civil Liability Act 2002* (NSW), s 21.

39 *Motor Accidents Compensation Act 1999* (NSW), s 144; *Motor Accidents Act 1988* (NSW), s 81A; *Transport Accident Act 1986* (Vic), s 93; *Accident Compensation Act 1985* (Vic), s 135A (7) (c) and for post 20 Oct 1999 s 134 AA, s 134 AB (22) (c), s 134 A;

(c) Exemplary damages are not available against motor vehicle insurers in Queensland and SA.[40] However, if the court is of the view that the relevant conduct was sufficiently reprehensible, exemplary damages may be awarded against the insured person.

(d) Exemplary or punitive damages are not available in personal injury proceedings in Queensland.[41]

(e) The Northern Territory proposes to abolish awards of exemplary damages in respect of personal injury and death.[42]

(f) The Crown (in some jurisdictions) is not liable to pay exemplary or punitive damages for the conduct of police officers.[43]

(g) Exemplary damages cannot be recovered in personal injury proceedings against a deceased estate in the ACT, NT and Tasmania.[44]

13.163 The main arguments in favour of retaining exemplary damages are:

(a) It is a legitimate function of the civil law to penalise reprehensible conduct; exemplary damages fulfil this function.

(b) Exemplary damages provide a way of punishing defendants where criminal, regulatory and administrative sanctions are inadequate.

13.164 Various arguments have been used to support abolition of exemplary damages. They are:

(a) Exemplary damages confuse the punishment function of the criminal law with the compensation function of the civil law.

(b) Exemplary damages constitute an undeserved windfall for the plaintiff.

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40 *Motor Accidents Insurance Act 1994* (Qld), s 55 as amended; *WorkCover Queensland Act 1996* (Qld), s 319; *Motor Vehicles Act 1959* (SA), s 113A as amended.

41 *Personal Injuries Proceedings Amendment Act 2002* (Qld), s 8.

42 Personal Injuries (Liabilities and Damages) Bill 2002 (NT), s 19.

43 *Australian Federal Police Act 1979* (Cth), s 64B (3); *Police Service Administration Act 1990* (Qld), s 10.5 (2); *Police Administration Act 1978* (NT), s 163 (3)

44 *Law Reform (Miscellaneous Provisions) Act 1955* (ACT), s 5; *Administration and Probate Act 1935* (Tas), s27 (3); *Law Reform (Miscellaneous Provisions) Act* (NT), s 6.

(c) Awards of exemplary damages are unpredictable especially in jury trials.

(d) Awards for exemplary damages are often too high.

13.165 The patchwork of legislation now in force limiting or abolishing exemplary damages in various types of case can be taken to reflect a community view that the remedy of exemplary damages is neither necessary nor desirable. In this light, the Panel recommends the enactment of a general provision abolishing exemplary damages in relation to claims for negligently-caused personal injury or death.

13.166 There are also many relevant legislative limitations on the power of courts to award aggravated damages. The following are examples:

(a) Aggravated damages are not available in NSW for an action for personal injury or death caused by negligence.[45]

(b) Aggravated damages are excluded by the motor vehicle accident regimes in NSW and Vic.[46]

(c) Aggravated damages are not available in personal injury proceedings in Queensland.[47]

(d) Aggravated damages are not available against motor vehicle insurers in SA and insured persons are not entitled to be indemnified against such awards.[48]

(e) The Northern Territory proposes to abolish awards for aggravated damages in respect of personal injury and death.[49]

13.167 The main argument in favour of retaining aggravated damages is that, where a plaintiff has suffered an outrageous indignity, it is appropriate to make a separate, distinct award of damages. The main argument for abolishing them is that if they are truly compensatory, they are unnecessary because compensation for mental distress can be given under other heads. There is also

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45 *Civil Liability Act 2002* (NSW), s 21.

46 *Motor Accidents Compensation Act 1999* (NSW), s 144; *Motor Accidents Act 1988* (NSW), s 81A; *Transport Accident Act 1986* (Vic), s 93; *Accident Compensation Act 1985 (Vic)*, s 135A (7) (c) and for post 20 Oct 1999 s 134 AB (22) (c).

47 *Personal Injuries Proceedings Amendment Act 2002* (Qld), s 8.

48 *Motor Vehicles Act 1959* (SA), s113A.

49 Personal Injuries (Liabilities and Damages) Bill 2002 (NT), s 19.

the danger that if they are retained while exemplary damages are abolished, they will be used for punitive purposes. The Panel recommends that aggravated damages be abolished.

Recommendation 60

The Proposed Act should contain a provision abolishing exemplary and aggravated damages.

Indexation of fixed monetary amounts

13.168 Recommendations 45, 48 and 57 refer to fixed monetary amounts. In order to maintain the relative value of these amounts over time the Panel recommends that they be indexed to CPI.

Recommendation 61

The Proposed Act should provide that the fixed monetary amounts referred to Recommendations 45, 48 and 57 should be indexed to the CPI.

Appendices

Appendix A: *Trade Practices Act 1974* and state and territory equivalents

Table A1: Unconscionable conduct

Commonwealth Trade Practices Act 1974	NSW Fair Trading Act 1987	VIC Fair Trading Act 1999	QLD Fair Trading Act 1989	SA Fair Trading Act 1987	WA Fair Trading Act 1990	TAS Fair Trading Act 1987	ACT Fair Trading Act 1992	NT Consumer Affairs and Fair Trading Act 1990
Section 51AA	NIL	s 7	NIL	NIL	NIL	NIL	NIL	NIL
Section 51AB	s43	s8	s39	s57	s11	s15	s13	s43
Section 51AC	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL

* The *Australian Securities Commission Act 2001* (Cwth) duplicates the consumer protection provisions of the Act with regard to financial services.
ASIC Act (Cwth) s 12CA is equivalent to s 51AA of the Act.
ASIC Act (Cwth) s 12CB is equivalent to s 51AB of the Act.
ASIC Act (Cwth) s 12CC is equivalent to s 51AC of the Act.

Table A2: Misleading or deceptive conduct

Commonwealth Trade Practices Act 1974	Section 52	Section 53aa	Section 53c	Section 53f	Section 53g	Section 55A
NSW Fair Trading Act 1987	s42	sub-s44 (b)	sub-s44 (e)	sub-s44 (j)	sub-s44 (k)	s50
VIC Fair Trading Act 1999	s9	sub-s12 (b)	sub-s12 (e)	sub-s12 (j)	sub-s12 (k)	s11
QLD Fair Trading Act 1989	s38	sub-s40 (b)	sub-s40 (e)	sub-s40 (j)	sub-s40 (k)	s45
SA Fair Trading Act 1987	s56	sub-s58 (b)	sub-s58 (e)	sub-s58 (j)	sub-s58 (k)	s64
WA Fair Trading Act 1990	s10	para 12 (1) (b)	para 12 (1) (e)	para 12 (1) (k)	para 12 (1) (l)	s18
TAS Fair Trading Act 1987	s14	sub-s16 (b)	sub-s16 (e)	sub-s16 (j)	sub-s16 (k)	s21
ACT Fair Trading Act 1992	s12	sub-s14 (b)	sub-s14 (e)	sub-s14 (j)	sub-s14 (k)	s20
NT Consumer Affairs & Fair Trading Act 1998	s42	sub-s 44 (b)	sub-s44 (e)	sub-s44 (k)	sub-s44 (m)	s48

The *Australian Securities and Investments Commission Act 2001* (Cwth) and the *Corporations Act 2001 (Cwth)* duplicate the consumer protection provisions of the Act with regard to financial services.
ASIC Act (Cwth) s12DA and the *Corp Act (Cwth)* s1041H are equivalent to s52 of the Act.
ASIC Act (Cwth) s12DB and the *Corp Act* (Cwth) s1041E are equivalent to s53 of the Act.

Table A3: Product safety and product information actions against manufacturers and importers of goods.

Commonwealth	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
TPA Section 65C Product safety and unsafe goods	Fair Trading Act 1987 (NSW) s27	Fair Trading Act 1999 (Vic) Pt 3 Div 1 ss 33 and 34	Fair Trading Act 1989 (QLD) Pt 4 Div 2 ss 83 and 84	Trade Standards Act 1979 (SA) Pt 3 Pt 4 ss22, 23 and 26	Fair Trading Act 1987 (WA) Pt 5 ss50 and 51	No generic product safety Act	Consumer Affairs Act 1973 (ACT) ss 15FBA and 15FE	Consumer Affairs and Fair Trading Act 1990 (NT) Pt 4 Div 1 to 3 ss 25 and 26
TPA section 65D Product information standards	Fair Trading Act 1987 (NSW) ss 38 and 39	Fair Trading Act 1999 (Vic) Pt 3 Div 2 ss46, 47 and 48	Fair Trading Act 1989 (QLD) Pt 4 Div 1 ss 81 and 82	Trade Standards Act 1979 (SA) Pt 5 Pt 6 ss32,33 and 44	Fair Trading Act 1987(WA) Pt 6 ss 59 and 60	No generic product safety Act	Consumer Affairs Act 1973 (ACT) ss 15FC and 15FC	Consumer Affairs and Fair Trading Act 1990 (NT) Pt 4 Div 4 ss38 and 39
TPA section 74B Fitness for Particular purpose	Sale of Goods Act 1923 (NSW) s19	Goods Act 1958 (Vic) Pt 1 Div 6 s19	Sale of Goods Act 1896 (Qld) s 17	Sale of Goods Act 1895 (SA) sub-s14(I)	Sale of Goods Act 1895 (WA) s14	Sale of Goods Act 1896 (TAS) s19	Sale of Goods Act 1954 (ACT) Div 5 and 6 s 19	Consumer Affairs and Fair Trading Act 1990 (NT) s 73
TPA section 74C Actions in respect of false descriptions	Sale of Goods Act 1923 (NSW) s18	Goods Act 1958 (Vic) Pt 1 Div 6 s 18	Sale of Goods Act 1896(QLD) s 16	Sale of Goods Act 1895 (SA) s13	Sale of Goods Act 1895 (WA) s13	Sale of Goods Act 1896 (TAS) s18	Sale of Goods Act 1954 (ACT) Div 5 s 18	Consumer Affairs and Fair Trading Act 1990 (NT) s 74
TPA section 74D Actions in respect of goods of unmerchantable quality	Sale of Goods Act 1923 (NSW) s 19	Goods Act 1958 (Vic) Pt 1 Div 6 s19	Sale of Goods Act 1896 (QLD) s 17	Sale of Goods Act 1895 (SA) sub-s14(II)	Sale of Goods Act 1895(WA) s14	Sale of Goods Act 1896 (TAS) s19	Sale of Goods Act 1954 (ACT) Div 5 s19	Consumer Affairs and Fair Trading Act 1990 (NT) s 75

Table A4: Conditions and warranties in consumer transactions

(Cwth) Trade Practices Act 1974	NSW Sale of Goods Act 1923	VIC Goods Act 1958	QLD Sale of Goods Act 1896	SA Consumer Transactions Act 1972	WA Fair Trading Act 1997	Tas Sale of Goods Act 1896	ACT Sale of Goods Act 1954	NT Consumer Affairs & Fair Trading Act 1990
Section 74	Nil	sub-s91(a) implied condition that services will be rendered with due care and skill	Nil	sub-s71(1) implied condition in consumer contracts that services will be rendered with due care and skill	s40 duplicates s74 TPA	Nil	Nil	sub-s66 (l) implied warranty that services supplied to a consumer will be rendered with due care and skill
Section 68	Nil	s113 implied condition or warranty implied by the Goods Act does not negative an express term except in so far as it is inconsistent with the implied condition	Nil	s8 conditions implied into a consumer contract may not be excluded, limited or modified by agreement	s34: Provisions of contracts purporting to modify, exclude or restrict the warranty for the provision of due care and skill in services is void.	Nil	Nil	s68 renders void any contractual terms that supports to exclude, restrict or modify any liability for any condition implied by s66

The *Australian Securities and Investments Commission Act 2001* (Cwth) duplicates the consumer protection provisions of the Act with regard to financial services.
Section 12ED is equivalent to s74 of the Act with regard to contracts for financial services.
Section 12EB is equivalent to s 68 of the Act with regard to contracts for financial services.

Table A5: Remedies

Trade Practices Act 1974 (Cwth)	NSW Fair Trading Act 1987 (NSW)	VIC Fair Trading Act 1999 (Vic)	QLD Fair Trading Act 1989 (QLD)	SA Fair Trading Act 1987 (SA)	WA Fair Trading Act 1987 (WA)	TAS Fair Trading Act 1990 (Tas)	ACT Fair Trading Act 1992 (ACT)	NT Consumer Affairs and Fair Trading Act 1990 (NT)
Section 80 Injunction	ss65 and 66	ss 149 to 151	s 98	s83	ss74 to 76	ss 34 and 35	s 44	s89
Section 86C Non Punitive Orders	s 72	s 158	s 100	s82	s 77	s41	s 50	s 90
Section 86D Punitive Orders	s 67	s 153	s100	s 82	s 77	s 36	s 45	s90
Section 76 Pecuniary Penalties				s 82			s42	
Section 87A Preservation Orders	s 73	s154	s 102	s82	s 78	s 42	s 51	
Section 87 Other Orders	s 72	s 158	s 100	s 82 and 85	s 77	s 41	s50	s95
Section 87B Undertakings	s73A	ss 146 –148	Pt 5 Div 1B	Div 2			s 36	
Pt V Criminal Proceedings	ss62 to 64	Pt 11 Div 1	ss 92 to 94	Div 3	ss 69 to 73		s 43	s 88

Table A6: Regulatory Authorities

Commonwealth	NSW	Victoria	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
Australian Competition and Consumer Commission	NSW Office of Fair Trading	Victorian Office of Fair Trading and Business Affairs	Queensland Office of Fair Trading	South Australian Office of Consumer and Business Affairs	Western Australian Department of Consumer and Employment Protection	Tasmanian Consumer Affairs and Fair Trading	ACT Office of Fair Trading	Northern Territory Consumer and Business Affairs

Definitions

For the purposes of this Report, the following definitions apply:

Apportionment legislation

Legislation in all Australian jurisdictions that provides for the apportionment of damages when a person has been contributorily negligent.

Compatibility principle

According to this principle, a claim for breach of a common law duty of care committed by a public functionary in the performance or non-performance of a public function, will only be available if allowing such a claim is compatible with the provisions and policy of the relevant statute.

Consequential mental harm

Mental harm suffered as a consequence of physical injury.

Date of discoverability

The date on which the plaintiff knew, or ought to have known, that personal injury or death (a) had occurred, (b) was attributable to negligent conduct of the defendant, and (c) in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

Foreseeable risk of harm

A risk of harm of which a person knows or ought to know.

FTOTE

Full-time adult ordinary time earnings.

Inherent risk

A risk that cannot be removed or avoided by the exercise of reasonable care.

Like-against-like principle

Under this principle, if the plaintiff has received or will receive a collateral benefit which has the same nature as a head of damage, the benefit may be set off, but not otherwise.

Negligence

Failure to exercise reasonable care and skill.

Negligence calculus

The negligence calculus has four components:

(a) the probability that the harm would occur if care was not taken;

(b) the likely seriousness of that harm;

(c) the cost of taking precautions to avoid the harm; and

(d) the social utility of the risk-creating activity.

The calculus involves weighing (a) and (b) against (c) and (d).

Not-for-profit organisation (NPO)

An organisation that is prohibited under its governing rules or documents from distributing profits to its members, owners or managers.

Obvious risk

Includes risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

Personal injury

Includes (a) any disease, (b) any impairment of a person's physical or mental condition, and (c) pre-natal injury.

Personal injury law

The law governing liability and damages for personal injury and death resulting from negligence.

Policy decision

A policy decision is a decision based substantially on financial, economic, political or social factors or constraints.

Public functionary

A person or body performing a public function.

Proactive duty to inform

A duty to give information that a reasonable person in the circumstances would want to be told before making a decision.

Pure mental harm

Mental harm that is not a consequence of physical harm.

Reactive duty to inform

A duty to give the information that the information-giver knows or ought to know the person wants to be told before the person makes a decision.

Recreational activity

An activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.

Recreational services

Services of (a) providing facilities for participation in a recreational activity, (b) training a person to participate in a recreational activity, or (c) supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.

Structured settlement

A settlement between a plaintiff and a defendant pursuant to which the defendant is required to pay at least part of the agreed damages periodically rather than in a single lump sum.

The close-relationship limitation period

A period of 3 years from the date the prospective plaintiff turns 25 years of age.

The limitation period

A period of 3 years from the date of discoverability.

The long-stop period

A period of 12 years from the date of the conduct or events on which the claim is based.

The Proposed Act

The Act referred to Recommendation 1.

Volunteer

A person who does community work on a voluntary basis.

Work risks

Risks associated with work done by one person for another.

List of Submissions

Number	Individual/Organisation
1	Australian Doctors Fund
2	Dr W. Marchione
3	R. M. McKinnon
4	Vince Dudink
5	Gerry Calvert
6	Peter Hesse
7	G. E. Farrow
8	Wirraway Homestead
9	Confidential
10	Horse Federation of South Australia
11	United Medical Protection
12	Michael Johnson
13	Brian Clarke
14	Australian Horse Industry Council Inc
15	Beston, Macken & McManis Solicitors
16	Northern Recreation & Sports Advisory Council Inc
17	Australian Dental Association Inc
18	Insurance Council of Australia
19	Confidential
20	Confidential
21	Catholic Health Australia
22	Green Triangle Injured Persons Support Group Inc
23	Australian Council of Professions Ltd
24	Transfield Services
25	Glenn Puckeridge
26	The Association of Consulting Engineers Australia
27	Patient Injury Support & Advocacy (Australia)
28	R. Pfennigwerth
29	Mental Health Legal Centre Inc
30	Ramsay Health Care Ltd

Number	Individual/Organisation
31	Villamanta Legal Service
32	Queensland Advocacy Incorporated
33	Law Council of Australia
34	Law Society of Western Australia
35	Waurnvale Medical Centre
36	KLO Legal
37	B. T. Casey
38	Australian Private Hospitals Association Limited
39	Australian Diagnostic Imaging Association
40	T.M. Dwyer and D.R. Dwyer
41	Chillagoe Caving Club Inc
42	Australian Plaintiff Lawyers Association
43	Perisher Blue Pty Limited
44	Dr Alex G. Pitman
45	Professional Standards Council
46	Institution of Engineers, Australia
47	Australian Competition & Consumer Commission
48	St Patrick's School
49	Queensland Outdoor Recreation Federation Inc
50	Volunteering Australia
51	Australian Association of Pathology Practices Inc.
52	Confidential
53	Financial Planning Association of Australia Limited
54	National Product Liability Association Inc
55	Australian Medical Association
56	Australian Council of Social Service
57	Sport Industry Australia
58	Intellectual Disability Rights Service Inc.
59	Evan Whitton
60	Local Government Association of NSW & Shires Association of NSW
61	National Farmers' Federation
62	The Hon James Thomas AM, QC

Number	Individual/Organisation
63	Ray Steinwall
64	J. L. Hollaway
65	Ferguson & Associates Pty Ltd
66	Australian Society of Otolaryngology, Head and Neck Surgery
67	Australian Consumers' Association
68	Medical Error Action Group
69	Bar Association of Queensland
70	Local Government Association of Queensland (Inc)
71	John O'Brien & Associates Barristers & Solicitors
72	John Seymour
73	ValReview (Aust.) Pty Ltd
74	Keith Handscombe
75	A. F. Hardy
76	Paul Somerville
77	Consumer Law Centre Victoria
78	Mount Selwyn Snowfields Pty Limited
79	Australian Amusement Leisure and Recreation Association Inc.
80	Freehills
81	Robin Burren
82	Lyndria Cook
83	Civil Justice Foundation
84	Womens Legal Resources Centre
85	Robert Pearce
86	Peter J. Deakin QC
87	David Stronach
88	Darwin Community Legal Service
89	Buller Ski Lifts Ltd
90	Amaca Pty Limited
91	Sydney Foundation for Medical Research
92	Local Government Association Mutual Liability Scheme
93	The Institute of Chartered Accountants in Australia
94	The Australian Society of Otolaryngology, Head and Neck Surgery Ltd. — Queensland Section

Number	Individual/Organisation
95	Angus Corbett
96	PricewaterhouseCoopers
97	CSR Limited
98	KPMG
99	Deloitte Touche Tohmatsu
100	Ernst & Young

List of Consultations and Advice

Thursday 18 July 2002	**Individual** The Honourable Justice N Owen, Supreme Court of Western Australia Mr Wayne Martin QC, Western Australia Bar
Thursday 25 July 2002	**Individual** Ms Fiona Tito, Executive Director, Enduring Solutions Pty Ltd
Friday 26 July 2002	**Australian Health and Medical Advisory Council (AHMAC)** Professor Marcia Neave Ms Fiona Tito Mr James Murray Mr Bill Madden Mr Peter Quinton Dr Ross Sweet
Monday 29 July 2002	**Individual** The Hon. Justice Keith Mason, President, New South Wales Court of Appeal
Wednesday 31 July 2002	**United Medical Protection (UMP)** Dr Malcolm Stuart Mr D. Brown **Individual** Dr Shirley Prager Professor Ann Daniel
Thursday 1 August 2002	**Clayton Utz** Ms Jocelyn Kellam Mr Colin Loveday **Individual** The Hon. Justice G. L. Davies, Court of Appeal, Supreme Court of Queensland
Friday 2 August 2002	**NSW Law Reform Commission** Peter Hennessy, Executive Director **Individual** Mr Michael Grant-Taylor SC, Queensland Bar Professor Nicholas Mullany, Western Australia Bar
Monday 5 August 2002	**Individual** Professor John Keeler Associate Professor Richard Bryant

Tuesday 6 August 2002	**Australian Competition and Consumer Commission (ACCC)** Professor Alan Fels, Chairperson Ms Jennifer McNeil, Commissioner Mr Brian Cassidy, CEO Mr Robert Antich, General Manager, Compliance Strategies Mr Henry Ergas, Network Economics Consulting Group **Dust Diseases Tribunal** His Honour Judge Duck **Individual** His Honour Chief Judge K. J. Hammond, Chief Judge, District Court of Western Australia The Hon. Chief Justice Doyle, Supreme Court of South Australia
Wednesday 7 August 2002	**Individual** Mr John Hislop QC, New South Wales Bar Mr D. Jackson QC, New South Wales Bar The Hon. Chief Justice W Cox, Supreme Court of Tasmania
Thursday 8 August 2002	**Local Government Association** Mr Alby Taylor Mr David Clark, Legal Officer **Individual** Professor Harold Luntz
Friday 9 August 2002	**Individual** Professor Jim Davis
Monday 12 August 2002	**Australian Plaintiff Lawyers Association (APLA)** Ms Jane Staley, Executive Officer Mr Peter Semmler QC Dr Andrew Morrison Mr John Gordon **Law Council of Australia (LCA)** Mr Tony Abbott, President Mr Ron Heinrich, President-Elect The Hon L. J. Priestley QC, consultant barrister assisting the Law Council of Australia Mr James Greentree-White, Legal Officer
Tuesday 13 August 2002	**Individuals** Professor Jane Stapleton Dr Nick Seddon
Thursday 15 August 2002	**Insurance Council of Australia (ICA)** Mr Alan Mason, Executive Director Mr Dallas Booth, Deputy Chief Director Mr John Morgan, Partner, Allens Arthur Robinson Mr Mohinder Kumar, National Claims Manager, Allianz Insurance Australia **Individual** Chief Judge G. Waldron

Tuesday 20 August 2002	**Individual** Mr Ian Freckleton
Wednesday 21 August 2002	**Individual** The Hon. Justice J Wood, Chief Judge at Common Law, Supreme Court of NSW
Thursday 5 September 2002	**Law Council of Australia (LCA)** Mr Tony Abbott, President Hon L. J. Priestley QC, consultant barrister assisting the Law Council of Australia Professor Nicholas Mullany, barrister assisting the Law Council of Australia Mr James Greentree-White, Legal Officer
Friday 6 September 2002	**Individual** Dr Yolande Lucire
Monday 9 September 2002	**Insurance Council of Australia (ICA)** Mr Dallas Booth, Deputy Chief Director

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Annetts v Australian Stations Pty Ltd [2002] HCA 35 (5 September 2002)	Paragraphs 9.8, 9.9, 9.11-9.14, 9.17-9.19, 9.23, 9.24, 9.29, 9.30
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Bolitho v City and Hackney Health Authority [1998] AC 232	Paragraphs 3.9, 3.18
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Bonnington Castings v Wardlaw [1956] AC 613	Paragraph 7.28
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Chappel v Hart (1998) 195 CLR 232	Paragraphs 7.35, 7.37, 7.46
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Sutherland v Hatton [2002] IRLR 263	Paragraph 9.30
Sutherland Shire Council v Heyman (1985) 157 CLR 424	Paragraphs 8.34, 10.12, 10.26
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