The Effects of Tort Law Reform on Medical Liability*

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This paper outlines recent amendments to the Wrongs Act 1958 (Vic) and other Victorian legislation as part of the process of “tort law reform” that has occurred during the last three years. Attention is drawn to corresponding changes in other Australian jurisdictions. Its focus is primarily on litigation involving medical practitioners.

Introduction

Until recently, civil liability was almost exclusively covered by the common law. Over the centuries, there have, of course, been statutory changes, mostly in the direction of expanding liability. So, for instance, when the common law decided that the death of a human being could not be complained of as an injury in a civil court,1 Lord Campbell’s Act provided a new remedy to certain relatives of those who had had a reasonable expectation of benefit from the continued existence of the deceased.2 Similarly, when the common law, unlike admiralty law, took the attitude that contributory negligence on the part of a plaintiff was a complete defence to the liability of the defendant in negligence,3 the Law Reform (Contributory Negligence) Act 1945 (UK) provided that it would no longer be a complete defence and permitted the courts to reduce the damages recoverable by the plaintiff instead. This reform, too, was adopted in all Australian jurisdictions.4 Limitation of actions legislation, on the other hand, required plaintiffs to bring their actions within a limited time, but even here the more recent statutes before those of the last few years moved in the direction of permitting more time to plaintiffs who suffered personal injuries and were unaware of material facts until close to or after the expiry of the limitation period.5

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1 Baker v Bolton (1808) 1 Camp 493; reaffirmed in Admiralty Commissioners v SS Amerika (Owners) [1917] AC 38; and accepted as part of Australian law in Woolworths Ltd v Crotty (1942) 66 CLR 603. See Swan v Williams (Demolition) Pty Ltd (1987) 9 NSWLR 172.

2 Fatal Accidents Act 1846 (UK), adopted in all Australian jurisdictions: see, eg, Compensation to Relatives Act 1897 (NSW); Wrongs Act 1958 (Vic), Part III.

3 See Cayzer, Irvine & Co v Carron Co (1884) 9 App Cas 873 at 881per Lord Blackburn.

4 See, eg, Law Reform (Miscellaneous Provisions) Act 1965 (NSW), Part 3; Wrongs Act 1958 (Vic), Part V.

5 See, eg, Limitation Act 1969 (NSW); Limitation of Actions Act 1958 (Vic).
In the last three years, all this changed. Numerous statutes to implement “tort law reform” were passed in all Australian jurisdictions in the period 2001-04. Almost uniformly, these statutes made changes to the common law that restricted liability or damages, or restated the common law in an apparently more restrictive manner. This article sets out briefly the background that led to the enactment of these statutes and outlines the more significant changes that have been made in Victoria, though some reference is also made to comparable provisions in the other Australian jurisdictions. The focus of the paper is on those changes that affect the liability of health professionals.6

Background to the statutory changes

Almost from the beginning of the new millennium, complaints filled the media of huge increases in insurance premiums for public liability and medical indemnity insurance.7 In many instances, community events had to be cancelled and health professionals threatened to withdraw from practice because insurance was not available on reasonable terms or at all.8 Undoubtedly, a significant factor was the collapse of the largest medical indemnity defence organisation in Australia, United Medical Protection (UMP), and of one of the largest public liability and professional indemnity insurers in Australia, HIH.9 Although an actuarial report to a joint meeting of government ministers from the Commonwealth and the States attributed the rise to increased costs of claims,10 it is questionable whether there was in fact any increase in litigation.11 Be that as it may, the Chief Justice of New South Wales criticised the courts for “stretching” not only the law,12 but the facts in favour of plaintiffs, and called for a more principled approach.13

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12 See Atiyah PS, The Damages Lottery (Hart, 1997). See also Lisle v Brice (2001) 34 MVR 206 (Qld CA) at [4]-[5] per Thomas JA (referring to the social destructiveness of a culture of blame). On his retirement, his Honour repeated his remarks as to the excessive generosity of the courts in
One response to the perception of a crisis in public liability and medical indemnity insurance and the call for a more principled approach was the establishment of a Panel of Eminent Persons to review the Law of Negligence (the Ipp Committee). This followed a recommendation to this effect made to a meeting of the heads of Commonwealth and State treasuries by actuaries and accountants. The Panel of four experts was headed by Justice Ipp (formerly a Justice of the Western Australian Supreme Court and, at the time, an acting Justice of the New South Wales Supreme Court, but now a Justice of that Court). The other members were Professor Peter Cane, a torts expert at the Australian National University; Associate Professor Don Sheldon, a surgeon; and Mr Ian Macintosh, a long-time mayor of a local council.

The Panel’s terms of reference were very restrictive. Significantly, the terms of reference were introduced by a preamble, which read:

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.

The terms of reference themselves made it clear that the assumptions contained in this preamble were unchallengeable and that the panel had in effect to devise ways of limiting liability and damages, but within the law of negligence. In any event, the time frame given to the panel (two months) made it impossible for it to test the assumptions in the terms of reference. It had to ignore existing empirical evidence and could not conduct any empirical studies of its own.

Despite the assumptions made in the terms of reference, the Committee agreed with the Chief Justice of New South Wales that many problems had arisen not from the common law principles themselves, but rather from the way that the judges had interpreted and “stretched” them. The Committee therefore recommended that the common law should be re-stated, rather than amended. The legislative amendments implementing these recommendations need to be so understood.

In some areas where there was community pressure for change, the Committee said that the common law could be left to develop without intervention. For example, doctors were concerned about being sued if they assisted in an emergency, though no doctors are known to have been sued in such a case. The Committee therefore said permitting a range of claims that would not have been allowed in an earlier era: Lane B, "Insurance Crisis Our Fault, Says Judge", The Weekend Australian, 23 March 2002.


17 Compare Spigelman, The New Liability Structure, above n 13: “Both my brothers are doctors. Even in the late 1960s I recall the scorn that they expressed about their American colleagues who refused to stop at the scene of road accidents. Australian doctors have long since joined them.”
that legislative protection for “Good Samaritans” was not necessary. 18 Nevertheless, all jurisdictions other than Tasmania now have Good Samaritan provisions, two sets dating from before the Ipp Committee reported. The enactment of such provisions does not seem to have allayed the fears of medical professionals. 19 The relevant Victorian provisions are in the *Wrongs Act*, Part VIA, and protect individuals who act in good faith in treating a person who is at risk of death or injury, or already injured, or apparently injured, and where the individual expects no reward. This may be at the scene of the accident or by telephone. 20 In contrast to New South Wales, for instance, this applies even if the emergency was caused by an act or omission of the Good Samaritan: s 31B(3). Unlike many of the comparable provisions, there is no exclusion of protection if the Good Samaritan was intoxicated at the time. Some of the other statutes exclude conduct that falls within the scope of a compulsory insurance scheme, but there is no similar exclusion in Victoria.

The Ipp Committee’s final report did recommend some legislative changes to tort law 21 and a few of its recommendations have been implemented in Victoria. Other recent legislative changes, not according precisely with recommendations of the Panel, have restricted the circumstances in which claims may be made, by setting thresholds and limiting damages that may be awarded by imposing caps on certain heads. Limitation periods have also been reduced. Finally, there has been a range of other measures designed to avoid or minimise litigation such as encouraging apologies, providing more alternative dispute resolution and improving court procedures.

Although some of the legislation to be referred to below preceded the report of the Ipp Committee, most of the changes followed on that report. Many of those enacted were not recommended in the report and in some instances, as we have seen in relation to Good Samaritans, the legislation actually goes against specific recommendations in the report that no change was needed.

**The statutes**

The first recommendation of the Ipp Committee is headed “A national response” and calls for a single statute to be enacted in each jurisdiction to implement the succeeding proposals. Instead, there have been several tranches of law reform in each jurisdiction and the resulting statutes have not been uniform among the jurisdictions, as again we have seen with the illustration of the Good Samaritan provisions. Even before the Ipp Committee was appointed, New South Wales set the ball rolling with the *Health Care*

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20 Comparable provisions with some differences are: *Civil Liability Act 2002* (NSW) Part 8 (Good Samaritan not personally liable, but vicarious liability not affected (s 57); also number of exceptions, such as if it is the Good Samaritan’s intentional or negligent act that caused the emergency (s 58)); *Law Reform Act 1995* (Qld), Part 5 (gross negligence not protected); *Civil Liability Act 1936* (SA), s 74 (recklessness not protected); *Civil Liability Act 2002* (WA), Part 1D (recklessness not protected; vicarious liability of medically qualified Good Samaritan not affected); *Civil Law (Wrongs) Act 2002* (ACT), Part 2.1; *Personal Injuries (Liabilities and Damages) Act 2002* (NT), s 8.

21 For a consideration of the proposals specifically relevant to medical liability, see Parker M, "Reforming the Law of Medical Negligence: Solutions in Search of a Problem" (2003) 11 *TLJ* 136.
Liability Act 2001, subsequently superseded by its Civil Liability Act 2002. That Act was amended after the Ipp Committee reported and has been again amended several times thereafter to introduce further “reforms”. Tasmania and Western Australia each enacted a Civil Liability Act in 2002, followed by amending Acts. Queensland’s Civil Liability Act was enacted in 2003 in the wake of its Personal Injuries Proceedings Act 2002. South Australia, too, now has a Civil Liability Act, dated 1936, as a result of the renaming of its Wrongs Act 1936 by the Law Reform (Ipp Recommendations) Act 2004 (SA). The Australian Capital Territory called its legislation the Civil Law (Wrongs) Act 2002 (ACT) and Victoria enacted successive amendments to the Wrongs Act 1958 (Vic) without changing the name of that Act. The Northern Territory has so far lagged, with relatively modest reforms in the Personal Injuries (Liabilities and Damages) Act 2003 (NT). The Commonwealth has also made a number of changes to the law, principally by amendments to the Trade Practices Act 1974 (Cth) (see, eg, Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004 (Cth)), but has also gone against one of the Ipp Committee’s recommendations (no 10) by enacting the Commonwealth Volunteers Protection Act 2003 (Cth). As already indicated, this paper considers principally the law in Victoria, but makes reference to comparable legislation in other jurisdictions.22

An important point to note is that the legislation in Victoria and some, but not all, of the other jurisdictions is retrospective in the sense that it applies to injuries that occurred before a particular amendment as well as to injuries that occur afterwards. Usually, however, where it does apply to injuries prior to enactment, an exception is made for proceedings already commenced in a court. An example is the Wrongs Act 1958 (Vic), s 66, in relation to Part X of the Act. Since the amendments in Victoria were passed piecemeal, it is always important to check when the relevant legislation came into force and whether proceedings were already on foot at the relevant date. Some of the New South Wales amendments apply even to proceedings already commenced in a court at the date of the enactment, but not to proceedings already commenced at the date of an earlier announcement by the government of its intention to enact the legislation.23

**Scope of reforms: actions arising from negligence**

The first point to emphasise in considering the tort law reforms is that they apply to actions alleging negligence. At various points in the Wrongs Act 1958 (Vic) and the comparable legislation, negligence is defined as meaning: “failure to exercise reasonable care”.24 The major restatements of the law of negligence appear in Part X,

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22 Commonwealth of Australia, Reform of Liability Insurance Law in Australia (2004) purports to set out what changes have been implemented in each jurisdiction, but the accuracy of the list is questionable. It was prepared in an effort to encourage overseas insurers to re-enter the Australian market. As Spigelman CJ, The New Liability Structure, above n 13, points out, the booklet carries a disclaimer (at p 12): “Information contained in this report should not be relied upon without reference to Australian legislation in force from time to time and appropriate legal advice.” For a tabular statement of the implementation of each of the Ipp Committee’s recommendations and other “reforms”, see Butler D, “A comparison of the adoption of the Ipp report recommendations and other personal injuries liability reforms” (2004) 12 TLJ (forthcoming).

23 For the relevant dates of the NSW legislation affecting different aspects of damages in medical litigation, see Luntz H, “Damages in Medical Litigation in New South Wales” (2004) (forthcoming).

24 Sections 43, 67 and 79. Compare Civil Liability Act 2002 (NSW), s 5; Civil Liability Act 1936 (SA), s 3; Civil Law (Wrongs) Act 2002 (ACT), ss 32, 40.
which extends, as do some other parts (eg, Part XI on Mental Harm) to all claims based on negligence, whatever the formal cause of action, including claims “in contract, under statute or otherwise”. This accords with the Ipp Committee’s “overarching recommendation” (no 2). On the other hand, actions in trespass are not affected by the changes. So are a range of matters excluded from Part X (and some other parts), such as actions falling within the scope of the Transport Accidents Act 1985 (Vic), various workers’ claims covered by workers’ compensation legislation and, for reasons difficult to discern, claims for damages in respect of dust-related diseases and in respect of smoking or other tobacco use. However, s 45(2) (and comparable provisions elsewhere in the Act) goes on to provide that the exclusion of claims in respect of dust-related diseases and smoking does not include a claim for damages that relates to the provision of or the failure to provide a health service. Thus negligent advice by a health professional in relation to smoking falls within the scope of the Act, whereas a claim against a tobacco manufacturer is outside it. This particular quirk appears to be unique to Victoria.

RestRICTING CIRCUMSTANCES WHEN DUTY OF CARE ARISES

In Sullivan v Moody (2001) 207 CLR 562; 75 ALJR 1570; 183 ALR 404; Aust Torts Reps 81-622; [2001] HCA 59, a unanimous High Court abandoned the test of “proximity” which during the era of Deane J had been seen as the determinant or touchstone of when a duty of care in negligence exists. Since then the High Court has been struggling to find a single test for duty of care. Neither the Ipp Committee nor the legislation attempts to solve this problem. In most claims against medical practitioners, there is no question that a duty of care is owed. In rare cases where the issue does arise, the Act gives no guidance. Thus we do not know whether the controversial decision in Lowns v Woods (1996) Aust Torts Reps 81-376, where the practitioner was held to be under a duty of care in the particular circumstances to attend to a person who was not a patient, would be followed in Victoria. Similarly, we do not know whether a Victorian court should hold that in any circumstances a medical practitioner owes a duty of care to, say, the sexual partner of a patient to warn that the patient is suffering from a communicable disease.

The Wrongs Act does contain several specific provisions which restrict the circumstances in which a duty of care arises. We have already mentioned Part VIA,
which prevents civil liability arising where individuals act as Good Samaritans. Restrictions on the duty of care in relation to “nervous shock” are contained in Part XI (mental harm) and will be dealt with below. Some other provisions relating to duty of care, such as Part VIB (food donor protection), are unlikely to be relevant to medical litigation. Division 2 of Part X of the Act is headed “Duty of Care”, but in fact the succeeding sections deal with the standard of care, not the issue of whether a duty of care arises. The Queensland and Tasmanian legislation correctly heads the comparable sections “Breach of Duty”, but the New South Wales, South Australian and Western Australian legislation is similar to that in Victoria. We shall deal with the sections relating to standard of care first.

Standard of care: the calculus of negligence

According to the much-cited statement of Mason J in *Wyong Shire Council v Shirt*, the standard of care at common law depends on the reasonable person’s response to a foreseeable risk. That case held that a risk is foreseeable as long as it is not “far-fetched or fanciful”. This has been criticised as too undemanding and the Ipp Committee recommended that it be reformulated so that only risks that are “not insignificant” should be treated as foreseeable. This has been done in the *Wrongs Act* s 48(1)(b). Victoria alone goes on to define “not insignificant” for this purpose in s 48(3):

(a) insignificant risks include, but are not limited to, risks that are far-fetched or fanciful; and

(b) risks that are not insignificant are all risks other than insignificant risks and include, but are not limited to, significant risks.

The principle stated in *Wyong Shire Council v Shirt* requires the tribunal of fact to consider the reasonable person’s response to a foreseeable risk, having regard to certain factors which are indicated in the judgment. Even though a risk is foreseeable, a reasonable person might disregard it. The Ipp Committee claimed that judges were perceived as overlooking this and were finding defendants liable in negligence merely because the risk was foreseeable. It accordingly recommended that the proposed Act should embody the principle 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)”. This, too, has in effect been included in the *Wrongs Act* by providing in s 48(1) that

A person is not negligent in failing to take precautions against a foreseeable risk of harm unless—

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30 *Civil Liability Act 2003* (Qld), Chap 2, Part 1; *Civil Liability Act 2002* (Tas), Part 6.

31 *Civil Liability Act 2002* (NSW), Part 1A Div 2; *Civil Liability Act 1936* (SA), Part 6 Div 1; *Civil Liability Act 2002* (WA), Part 1A Div 2.

32 (1980) 146 CLR 40 at 47-8; 54 ALJR 283; 29 ALR 217.

33 Above n 14, recommendation 28(b).

34 *Civil Liability Act 2002* (NSW), s 5B(1)(b); *Civil Liability Act 2003* (Qld), s 9(1)(b); *Civil Liability Act 1936* (SA), s 32(1)(b); *Civil Liability Act 2002* (Tas), s 11(1)(b); *Civil Liability Act 2002* (WA), s 5B(1)(b); *Civil Law (Wrongs) Act 2002* (ACT), s 43(1)(b).

35 This was also view of some judges: see Spigelman, “Negligence: The Last Outpost”, above n 13; *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [96]-[108] per McHugh J; 76 ALJR 1348; 191 ALR 449; Aust Torts Reps 81-672; 36 MVR 1; [2002] HCA 35.

36 Above n 14, recommendation 28(a).
(c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.\(^{37}\)

Section 48(2)\(^{38}\) then spells out the factors to be taken into account, which are similar to the ones enunciated in *Wyong*. Stated briefly, they are the probability of the risk occurring, the severity of the harm if it does, the cost and difficulty of taking precautions against the risk and the social utility of the conduct that creates the risk. This exercise will be familiar to courts. Section 49\(^{39}\) adds three further factors that were always inherent in the common law calculus, but have on occasion been overlooked. Thus, while it may appear not to be costly to erect a barrier or give a warning at one place where there is a risk of harm, the court must take into account whether there would be a similar need for the defendant to act at many places under its control, which may make the burden of taking precautions too costly in the light of the small probability of the risk occurring or its likely lack of severity if it does occur. Furthermore, the mere fact that a risk could have been avoided by doing something in a different way does not mean that it was negligent to do it in the way that was done. So, too, the taking of precautions after the event does not necessarily show that it was negligent not to do so beforehand.\(^{40}\)

**Standard of care: the relevance of common practice**

In many areas of the law, it is clear that the fact that the defendant has complied with a common practice in the particular industry is not a reason for the court necessarily to conclude that the defendant was not negligent.\(^{41}\) Doctors — and some other professionals — have, however, been protected in England by the “*Bolam test*”, which holds that it cannot amount to negligence if what the defendant did complied with a practice regarded as proper at the time by a responsible body of opinion within the profession.\(^{42}\) This special protection for doctors was rejected in Australia in a series of High Court cases. In *Rosenberg v Percival*, Gleeson CJ, referring to the decision in *Rogers v Whitaker*,\(^{43}\) said:

\(^{37}\) Civil Liability Act 2002 (NSW), s 5B(1)(c); Civil Liability Act 2003 (Qld), s 9(1)(c); Civil Liability Act 1936 (SA), s 32(1)(c); Civil Liability Act 2002 (Tas), s 11(1)(c); Civil Liability Act 2002 (WA) s 5B(1)(c); Civil Law (Wrongs) Act 2002 (ACT) s 43(1)(c).

\(^{38}\) Civil Liability Act 2002 (NSW), s 5B(2); Civil Liability Act 2003 (Qld), s 9(2); Civil Liability Act 1936 (SA), s 32(2); Civil Liability Act 2002 (Tas), s 11(2); Civil Liability Act 2002 (WA) s 5B(2); Civil Law (Wrongs) Act 2002 (ACT) s 43(2).

\(^{39}\) Civil Liability Act 2002 (NSW), s 5C; Civil Liability Act 2003 (Qld), s 10; Civil Law (Wrongs) Act 2002 (ACT), s 44. The Civil Liability Act 2002 (Tas), s 12, includes only two of the factors mentioned in the other Acts; the one excluded is the one relating to similar risks. The Civil Liability Act 1936 (SA) and the Civil Liability Act 2002 (WA) omit all of them.

\(^{40}\) While this was always the case at common law (*Hart v Lancashire & Yorkshire Railway Co* (1869) 21 LT 261 at 263 per Bramwell B), it probably remains true that the taking of such precautions is relevant evidence of their practicability: *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202; 31 ALJR 132; *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201; 49 ALJR 68; 5 ALR 289; *Theilemann v The Commonwealth* [1982] VR 713.

\(^{41}\) Eg, *Mercer v Commissioner for Road Transport & Tramways (NSW)* (1936) 56 CLR 580.

\(^{42}\) The *Bolam* principle is the test for medical negligence that has been accepted in many English cases. It is derived from the charge to the jury by McNair J in *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118.

\(^{43}\) (1992) 175 CLR 479; 67 ALJR 47; 109 ALR 625; Aust Torts Reps 81-189.
“... the relevance of professional practice and opinion was not denied; what was denied was its conclusiveness. In many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility for deciding the content of the doctor’s duty of care rests with the court, not with his or her professional colleagues.”

In response to fears of the medical profession that this exposed them to findings of negligence with which they could not agree, the Ipp Committee recommended the reintroduction of the Bolam test, subject to certain modifications. However, it confined this to medical treatment. With regard to a doctor’s duty to give advice, the Committee recommended a codification of the principles of Rogers v Whitaker, as reaffirmed in Rosenberg v Percival.

The Wrongs Act adopts, in relation to the provision of a service (other than the giving of a warning or other information) by all professionals (not only medical practitioners), a “modified Bolam test”. Thus, under the legislation, an “individual practising a profession” is not negligent if:

it is established that [he or she] acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field (peer professional opinion) as competent professional practice in the circumstances.

The peer opinion need not be universal and there may be different peer opinions which qualify. The peer professional opinion on which the doctor may rely by way of defence is one “widely accepted in Australia”, a qualification not included in the Ipp recommendation. In another departure from the Ipp recommendation, one which is unique to Victoria, the Act provides that a court may disregard peer professional opinion if it considers it “unreasonable”, in which case the court must give reasons

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45 Above n 14, recommendation 3.
46 Wrongs Act 1958 (Vic) s 59(1). This provision may be compared with the “modified Bolam test” now used in England: see Bolitho v City and Hackney Health Authority [1998] AC 232, in which it was held that the Bolam principle would not apply if a “reputable body of opinion” within the profession is “irrational”.
47 Wrongs Act 1958 (Vic), s 59(1). Compare Civil Liability Act 2002 (NSW), s 5O(1) (omits “significant number of respected practitioners in the field”); Civil Liability Act 2003 (Qld), s 22(1) (omits “in Australia”); Civil Liability Act 2002 (Tas), s 22(1) (omits “significant number of respected practitioners in the field”); Civil Liability Act 1936 (SA), s 41(1) (substitutes “members of the same profession” for “peer professional opinion” and omits “significant number of respected practitioners in the field”). The Western Australia, the ACT and the NT have no comparable provisions.
48 Wrongs Act 1958 (Vic), s 59(4); Civil Liability Act 2002 (NSW), s 5O(4); Civil Liability Act 2003 (Qld) s 22(4); Civil Liability Act 1936 (SA), s 41(4); Civil Liability Act 2002 (Tas), s 22(4).
49 Wrongs Act 1958 (Vic), s 59(3); Civil Liability Act 2002 (NSW), s 5O(3); Civil Liability Act 2003 (Qld), s 22(3) (“in the field” rather than “in Australia”); Civil Liability Act 1936 (SA), s 41(3); Civil Liability Act 2002 (Tas), s 22(3).
50 See note 47.
51 Wrongs Act 1958 (Vic), s 59(2)–(4). The Ipp Committee recommended, in accordance with Bolitho, that peer professional opinion may be disregarded if it is “irrational”. This has been adopted in the other jurisdictions that have adopted the modified Bolam rule: see Civil Liability Act 2002 (NSW), s 5O(2)–(4); Civil Liability Act 2003 (Qld), s 22(2)–(4); Civil Liability Act 1936 (SA), s 41(2)–(4); Civil Liability Act 2002 (Tas), s 22(2)–(4).
for disregarding it, though a jury need not give reasons.\textsuperscript{52} The use of the word “unreasonable”\textsuperscript{53} leads to a rather circular argument: a person must take reasonable care, but acting in accordance with a practice widely accepted in the profession will be reasonable unless that practice is not reasonable!

As already noted, the adoption of a modified form of the Bolam test in the legislation applies only to alleged negligence in the provision of a service, which in the medical context would include history-taking, examination, diagnosis and treatment. It does not apply to the giving of or failure to give a warning or information that is associated with a professional service.\textsuperscript{54} If a patient alleges that a doctor failed to take reasonable care in informing the patient about a material risk, the test stated in Rogers\textit{ v} Whitaker for determining when a risk is material and must be disclosed presumably continues to apply. According to the Rogers test, a risk is material if:

“in the circumstances of the particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.”\textsuperscript{55}

In Rosenberg\textit{ v} Percival, Gummow J referred to the two “limbs” of the test as “objective” (a reasonable person in the patient’s position) and “subjective” (the particular patient).\textsuperscript{56} In the Ipp Report this was restated in terms of the doctor’s “proactive” and “reactive” duties.\textsuperscript{57} Although this formulation has been adopted in Queensland and Tasmania with respect to doctors,\textsuperscript{58} the Wrongs Act fails to spell out the standard of care in relation to the duty to inform. It merely restates the content of the duty in the following form:

A person (the\textbf{ defendant}) who owes a duty of care to another person (the\textbf{ plaintiff}) to give a warning or other information to the plaintiff in respect of a risk or other matter, satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information.\textsuperscript{59}

Again, this particular formulation appears to be unique to Victoria.

A series of convoluted sections in Part X Division 4 of the Wrongs Act 1958 (Vic) deal with obvious risks, inherent risks and the onus of proof in relation to the defence of voluntary assumption of risk. There is no liability for the materialisation of an inherent risk, which is defined as “a risk of something occurring that cannot be

\textsuperscript{52} Wrongs Act 1958 (Vic), s 59(5)-(6).

\textsuperscript{53} Compare Civil Liability Act 2002 (NSW), s 50(2) (“irrational”); Civil Liability Act 2003 (Qld), s 22(2) (“irrational or contrary to a written law”); Civil Liability Act 1936 (SA), s 41(2) (“irrational”), Civil Liability Act 2002 (Tas) s 22(2) (“irrational).

\textsuperscript{54} Wrongs Act 1958 (Vic), s 60. Compare Civil Liability Act 2002 (NSW), s 5P (“in respect of the risk of death of or injury to a person”), Civil Liability Act 2003 (Qld), s 22(5) (“in relation to the risk of harm to a person”); Civil Liability Act 1936 (SA), s 41(5) (“in respect of a risk of death of [sic] or injury associated with the provision of a health care service”; Civil Liability Act 2002 (Tas), s 22(5) (“in relation to the risk of harm”).

\textsuperscript{55} Above n 43, at 490.

\textsuperscript{56} Above n 44, at [75].

\textsuperscript{57} Above n 14, paras 3.51–3.70.

\textsuperscript{58} Civil Liability Act 2003 (Qld), s 21; Civil Liability Act 2002 (Tas), s 21.

\textsuperscript{59} Wrongs Act 1958 (Vic), s 50.
avoided by the exercise of reasonable care”. The onus of proof in relation to the defence of voluntary assumption of an obvious risk is placed on the plaintiff, requiring the plaintiff to prove unawareness of the risk. Despite the non-application of this provision to other risks associated with work done by one person for another, it is specifically made applicable to the provision of health services. However, neither of the sections dealing with inherent or obvious risks affects the duty to warn of risks. Other jurisdictions similarly state that the provisions relating to inherent risks do not affect the duty to warn. Those jurisdictions that exclude in general the need to warn of obvious risks, do not apply these exclusions to professional services that carry risk of injury or death.

Role of judge and jury: law and fact

The rules concerning the issues to be determined by the judge and the jury are not affected by the legislation. At common law, it is for the jury, if there is one, to decide whether the defendant is in breach of the duty of care and whether this breach has caused the plaintiff’s condition. As we have seen, under the statute in Victoria, the jury, unlike a judge, is not required to give reasons for rejecting peer professional opinion as unreasonable. As at common law, it remains for the judge to determine whether there is evidence on which a reasonable jury could (not would) find that there has been a breach and that the breach caused the harm; these are questions of law. The judge must leave the decision of these matters to the jury if there is any evidence on which a reasonable jury could so find, though a mere “scintilla” of evidence is no longer enough.

Causation

One aspect in which the Ipp Committee considered that liability in negligence might be too readily imposed was in establishing causation. The Committee referred to “a perception amongst various groups that courts are too willing to impose liability for

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60 Wrongs Act 1958 (Vic), s 55. The comparable sections add “and skill” to the definition: Civil Liability Act 2002 (NSW), s 5I; Civil Liability Act 2003 (Qld), s 16; Civil Liability Act 1936 (SA), s 39; Civil Liability Act 2002 (WA), s 5P. There are no comparable sections in Tasmania or the territories.

61 Wrongs Act 1958 (Vic), s 56(2).

62 Wrongs Act 1958 (Vic), s 56(3).

63 Wrongs Act 1958 (Vic), ss 55(3) and 56(5).

64 Civil Liability Act 2002 (NSW), s 5I(3); Civil Liability Act 2003 (Qld), s 16(3); Civil Liability Act 1936 (SA), s 39(3); Civil Liability Act 2002 (WA), s 5P(2).

65 Civil Liability Act 2002 (NSW), s 5H; Civil Liability Act 2003 (Qld), s 15; Civil Liability Act 1936 (SA), s 38; Civil Liability Act 2002 (Tas), s 17; Civil Liability Act 2002 (WA), s 5O.

66 Civil Liability Act 2002 (NSW), s 5I(2)(c); Civil Liability Act 2003 (Qld), s 15(2)(c) (but doctors, to whom s 21 applies, are excluded here); Civil Liability Act 1936 (SA), s 38(2)(c); Civil Liability Act 2002 (Tas), s 17(2)(c) (but registered medical practitioners, to whom s 21 applies, excluded here); Civil Liability Act 2002 (WA), s 5O(2)(c).

67 Naxakis v Western General Hospital (1999) 197 CLR 269; 73 ALJR 782; 162 ALR 540; [1999] HCA 22.

68 This issue has recently been considered in Mendelson D, "Australian Tort Law Reform: Statutory Principles of Causation and the Common Law” (2004) 11 JLM 492. However, with respect, some of the interpretation of both the common law and the changes effected by the legislation are open to question.
consequences that are only ‘remotely’ connected with the defendant’s conduct”. 69
Adopting the analysis of Professor Jane Stapleton,70 the Ipp Committee pointed out that causation has to be approached in two stages. The first stage is whether the defendant’s negligence made any difference, ie whether “but for” the defendant’s negligence the harm would not have occurred. Ordinarily this is a purely factual question, but there may be cases where it is impossible to prove causation; there is an “evidentiary gap”. 71 In such instances, it may be necessary to make a normative judgment as to whether the law should hold the defendant liable.72

As was recently said by Lord Bingham in the House of Lords,

“It is now, I think, generally accepted that the ‘but for’ test does not provide a comprehensive or exclusive test of causation in the law of tort. Sometimes, if rarely, it yields too restrictive an answer, as in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32. More often, applied simply and mechanically, it gives too expansive an answer: ‘But for your negligent misdelivery of my luggage, I should not have had to defer my passage to New York and embark on SS Titanic.’ But, in the ordinary run of cases, satisfying the ‘but for’ test is a necessary if not a sufficient condition of establishing causation.”73

Because the “but-for” test gives too expansive an answer in the general run of cases, it is necessary to move on to the second stage of the causation inquiry. The second stage is always normative: how far should the defendant be held liable for the factual consequences of the negligence, which may stretch endlessly into the future?74 As the Committee said, whether a defendant has made a “material contribution to harm … [or] to risk [is a] normative issue that depends ultimately on a value judgement about how the costs of injuries and death should be allocated”.75 In other words, a court should bear in mind whether it is fair or “right” that the defendant should be required to bear the loss in a particular case — a similar question to the one underlying the changes discussed earlier in relation to foreseeability and the standard of care.

Since the legislatures adopted the essence of the Ipp Committee’s recommendation on causation, it is desirable to set out what recommendation 29 actually said. The first point relates to the onus of proof. There have been confusing dicta in the High Court as to whether and when an onus may rest on the defendant to rebut a prima facie case made out by the plaintiff.76 The Ipp Committee’s recommendation stated:

69 Above n 14, para 7.47.
71 Above n 14, paras 7.27-36.
73 Chester v Afshar [2004] UKHL 41 at [8]. The House of Lords in this case, by a majority of 3:2, followed Chappel v Hart (1998) 195 CLR 232; (1998) 156 ALR 517; (1998) Aust Torts Reps 81-492; 72 ALJR 517; [1998] HCA 55, which was also decided by a majority of 3:2. Lord Bingham was one of the dissentients in this case, but that does not affect this statement.
74 Compare Liesbosch, Dredger v Edison, SS [1933] AC 449 at 460 per Lord Wright, approved in National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569 at 592 per Windeyer J.
75 Above n 14, para 7.33.
76 See Gunson J, "Turbulent Causal Waters: The High Court, Causation and Medical Negligence" (2001) 9 Tort L Rev 53.
(a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

This has been adopted in all jurisdictions other than the Northern Territory.77

Recommendation 29 then continued:

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.

Again, all jurisdictions other than the Northern Territory have adopted versions of this, though the wording differs.78 The Wrongs Act now requires courts to consider

77 Wrongs Act 1958 (Vic), s 52; Civil Liability Act 2002 (NSW), s 5E; Civil Liability Act 2003 (Qld), s 12; Civil Liability Act 1936 (SA), s 35; Civil Liability Act 2002 (Tas), s 14; Civil Liability Act 2002 (WA), s 5D, Civil Law (Wrongs) Act 2002 (ACT), s 46.

78 Wrongs Act 1958 (Vic), s 51; Civil Liability Act 2002 (NSW), s 5D; Civil Liability Act 2003 (Qld), s 11; Civil Liability Act 1936 (SA), s 34; Civil Liability Act 2002 (Tas), s 13; Civil Liability Act 2002 (WA), s 5C; Civil Law (Wrongs) Act 2002 (ACT), s 46.
first whether “the negligence was a necessary condition of the occurrence of the
harm”. All the legislation goes on to allow the court to depart from this in an
“appropriate” or “exceptional” case. With regard to this first element, factual
causation, and when it would be necessary to depart from the ordinary “but-for” rule,
the Committee clearly had in mind the case of Fairchild v Glenhaven Funeral
Services Ltd [2003] 1 AC 32. The South Australian section specifically refers to this
case in a footnote. Ironically, Fairchild involved mesothelioma as a result of
exposure to asbestos by different employers, yet claims in respect of dust-diseases or
actions by workers or both are excluded from the operation of the relevant part of
most of the statutes. A possible example in which the court might be called on to
decide whether there was an “evidentiary gap” and to hold that factual causation was
satisfied though it could not be proved would be the following. Assume that a surgeon
and a member of the theatre staff each independently through negligence introduced
an infection into the wound during an operation. There is no scientific way in which it
could be established which infection actually took hold in the plaintiff. The surgeon
and the member of the theatre staff were not both employed by a common employer
and one is not vicariously liable for the other. The court might well consider this an
“appropriate case” in accordance with common law principles to impose liability on
both the surgeon and the member of the theatre staff.

The second element of the test for causation, scope of liability, requires the court to
consider whether “it is appropriate for the scope of the negligent person’s liability to
extend to the harm” shown to have been caused factually at the first stage. In the Ipp
Committee’s recommendation, the “scope of liability” was referred to as a
“normative” issue that requires consideration of 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. Although the second part of this statement is adopted
by the legislation, the word “normative” is not used. The issue will come into play
where there is something that at common law might be considered a novus actus
interveniens. So if the plaintiff, while recuperating from a surgical operation in the

79 Section 51(1)(a). See also Civil Liability Act 2002 (NSW), s 5D(1)(a); Civil Liability Act 2003
(Qld), s 11(1)(a); Civil Liability Act 1936 (SA), s 34(1)(a); Civil Liability Act 2002 (Tas), s 13(1)(a)
(“element” substituted for “condition”); Civil Liability Act 2002 (WA), s 5C(1)(a); Civil Law
(Wrongs) Act 2002 (ACT), s 45(1)(a) (“happening” instead of “occurrence”).
80 See Stapleton, above n 72.
81 Civil Liability Act 1936 (SA), s 34(2)(a).
82 Wrongs Act 1958 (Vic), s 45; Civil Liability Act 2002 (NSW), s 3B; Civil Liability Act 2003 (Qld),
s 5; Civil Liability Act 2002 (Tas), s 3B; Civil Liability Act 2002 (WA), s 3A.
84 See Wrongs Act 1958 (Vic), s 51(2); Civil Liability Act 2002 (WA), s 5D(2). Compare Cook v
Lewis [1951] SCR 830. The legislation in NSW, Queensland and Tasmania requires “an
exceptional case”: Civil Liability Act 2002 (NSW), s 5D(2); Civil Liability Act 2003 (Qld), s 11(2);
Civil Liability Act 2002 (Tas), s 13(2). South Australia and the ACT require neither an
“appropriate” nor an “exceptional” case, but spell the requirements out more fully than elsewhere:
Civil Liability Act 1936 (SA), s 34(2); Civil Law (Wrongs) Act 2002 (ACT), s 45(2).
85 Wrongs Act 1958 (Vic), s 51(1)(b); Civil Liability Act 2002 (NSW), s 5D(1)(b); Civil Liability Act
2003 (Qld), s 11(1)(b); Civil Liability Act 1936 (SA), s 34(1)(b); Civil Liability Act 2002 (Tas),
s 13(1)(b); Civil Liability Act 2002 (WA), s 5C(1)(b); Civil Law (Wrongs) Act 2002 (ACT) s
45(1)(b).
hospital, tripped over a step and sustained an injury that could have happened anywhere, it might be thought that it would be inappropriate to make a doctor whose negligently late diagnosis of the condition led to the need for the operation liable for the consequences of the fall.\textsuperscript{86} It would be different if the fall was contributed to by weakness stemming from the condition or if the breach of duty involved failure to guard against such a fall.\textsuperscript{87}

The recommendation of the Ipp Committee set out above included a definition of the “scope of liability”, which is to be considered as a normative question at the second stage of investigating causation. That definition covered matters that at common law would have been considered under rubrics such as “legal causation”, “foreseeability” “commonsense” and “remoteness of damage”. None of the legislation, however, attempts to define “scope of liability”, though it does, with some slight variation of wording, adopt the requirement that:

For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.\textsuperscript{88}

The actual decision of the majority in \textit{Chappel v Hart} (1998) 195 CLR 232 provides an illustration of how the usual principles of causation may be overridden by considering normatively the scope of the liability, in that case the scope of the liability for a failure by the doctor to warn of a risk inherent in a particular operation. As Mason CJ pointed out in \textit{March v E & M H Stramare Pty Ltd} (1991) 171 CLR 506 at 516; 65 ALJR 334; 99 ALR 423; Aust Torts Reps 81-095, in demonstrating why the “but-for” test cannot be used as an exclusive test of causation, ordinarily "[a] factor which secures the presence of the plaintiff at the place where and at the time where he or she is injured is not causally connected with the injury, unless the risk of the accident occurring at that time was greater". Thus, to use Hayne J’s illustration in his dissenting judgment in \textit{Chappel v Hart} (at [118]), if the operating theatre were struck by lightning while the plaintiff was undergoing an operation which he or she would not have undergone at that time or place if warned of a different risk, the doctor is not liable for the consequences of the lightning strike. Yet the majority in \textit{Chappel v Hart} (followed by the majority of the House of Lords in \textit{Chester v Afshar}) held that a doctor who negligently fails to warn of a particular risk is liable for the happening of that risk on the occasion of the operation, even though it was very unlikely to happen on another occasion. Essentially, the normative judgment is that it is necessary to modify the ordinary rules of causation in order to reinforce the obligation which the law places on the doctor to take reasonable care in disclosing material risks.

The \textit{Wrongs Act} does not attempt to codify, as the Committee recommended,\textsuperscript{89} the subjective test at common law that the Australian courts have adopted for determining what the plaintiff would have done if warned where the negligence consists of failure to warn. Nor does it follow the Committee’s recommendation of making inadmissible

\begin{itemize}
  \item \textsuperscript{86} Compare \textit{Lindeman Ltd v Colvin} (1946) 74 CLR 313; \textit{McKiernan v Manhire} (1977) 17 SASR 571 at 576.
  \item \textsuperscript{87} Compare \textit{John James Memorial Hospital Ltd v Keys} [1999] FCA 678.
  \item \textsuperscript{88} \textit{Wrongs Act 1958} (Vic), s 51(4); \textit{Civil Liability Act 2002} (NSW), s 5D(4); \textit{Civil Liability Act 2003} (Qld), s 11(4); \textit{Civil Liability Act 1936} (SA), s 34(3); \textit{Civil Liability Act 2002} (Tas), s 13(4); \textit{Civil Liability Act 2002} (WA), s 5C(4); \textit{Civil Law (Wrong) Act 2002} (ACT), s 45(3).
  \item \textsuperscript{89} Recommendation 29(g)(ii), set out in the text above.
\end{itemize}
statements by the plaintiff as to what he or she would have done. In these last two respects, Victoria is at odds with some other jurisdictions.

**Psychiatric injury (mental harm)**

As noted above, the *Wrongs Act* redefines the circumstances in which plaintiffs may make claims for nervous shock, called in the legislation “mental harm”. The High Court having relaxed the criteria as to when a duty of care to avoid causing a psychiatric injury arises, the legislature has tightened them again. In part the Act follows *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* in listing factors such as the suddenness of the shock, presence at the scene and relationships between the parties as matters of fact going to the reasonable foreseeability of harm, but confines this list to the purposes of the section. Those purposes are to resolve one matter on which there was a difference of opinion in *Tame* — whether it is still a requirement at common law that the defendant ought to have been able reasonably to foresee that a person of *normal fortitude* might suffer a recognised psychiatric illness.

All the jurisdictions that have enacted legislation on the duty of care in relation to mental harm have followed the Ipp Committee and resolved the dispute by statutorily requiring reasonable foreseeability that a person of normal fortitude might in the circumstances of the case suffer a recognised psychiatric injury. This restriction applies not only to cases of “pure” mental harm, but also to consequential mental harm. For this purpose, “the circumstances of the case include the injury to

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90 Recommendation 29(g)(i), set out in the text above.
91 *Civil Liability Act 2002* (NSW), s 5D(3); *Civil Liability Act 2003* (Qld), s 11(3); *Civil Liability Act 2002* (Tas), s 13(3); *Civil Liability Act 2002* (WA), s 5C(3).
93 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 76 ALJR 1348; 191 ALR 449; Aust Torts Reps 81-672; 36 MVR 1; [2002] HCA 35. See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; 77 ALJR 1205; 198 ALR 100; Aust Torts Reports 81-702; [2003] HCA 33.
94 *Wrongs Act 1958* (Vic), s 72(2). See also *Civil Liability Act 2002* (NSW), s 32(2); *Civil Liability Act 1936* (SA), s 33(2); *Civil Liability Act 2002* (WA), s 5S(2); *Civil Law (Wrongs) Act 2002* (ACT), s 34(2); compare *Civil Liability Act 2002* (Tas), s 34(2) (only two factors listed). Queensland has not legislated in this respect.
95 The High Court in *Tame* required that the defendant ought reasonably have been able to foresee that a person such as the plaintiff might suffer a *recognisable* psychiatric illness. The legislation speaks of a *recognised* psychiatric illness. There is some room for an argument that “recognised” is narrower than “recognisable”. The Ipp Committee’s recommendation 33, that a panel of experts be appointed to develop guidelines for assessing whether a person has suffered a recognised psychiatric illness, appears to have been ignored.
96 Above n 14, recommendation 34(b).
97 *Wrongs Act 1958* (Vic), s 72(1); *Civil Liability Act 2002* (NSW), s 32(1); *Civil Liability Act 1936* (SA), s 33(1); *Civil Liability Act 2002* (Tas), s 34(1); *Civil Liability Act 2002* (WA), s 5S(1); *Civil Law (Wrongs) Act 2002* (ACT), s 34(1).
98 *Wrongs Act 1958* (Vic), s 74(1). The other legislation that deals with consequential mental harm does not prescribe this specifically, but includes consequential mental harm in the same sections as are referred to in n 97.
the plaintiff out of which the mental harm arose". The restriction does not apply where the defendant knew or ought to have known that the plaintiff was not a person of normal fortitude. Where a person of normal fortitude would foreseeably be affected to the extent of contracting some recognised psychiatric illness, but the plaintiff by reason of some special susceptibility unknown to the defendant is affected to a greater extent, the “eggshell skull” principle presumably still applies and the plaintiff may recover for all the loss. However, where the plaintiff suffers some physical injury and the “eggshell skull” principle would have allowed recovery for consequential mental harm, that seems to be no longer the case unless a person of normal fortitude would also have suffered a recognisable psychiatric injury.

The Wrongs Act, s 75, follows the Ipp Report in prohibiting the court from awarding damages specifically for economic loss for mental harm resulting from negligence unless the mental harm amounts to a recognised psychiatric illness. The other jurisdictions that have legislated on the topic confine this specifically to consequential mental harm. All these provisions may prevent claims for economic loss resulting from so-called “functional overlay”.

Where the Wrongs Act and the legislation in some of the States depart significantly from Tame and anything in the Ipp Report is to impose generally a requirement that in three-party cases the plaintiff either witness the events at the scene of the accident or be in a close relationship with the person endangered. Thus someone who is not in a close relationship with the direct victim must actually be present at the scene when the direct victim is injured, killed or endangered. Unlike the common law, presence at the aftermath is apparently not sufficient. However, someone in a close relationship with the direct victim need not be present at the scene or the aftermath, but presumably may be told of the events. Close relationship is not defined in Victoria. Presumably, where a child is negligently injured or killed in the course of birth, both parents would be in a “close relationship” with it and so would not be prevented from recovering damages if they suffered a recognised psychiatric illness on being told of it, even if the father was not present and the mother was under an anaesthetic at the

99 Wrongs Act 1958 (Vic), s 74(2); Civil Liability Act 2002 (NSW), s 32(3); Civil Liability Act 1936 (SA), s 33(2)(b) (circumstances include “nature of the bodily injury”); Civil Liability Act 2002 (Tas), s 34(3) (adds “nature and extent” of the injury); Civil Liability Act 2002 (WA), s 5S(3); Civil Law (Wrongs) Act 2002 (ACT), s 34(3) (“nature of the bodily injury”).

100 Wrongs Act 1958 (Vic), ss 72(3) and 74(1)(b); Civil Liability Act 1936 (SA), s 33(3). The language in some of the other jurisdictions differs slightly (court not required to disregard what defendant knew or ought to have known about the plaintiff’s fortitude): Civil Liability Act 2002 (NSW), s 32(4); Civil Liability Act 2002 (Tas), s 34(4); Civil Liability Act 2002 (WA), s 5S(4); Civil Law (Wrongs) Act 2002 (ACT) s 34(4).

101 Above n 14, recommendation 37.

102 Civil Liability Act 2002 (NSW), s 33; Civil Liability Act 1936 (SA), s 53(3); Civil Liability Act 2002 (Tas), s 35; Civil Liability Act 2002 (WA), s 5T (“pecuniary loss”); Civil Law (Wrongs) Act 2002 (ACT), s 35(2).

103 Wrongs Act 1958 (Vic), s 73(2). See also Civil Liability Act 2002 (NSW), s 30; Civil Liability Act 1936 (SA), s 53; Civil Liability Act 2002 (Tas), s 32.

104 Compare the definition in the Civil Liability Act 1936 (SA), s 53(1)(b). The Civil Liability Act 2002 (NSW), s 30(5) and Civil Liability Act 2002 (Tas), s 32(2), allow a remedy to a “close member of the family” who was not present and go on to define this term. In general, a duty may be owed to parents, spouses, children, siblings and some equivalents.
time, provided it was reasonably foreseeable that a person of normal fortitude might suffer such an illness. Would a grandmother qualify in such circumstances? The significance of the section is reduced by virtue of the fact that the whole Part does not apply to transport accidents, claims by persons entitled to workers’ compensation and to dust-disease and smoking claims, where the common law will continue to apply, unless limited by some other statutory provision.105 However, in the case of a dust-disease or smoking claim that arises out of the provision of a health service, the section is applicable.106 In New South Wales, the Law Reform (Miscellaneous Provisions) Act 1944, which used to provide for certain relatives who were not present at the scene of an accident to be able claim for nervous shock has been repealed by the Civil Liability Act 2002 (NSW), but its operation has been preserved for smoking and dust-related claims which fall outside that Act.107 The similar provisions in the two Territories continue to apply.108

Thresholds

Even if plaintiffs can prove all the elements of a negligence claim, however, they may still not be entitled to compensation. Subject to a range of exclusions,109 non-economic loss may be compensated in Victoria and most other jurisdictions only where the plaintiff surmounts a threshold. A person who suffers a lesser injury can in Victoria still recover compensation for economic loss. Non-economic loss is defined as meaning:

any one or more of the following—
(a) pain and suffering;
(b) loss of amenities of life;
(c) loss of enjoyment of life.110

The Ipp Committee recommended that the threshold be 15 per cent of a most extreme case.111 This level had already been adopted in New South Wales.112 It has

105 Wrongs Act 1958 (Vic), ss 69(1) and 73(3).
106 Wrongs Act 1958 (Vic), s 69(2).
108 Civil Law (Wrongs) Act 2002 (ACT), s 36; Law Reform (Miscellaneous Provisions) Act, Part VII.
109 The exclusions vary from jurisdiction to jurisdiction. The statutes usually, but not always, exclude intentional torts, sexual misconduct, smoking and dust-related cases and cases to which motor accident and workers’ compensation statutes apply. See Wrongs Act 1958 (Vic), s 28LC (smoking and dust-related cases, though excluded from other Parts of the Act, not excluded here); Civil Liability Act 2002 (NSW), s 3B; Civil Liability Act 1936 (SA), s 51 (which states the causes of action to which the damages provisions apply, rather than the exclusions); Civil Liability Act 2002 (Tas), s 3B; Civil Liability Act 2002 (WA), s 3A; Civil Law (Wrongs) Act 2002 (ACT), s 93 (only workers’ compensation claims excluded).
110 Wrongs Act 1958 (Vic), ss 28C and 28LB. Compare Trade Practices Act 1974 (Cth), s 87D (adding “disfigurement”); Civil Liability Act 2002 (NSW), s 3 (adding “disfigurement”); Civil Liability Act 2003 (Qld), s 51 (“general damages” defined in this way and also adding “disfigurement”); Civil Liability Act 2002 (WA), s 9 (“non-pecuniary” rather than “non-economic” and adding to the three others, “(d) curtailment of expectation of life; and (e) bodily or mental harm”); Civil Law (Wrongs) Act 2002 (ACT), s 99 (inclusive, not exhaustive, definition which also adds “disfigurement”). The South Australian Act has no relevant definition.
111 Above n 14, recommendation 47.
since been adopted by the Commonwealth for the purposes of non-economic loss damages for personal injury under the *Trade Practices Act 1974* (Cth): see s 87S. A different approach was adopted in Victoria and most other jurisdictions. In Victoria the threshold for non-economic loss requires the plaintiff to have suffered a “significant injury”. Significant injury is defined in ss 28LF and depends on assessment of the degree of impairment, according to a procedure laid down, by an approved medical practitioner or a medical panel. In most instances of physical injury, the threshold is more than 5 per cent; in cases of psychiatric injury, the threshold level is more than 10 per cent. For the 5 per cent threshold, the degree of impairment is assessed in accordance with the AMA Guides and operational guidelines laid down. Claims for loss of a foetus or loss of a breast are regarded as “significant” without further assessment. For purposes of the assessment of the psychiatric threshold, the AMA Guides apply with modifications. Claims may also be made without assessment if the parties agree to waive the need for assessment.

**Limits on damages**

The Ipp Committee recommended a cap on damages for non-economic loss of $250,000. The Commonwealth and Queensland have accepted this level of capping. South Australia has set the top of its indexed scale at slightly less. In the other jurisdictions, there is either no cap or it is higher. The Victorian

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112 *Civil Liability Act 2002* (NSW), s 16(1). It was higher than the 10% threshold that had been adopted in the *Motor Accidents Compensation Act 1999* (NSW), s 131. It has recently been criticised as possibly too high: see Spigelman, *The New Liability Structure*, above n 16.

113 Queensland has no threshold, but a sliding scale: *Civil Liability Act 2003* (Qld), s 62. South Australia also had a sliding scale, but provides a threshold of significant impairment for a minimum of seven days or a prescribed level of medical expenses: *Civil Liability Act 1936* (SA), s 52. Tasmania and Western Australia have thresholds of $4000 and $12,000 respectively (both indexed): *Civil Liability Act 2002* (Tas), s 27; *Civil Liability Act 2002* (WA), ss 9 and 10. The Northern Territory has a 5% impairment level: *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 27(2). The ACT has no threshold.

114 *Wrongs Act 1958* (Vic), s 28LE.

115 *Wrongs Act 1958* (Vic), ss 28LF(1) and (2), 28LG–28LNA.

116 *Wrongs Act 1958* (Vic), ss 28LB (definition of “threshold level”), 28LE and 28LF.

117 *Wrongs Act 1958* (Vic), s 28LH(1); this can be done before the injury has stabilised: s 28LH(2).

118 *Wrongs Act 1958* (Vic), s 28LF(1)(c) and (d).

119 *Wrongs Act 1958* (Vic), s 28LI.

120 *Wrongs Act 1958* (Vic), s 28LO.

121 It should be noted that many of the provisions dealt with in this section do not apply to some specific causes of action: see n 109 above.

122 Above n 14, recommendation 48.

123 *Trade Practices Act 1974* (Cth), s 87M (which also indexes the amount); *Civil Liability Act 2003* (Qld), s 62 (top of scale).

124 *Civil Liability Act 1936* (SA), s 52 ($241,500 in 2002).

125 Tasmania, Western Australia and the ACT.

indexed cap of $371,380, applies to injuries that occurred both before and after the date of the amending Act, 22 October 2002, unless proceedings had already been commenced in a court in respect of injuries that occurred before then.\textsuperscript{127}

In accordance with another of the Ipp Committee’s recommendations,\textsuperscript{128} in fixing the damages for non-economic loss, it is now permissible to refer to awards in other cases.\textsuperscript{129} Although the relevant section in Victoria is headed “Tariffs for damages for non-economic loss”, the Act does not require awards to be scaled according to the highest amount that may be awarded, as is done in some jurisdictions,\textsuperscript{130} and it is possible that the courts will construe the provision as not affecting awards that would otherwise fall below the maximum.\textsuperscript{131}

Damages for economic loss are also capped, this time in all jurisdictions.\textsuperscript{132} In most jurisdictions, when calculating damages for impairment of past or future earning capacity, “the court is to disregard the amount (if any) by which the claimant’s...”\textsuperscript{133}
gross weekly earnings would (but for the death or injury) have exceeded an amount that is” a multiple of average weekly earnings at the date of the award. The multiple varies from jurisdiction to jurisdiction, but in Victoria and several other States it is more than the Ipp Committee’s recommendation of twice average weekly earnings.

The largest component of an award of damages to a permanently injured plaintiff is almost always for future loss, including loss of earning capacity, but mainly for future care. The discount rate adopted is likely to have the most significant effect on the damages for such loss. Todorovic v Waller (1981) 150 CLR 402; 56 ALJR 59; 37 ALR 481 decided that at common law the rate adopted should be 3 per cent. The Ipp Committee recommended that the rate remain at 3 per cent and an appropriate regulatory body should recommend changes on six months’ notice. Seriously injured plaintiffs are greatly disadvantaged by the selection of a higher discount rate. Most jurisdictions have adopted a formula requiring future economic loss to be discounted at a rate of 5 per cent, unless a different rate is fixed by regulations. Tasmania and Western Australia have maintained their even higher rates. Only the ACT has continued with the common law.

Another area where limits are likely to have the heaviest impact on seriously injured plaintiffs is in relation to so-called Griffiths v Kerkemeyer damages, ie damages for voluntary attendant care and similar services provided to the plaintiff. In accordance with the Ipp Committee’s recommendation, these damages have now been limited by placing both a threshold and a cap on recovery for gratuitous attendant care services as defined in the statutes. Again, only the ACT has allowed them to continue.

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134 See n 132, above.
135 Above n 14, recommendation 49.
136 Above n 14, recommendation 53.
137 Wrongs Act 1958 (Vic), s 28I; Trade Practices Act 1974 (Cth), s 87Y; Civil Liability Act 2002 (NSW), s 14; Civil Liability Act 2003 (Qld) s 57 (no provision for different rate); Civil Liability Act 1936 (SA), s 57 (and definition of “prescribed discount rate” in s 3); Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 22.
138 Common Law (Miscellaneous Actions) Act 1986 (Tas), s 4 (7% or rate fixed by Governor); Law Reform (Miscellaneous Provisions) Act 1941 (WA), s 5 (6% or rate fixed by Governor).
140 Above n 14, recommendation 51.
141 Wrongs Act 1958 (Vic), ss 281A and 281B; Trade Practices Act 1974 (Cth), s 87W; Civil Liability Act 2002 (NSW), s 15; Civil Liability Act 2003 (Qld), s 59; Civil Liability Act 2002 (WA), ss 12-13; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 23. Compare Civil Liability Act 1936 (SA), s 58. Tasmania abolished such damages altogether a long time ago: Common Law (Miscellaneous Actions) Act 1986 (Tas), s 5.
Recently, some courts have come to recognise that damages may be awarded for the plaintiff’s loss of the ability to provide gratuitous services to others.\(^{142}\) The Ipp Committee recommended similar limits to those it recommended for gratuitous service provided to the plaintiff.\(^{143}\) Only a few jurisdictions have seen the need to adopt this recommendation.\(^{144}\)

Unlike a few other jurisdictions,\(^{145}\) Victoria has not seen the need to adopt the Ipp Committee’s recommendation to abolish exemplary (punitive) and aggravated damages.\(^{146}\) Backwell v AAA [1997] 1 VR 182; (1996) Aust Torts Reps 81-387, can therefore continue to apply in Victoria in respect of exemplary damages. It is doubtful whether aggravated damages have any role to play in relation to medical negligence claims.\(^{147}\)

It must also be remembered that the legislation contains provisions excluding certain types of action from the limits discussed in this section. The exclusions vary from jurisdiction to jurisdiction. The statutes usually, but not always, exclude intentional torts, sexual misconduct, smoking and dust-related cases and cases to which motor accident and workers’ compensation statutes apply.\(^{148}\)

**Structured settlements**

As already mentioned, the largest single component of very large damages awards is usually future care costs.\(^{149}\) At common law, the court could only make an award of damages in the form of a lump sum, which required the damages to be assessed once and for all.\(^{150}\) Assessing the amount of a lump sum to cover future costs is complex and expensive. Also, the calculation may be unfair in practice. The plaintiff may die prematurely so that the estate gains an undue windfall; the plaintiff may live far longer than expected and the provision may be inadequate; or the funds may be lost

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\(^{143}\) Above n 14, recommendation 52.

\(^{144}\) Wrongs Act 1958 (Vic), ss 28ID and 28IE; Trade Practices Act 1974 (Cth), s 87X; Civil Liability Act 2003 (Qld), s 59. Compare Civil Law (Wrongs) Act 2002 (ACT), s 100.

\(^{145}\) Trade Practices Act 1974 (Cth), s 87ZB; Civil Liability Act 2002 (NSW), s 21; Civil Liability Act 2003 (Qld), s 52; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 19

\(^{146}\) Above n 14, recommendation 60.


\(^{148}\) See Wrongs Act 1958 (Vic), s 28C (smoking and dust-related cases, though excluded from other Parts of the Act, not excluded here); Civil Liability Act 2002 (NSW), s 3B; Civil Liability Act 2003 (Qld), s 5; Civil Liability Act 1936 (SA), s 51 (which states the causes of action to which the damages provisions apply, rather than the exclusions); Civil Liability Act 2002 (Tas), s 3B; Civil Liability Act 2002 (WA), s 3A; Civil Law (Wrongs) Act 2002 (ACT), s 93 (only workers’ compensation common law claims excluded); Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 4.


\(^{150}\) Todorovic v Waller (1981) 150 CLR 402; 56 ALJR 59; 37 ALR 481.
through fraud or unwise investment. The new legislation authorises the court to make an award in the form of a structured settlement, which is defined as “an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means”.  

The legislation permitting a court to make an order for a structured settlement allows the court to do so only with the consent of the parties — it cannot order a structured settlement against their will. Federal taxation legislation has been amended to remove the disincentives to structured settlements. The legislation in Victoria falls short of the recommendation of the Law Reform Committee of the Parliament of Victoria, Legal Liability of Health Service Providers, which would have made it compulsory for a court to order a structured settlement if the damages for future loss exceeded $500,000 (indexed). It even falls short of the Ipp Committee’s recommendation, implemented in somewhat different terms in New South Wales and Queensland, that a court, proposing to make an award in excess of a certain sum for future economic loss, be required to inform the parties, who would then be encouraged to arrive at a structured settlement.

**Apologies**

There are also other measures to encourage potential litigants to avoid litigation altogether. Recognising that many plaintiffs want recognition of their injury, an explanation and an apology, the legislation encourages potential defendants to apologise for what has occurred. In the past, there was often a “wall of silence” after an injury, frequently on legal advice, as an apology was seen as an admission of liability. Now, the legislation makes it clear that giving an apology (“an expression of sorrow, regret or sympathy”), or reducing or waiving fees, does not amount to an admission of liability. On the other hand, the definition of “apology”, unlike that in some other jurisdictions, excludes “a clear acknowledgment of fault”.  

151 Wrongs Act 1958 (Vic), ss 28M and 28N; Trade Practices Act 1974 (Cth), s 87ZC; Civil Liability Act 2002 (NSW), ss 22-26; Civil Liability Act 2003 (Qld), ss 63-67; Supreme Court Act 1935 (SA), s 30BA (and equivalent legislation for the lower courts); Civil Liability Act 2002 (Tas), ss 7A and 8; Civil Liability Act 2002 (WA), ss 14 and 15; Civil Law (Wrongs) Act 2002 (ACT), s 106; Personal Injuries (Liabilities and Damages) Act 2003 (NT), ss 31 and 32.

152 Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002 (Cth).


154 Civil Liability Act 2002 (NSW), s 23; Civil Liability Act 2003 (Qld), s 64.

155 Above n 14, recommendation 57.

156 Wrongs Act 1958 (Vic), s 14I (definition of apology). Compare Civil Liability Act 2002 (NSW), s 68; Civil Liability Act 2003 (Qld), s 71; Civil Liability Act 1936 (SA), s 75; Civil Liability Act 2002 (Tas), s 7(3); Civil Liability Act 2002 (WA), s 5AF; Civil Law (Wrongs) Act 2002 (ACT), s 13; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 12. In some of these the relevant term is “expression of regret”.

157 Wrongs Act 1958 (Vic), ss 14J and 14K. Compare Civil Liability Act 2002 (NSW), ss 67-69; Civil Liability Act 2003 (Qld), ss 68-72; Civil Liability Act 1936 (SA), s 75; Civil Liability Act 2002 (Tas), ss 6A and 7; Civil Liability Act 2002 (WA), ss 5AF-AH; Civil Law (Wrongs) Act 2002 (ACT), ss12-14; Personal Injuries (Liabilities and Damages) Act 2003 (NT) ss 11-13.

158 Compare Civil Liability Act 2002 (NSW), s 68; Civil Law (Wrongs) Act 2002 (ACT), s 13. Most jurisdictions, however, do exclude admissions of fault from their definitions of apology or expressions of regret.


**Limitation period**

Finally, in accordance with the Ipp Committee’s recommendations, amendments have also been made to the limitation period. In Victoria, it is now three years from the time when an injury is discoverable; or 12 years from the date of the act or omission that caused the death or injury. The limitation period for minors and mentally incapacitated people is six years from when the injury is discoverable, or 12 years from the event that caused the injury, but is suspended if the plaintiff is a minor who is not in the care of a capable parent or guardian; or is incapacitated and not a represented person. Plaintiffs may apply to a court for an extension of the limitation period.

**Conclusion**

The legislative changes that followed the Ipp Committee’s report were clearly intended to limit the circumstances in which claims can be made and liability imposed; and also to limit the amount of compensation that is payable. The legislative changes create some new immunities from liability; limit recovery for psychiatric injury; reintroduce in modified form the *Bolam* test of professional negligence; replace the “not far-fetched or fanciful” test of foreseeability with one requiring that the risk be “not insignificant”; extend the scope of the traditional defence of voluntary assumption of risk; and provide caps, thresholds and a higher discount rate in relation to damages. There are also provisions not mentioned above dealing with contributory negligence, so that, for instance, contributory negligence can now defeat a claim.

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159 *Wrongs Act 1958* (Vic) s 14I. Cf *Civil Law (Wrongs) Act 2002* (ACT) s 14; *Civil Liability Act 2002* (NSW) s 69; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 12(b); *Civil Liability Act 2003* (Qld) s 71; *Wrongs Act 1936* SA s 39; *T Civil Liability Act 2002* (Tas) s 7(3); *Civil Liability Act 2002* (WA) s 5AF.

160 Above n 14, recommendations 24 and 25.

161 *Limitation of Actions Act 1958* (Vic), ss 27D and 27F. See also *Trade Practices Act 1974* (Cth), ss 87F-87H; *Limitation Act 1969* (NSW), ss 50C and 50D. Compare *Limitation Act 1974* (Qld), s 11 (3 years from arising of cause of action); *Limitation of Actions Act 1936* (SA), s 36 (3 years from accrual of cause of action); *Limitation Act 1974* (Tas), s 5 (3 years from accrual of cause of action); *Limitation Act 1935* (WA), s 38 (6 years from accrual of cause of action; 4 years if brought in trespass); *Limitation Act 1985* (ACT), s 16B (from 1 July 2003, 3 years — from discovery in cases of disease or disorder; from injury in other cases); *Limitation Act (NT)*, s 12 (3 years from accrual of cause of action).

162 *Limitation of Actions Act 1958* (Vic), ss 3(2) (meaning of “disability”).

163 *Limitation of Actions Act 1958* (Vic) s 27E. Under the *Trade Practices Act 1974* (Cth) and in New South Wales the comparable period is three years: *Trade Practices Act 1974* (Cth), s 87F; *Limitation Act 1969* (NSW), s 50C.


entirely.\textsuperscript{166} Other of the new provisions relating to the substantive law restate, rather than alter, the previous law. The common law, as emanating from the High Court of Australia, was already moving to a much more restrictive attitude towards the tort of negligence.\textsuperscript{167} But the interpretation of some of the legislative provisions is going to provide challenges for judges at all levels.

It is too soon to predict the impact that the legislative changes will have on insurance premiums, especially with the backlog of claims made in anticipation of legislative reform. In a recent report, the ACCC reached the following conclusion:

To date the ACCC’s monitoring program has shown costs and premiums for public liability insurance and professional indemnity insurance have increased overall between 1997 and June 2003. Some insurers that underwrite public liability insurance expect cost savings and constraint in premium increases to occur in 2003 following tort reform. Insurers that underwrite professional indemnity insurance do not expect costs and premiums in 2003 to be constrained as a result of such reforms. The ACCC will examine developments for the full 2003 year as part of the next monitoring report when data becomes available.\textsuperscript{168}

Only time will tell whether the legislative changes that have been made would have been better left to the common law or whether what was called for was a much more radical solution, such as the replacement of the common law entirely by a comprehensive compensation scheme such as that which has operated in New Zealand for 30 years.\textsuperscript{169}

\textsuperscript{166} Wrongs Act 1958 (Vic), s 63; Civil Liability Act 2002 (NSW), s 5S; Civil Liability Act 2003 (Qld), s 24; Civil Law (Wrongs) Act 2002 (ACT), s 47. This is contrary to the decision in Wynbergen v Hoyts Corp Pty Ltd (1997) 72 ALJR 65; 149 ALR 25; Aust Torts Reps 81-446.

\textsuperscript{167} In the period 2000-2003, only 12 of 36 (ie 33\%) decisions of the High Court relating to personal injury could be considered as pro-plaintiff, whereas in the period from 1987 to 1999, 80\% were: see Luntz H, “Editorial Comment: Round-up of cases in the High Court of Australia in 2003” (2004) 12 TLJ 1.

\textsuperscript{168} Australian Competition and Consumer Commission, Public Liability and Professional Indemnity Insurance: Second Monitoring Report (2004) http://www.accc.gov.au/content/index.phtml/itemId/484087/fromItemId/378570 viewed 26 February 2004. The following report, Australian Competition and Consumer Commission, Public Liability and Professional Indemnity Insurance: Third Monitoring Report (2004) http://www.accc.gov.au/content/item.phtml?itemId=530860&nodeId=file411b0abl4781d&fn=Public%20liability%20insurance%E2%80%94July2004.pdf viewed 16 August 2004, pp ix-x, found that in 2003 there was an increase of 17\% in public liability and 15\% in professional indemnity insurance premiums; in respect of the number of claims there was a marginal increase in the former category and the latter remained unchanged; and the average size of claims settled increased by 17\% in respect of public liability and 41\% in respect of professional indemnity. Owing to the “long tail” that liability insurance carries, many of these claims might not have been subject to the new regime.

\textsuperscript{169} Compare Luntz, above n 9.
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