CIVIL LIABILITY REFORM AND VOLUNTEER PROTECTION IN QUEENSLAND

Working Paper No. CPNS 18

DAVID MUIR, PROFESSOR JOHN DEVEREUX & PAUL TELFORD
(OVERVIEW OF CIVIL LIABILITY ACT)

PROFESSOR MYLES MCGREGOR-LOWNDES
(VOLUNTEER PROTECTION IN QUEENSLAND)

Centre of Philanthropy and Nonprofit Studies
Queensland University of Technology
Brisbane, Australia

June 2003

The Centre of Philanthropy and Nonprofit Studies is a research unit at the Queensland University of Technology. It seeks to promote research from many disciplines into the nonprofit sector.

The Centre of Philanthropy and Nonprofit Studies reproduces and distributes these working papers from authors who are affiliated with the Centre or who present papers at Centre seminars. They are not edited or reviewed, and the views in them are those of their authors.

A list of all the Centre’s publications and working papers are available from the address below:

© Queensland University of Technology 2003
Published by the Centre of Philanthropy and Nonprofit Studies
The Queensland University of Technology

GPO Box 2434
BRISBANE QLD 4001
Phone: +61 7 3864 1020
Fax: +61 7 3864 9131
Email: cpns@qut.edu.au
http://cpns.bus.qut.edu.au

ISBN 1-74107-026-0
ISSN 1037-1516
Civil Liability Act 2003

May, 2003

by David Muir, Prof. John Devereux & Paul Telford

Deacons
175 Eagle Street
Brisbane Qld 4000

Phone: (07) 3309 0777
Fax: (07) 3309 0999
Website: www.deacons.com.au
The Civil Liability Act 2003 (Qld) amends the Personal Injuries Proceedings Act 2002 (Qld). This legislation radically changed the assessment of damages for most personal injury claims commenced in Queensland on or after 18 June 2002.

The Civil Liability Act 2003 (Qld) amends the Personal Injuries Proceedings Act 2002 and imports into the law of Queensland provisions which alter common law principles concerning the determination of liability in civil actions commenced on or after 9 April 2003. In general, the amendments have the effect of making it more difficult for claimants to succeed in their actions.
Civil Liability Act 2003 (Qld)

Commencement

The Civil Liability Act 2003 (“the Act”) was proclaimed to commence from 9 April 2003. The amendments are partially retrospective, in that they extend to civil liability arising on or after 2 December 2002. Chapter 2, Part 2 of the Act, dealing with proportionate liability, will commence on a date to be proclaimed. The principal provisions of the Act are discussed below.

The law of civil liability (chapter 1, part 2)

The Act operates as an amendment to the Personal Injuries Proceedings Act 2002, although certain provisions of the Act relate to civil actions which do not involve claims for damages for personal injury, such as actions in negligence against professionals. The Act applies to any civil claim for damages for harm regardless of whether the claim is brought in tort, in contract, under statute or otherwise. “Harm” is defined broadly to include personal injury, damage to property and economic loss. The Act specifically binds the Crown.

The Act does not apply to circumstances of civil liability for claims for which there are already in place statutory compensation regimes (this includes, workers’ compensation claims, dust diseases claims and claims arising from exposure to tobacco smoke. Unlike the Personal Injuries Proceedings Act 2002, the Civil Liability Act 2003 will affect claims the subject of the compulsory third party legislation in Queensland.

Section 7(1) of the Act provides that the Act does not purport to create or confer any cause of civil action for the recovery of damages. Presumably, in the event of any discrepancy, a court will revert to the common law position concerning the operation of the law regarding breach of duty, as it existed pre the Civil Liability Act 2003.

Importantly, section 7(3) of the Act notes that parties may contract out of the provisions of the Act. Chapter 2 of the Act then sets out a number of general principles of the law of negligence and contains several provisions concerning the application of these principles in certain situations. These are discussed separately.

Breach of duty (part 1, division 1)

The Act introduces an obligatory two-tier test for determining whether a person has breached a duty of care by failing to take precautions against a risk of harm (Section 9). Each limb of the test must be satisfied as a pre-requisite to the finding of a breach of duty. The first tier recognises that only certain risks will give rise to a claim:

1. The risk must be foreseeable (that is, a risk which a person knew or ought reasonably to have known);
2. The risk must not be insignificant;
3. In the circumstances, a reasonable person in that person’s position would have taken precautions against a risk of harm.
In addition, a court is now bound to take into account the following factors when considering whether a person has failed to take reasonable steps to minimise or avoid the risk:

1. The probability that the harm would occur if care were not taken;
2. The likely seriousness of the harm;
3. The burden of taking precautions to avoid the risk of harm;
4. The social utility of the activity that creates the risk of harm.

Section 9 largely involves a re-statement of the common law position. Further, given that the test in section 9 is a test as to whether a person has not breached a duty, it is arguable that the test might be satisfied and yet a court could still find that a defendant has not been negligent in the circumstances of the claim.

Section 10 goes on to provide the following “other principles” in relation to liability for breach of duty:

1. The burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible;
2. The fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to liability;
3. The subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to liability.

It is also arguable that these “other principles” also simply clarify, rather than re-state, the common law.

**Causation (chapter 2, part 1)**

Section 11 of the Act contains a statement of general principles concerning the manner in which it is to be determined whether a breach of duty has caused particular harm. For there to be a finding that negligence was causative of harm, the following elements must be satisfied:

1. The breach of duty must be a necessary condition of the occurrence of the harm (in the Act, this is called “factual causation”);
2. It must be appropriate for the scope of the liability of the person in breach to extend to the harm so caused (in the Act, this is called “scope of liability”).

If it is relevant to the determination of factual causation to determine what the person who has suffered harm would have done if the person in breach of their duty had not been in breach, the matter is to be determined subjectively in the light of all relevant circumstances. However, a statement made by the person after suffering the harm about what he or she would have done is inadmissible for this purpose (except to the extent (if any) that the statement is against the person’s interests).
Assumption of risk (chapter 2, part 1)

Some of the more controversial sections in the Act involve provisions for determining liability in cases of obvious and inherent risks. An obvious risk is defined as a risk which would have been obvious to a reasonable person in the position of the person who suffered the harm, and include risks that are a matter of common knowledge (Section 13). A risk may be classified as obvious even though it has a low probability of occurring and even if the risk is not prominent, conspicuous or physically observable. Although these provisions appear broad, the Act specifically provides that a risk cannot be classified as obvious if it is a risk concerning a thing which has been created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing.

Section 14 of the Act is also of great significance in that it reverses the onus of proof in claims involving an obvious risk where the defendant has raised the defence of volenti non fit injuria (voluntary assumption of risk). A person will be deemed to be aware of the type or kind of an obvious risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

Pursuant to section 15 of the Act, a person does not need to be warned of an obvious risk except in the following circumstances:

1. The person has requested advice or information about the risk;
2. The defendant is required by a written law to warn the plaintiff of the risk; or
3. The defendant is a professional, other than a doctor, and the risk is a risk of death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

Other than in connection with a duty to warn of a risk, a person cannot be liable in negligence for an occurrence caused through the materialisation of an inherent risk, defined as the risk of something occurring that cannot be avoided by the exercise of reasonable care and skill. (Section 16)

Dangerous recreational activities (chapter 2, part 1)

Division 4 of Chapter 2 imports into the Civil Liability Act 2003 a regime for determining liability in claims arising from dangerous recreational activities. Dangerous recreational activity is defined as a recreational activity that involves a significant risk of physical harm. A person will not be liable in negligence for harm suffered arising from the combination of an obvious risk and a dangerous activity.

The New South Wales equivalent – the Civil Liability (Personal Responsibility) Act 2002 provides that nothing in the written law of New South Wales renders waiver clauses restricting liability void or unenforceable (section 5N). This provision has not yet taken effect and awaits passage through the Commonwealth Parliament of the Trade Practices Amendment (Liability for Recreational Service) Bill 2002. There is no similar recognition in the Queensland legislation.
Professional responsibility (chapter 2, part 1)

In relation to doctors, a breach of the duty to warn of a risk will not occur unless the doctor fails to provide for the benefit of the patient information about the risk:

1. That a reasonable person in the patient’s position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice; and

2. That the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

For the purpose of this section, “patient” includes a person who has the responsibility for making a decision for another person under a legal disability.

Section 21 provides that, except in the case of providing advice concerning a warning of risk of harm, a professional does not breach a duty of care where their services were provided in a manner consistent with a standard widely accepted by their peers, unless this body of professional opinion is irrational or contrary to written law.

This section represents a significant departure from the common law duty expected of a professional. Unfortunately, “professional” is simply defined as someone practising a profession. Neither the terms “widely accepted” nor “peer professional opinion” are defined in the Act. However, the Act does state that peer professional opinion does not have to be universally accepted to be considered widely accepted. Further, the fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of determining what is widely accepted by peer professional opinion as competent professional practice.

Contributory negligence (chapter 2, part 1)

The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who has suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm (Section 23). The operation of the common law has been altered in that a court may determine a reduction of 100% for contributory negligence if the court thinks it is just and equitable to do so (Section 24).

Good Samaritans (chapter 2, part 1)

A Good Samaritan cannot be held liable in respect of any act or omission in an emergency when assisting a person who is apparently injured or at risk of being injured. The Act does not define “Good Samaritan”, but rather proceeds by reference to a “person in distress”, a term which is broadly defined in section 25 to include:

1. A person who is injured, apparently injured or at risk of injury; and

2. A person who is suffering, or apparently suffering, from an illness.
Civil liability will not attach to a person rendering first aid or other assistance to a person in distress. For the purposes of the section, the Good Samaritan must be performing duties to enhance public safety for a prescribed entity, in the circumstances of an emergency and without reckless disregard for the safety of the person in distress.

**Proportionate liability (chapter 2, part 2)**

Chapter 2 of Part 2 of the Act only applies to claims for damages exceeding $500,000 and has no application in respect of personal injury actions. These provisions will commence on a date to be proclaimed.

The intention of the Part is to limit the damages payable by any given defendant to an amount which represents that proportion of the plaintiff’s damages which are attributable to that defendant’s conduct. The provisions affecting this are as follows:

1. The liability of a defendant who is a concurrent wrongdoer in relation to a claim is limited to an amount reflecting the proportion of the damage claimed, that the court considers just having regard to the extent of that defendant’s responsibility for the damage (Section 30(1)).

2. In apportioning responsibility between defendants in proceedings the court is to exclude the proportion of the damage to which the plaintiff is contributorily negligent and the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings (section 30(3)).

3. The provisions apply whether or not all concurrent wrongdoers are party to the proceedings (section 30(4)).

4. A defendant against whom judgment is given as a concurrent wrongdoer cannot be required to contribute or indemnify another concurrent wrongdoer in respect of the claim (whether in the same or different proceedings).

5. A plaintiff who has previously recovered judgment against a concurrent wrongdoer is not prevented from bringing another action against another concurrent wrongdoer. However, the plaintiff cannot recover total damages greater than the actual damage suffered.

Section 31 of the Act maintains the position of joint and several liabilities in the case of agency, fraud (including breaches of section 38 of the *Fair Trading Act* (Qld) and section 52 of the *Trade Practices Act* (Cth)) and also with respect to concurrent defendants that formed a common intention to commit an intentional tort and actively took part in the commission of that tort. In circumstances where a plaintiff engages a professional to advise in relation to prospective loss prevention, both the person whose actions cause the loss and the professional can be jointly and severally liable.

Section 33 of the Act provides that these sections will operate subject to the common law rules of vicarious responsibility.
Liability of public authorities (chapter 2, part 3)

Part 3 of Chapter 2 concerns the civil liability of public or other authorities, including the Crown, government departments, public health organisations and local councils. The Part applies to civil liability including liability where damages are sought in an action for breach of contract or any other action.

Section 35 of the Act sets out a number of general principles to be employed in determining whether an authority has a duty of care or has breached a duty of care. The provisions largely reflect recent developments in case law involving public authorities. Most importantly, when determining whether an authority ought to have exercised a function, the courts must take into account the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions.

The Act deals specifically with liability claims against road authorities. A road authority is not liable for harm arising from the failure to carry out roadwork, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm (Section 37).

Volunteers (chapter 2, part 3)

A volunteer cannot be held liable for an act or omission while doing community work organised by a community organisation or as an office-holder of a community organisation. A volunteer is defined as a person who does community work on a voluntary basis. Community work is defined as work that is not for private financial gain and that is done for charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purposes.

The protection contained in section 39 of the Act does not apply in the following situations:

1. If the volunteer at the time of the act or omission was engaged in conduct that constitutes a criminal offence;

2. If the volunteer was significantly impaired by alcohol or drugs and the volunteer failed to exercise reasonable care and skill in doing the work;

3. The volunteer knew or ought to have known that he or she was acting contrary to instructions or outside the scope of the activities authorised by the community organisation;

4. If the liability of the volunteer is a liability that is required by law to be insured against;

5. If the liability would be covered by a motor vehicle third party insurance policy;
Recovery by criminals (chapter 2, part 4)

Pursuant to the section 45 of the Act, no damages can (generally) be awarded if the person whose death, injury or damage, the subject of the proceedings, was engaged in conduct that constitutes an indictable offence (whether proven or not) and the conduct contributed to the risk of harm. At the discretion of the court, this absolute defence may be lifted although the court must reduce the damages by at least 25% to take into account the plaintiff’s criminal conduct.

The Effect of Intoxication (Chapter 2, Part 4)

The provisions of Division 2 of Part 4 introduce significant changes to liability claims arising from situations in which claimants are intoxicated. Intoxication is defined to include being under the influence of alcohol or drugs to the extent that a person’s capacity to exercise proper skill and care is impaired.

Except for claims arising on licenced premises, a defendant does not owe an intoxicated plaintiff a duty of care merely because the plaintiff is intoxicated, nor does the defendant owe the plaintiff a higher standard of care than if the plaintiff was sober. Similarly, a court cannot take into account the prospect that a person may be intoxicated when considering whether a duty of care arises (Section 46).

A court will presume contributory negligence to the extent of not less than 25% in respect of a claim brought by or on behalf of a person who was intoxicated at the time the harm occurred. This presumption may be rebutted by proof of those matters set out in section 47(3), including that the intoxication was not self-induced. A higher level of contributory negligence will be assumed in the case of a plaintiff who was driving a motor vehicle at the time he or she suffered harm.

If the plaintiff (as passenger) in an action seeking damages for personal injury arising out of a motor vehicle accident was at least 16 years old and was, or ought reasonably to have been aware that the defendant (driver) was intoxicated, a court will also presume contributory negligence of not less than 25%. Again, this presumption can be rebutted (Section 48).

Section 48(5) of the Act removes the defence of volenti non fit injuria (voluntary assumption of risk) in respect of these types of claims.

The assessment of damages (chapter 3)

Chapter 3 of the Act is concerned with claims for personal injury damages and mirrors similar provisions in the Personal Injuries Proceedings Act 2002, although extends their application to other claims, such as those involving motor vehicles. These provisions include (by way of example):

1. Section 52 of the Act which precludes a court from awarding exemplary, punitive or aggravated damages in relation to a claim for personal injury damages, except for circumstances involving an intention unlawful act, sexual assault or sexual misconduct;
2. Section 54 which provides that damages for loss of earnings are limited to that amount which is 3 times the average weekly earnings per week;

3. All claims for future loss (including damages for the provision of future gratuitous services) will be subject to a discount rate of 5%;

4. A defendant intending to argue that a plaintiff has failed to mitigate his or her damages must give the plaintiff a written notice to that effect. (Section 53)

Interest is no longer available for awards in respect of general damages, defined to include pain and suffering, loss of amenities of life, loss of expectation of life or disfigurement.

Sections 61 and 62 of the Act prescribe a formula for the quantification of general damages. Provisions contained in the Personal Injuries Proceedings Act 2002 relating to structured settlements are also expanded.

Apologies (chapter 4)

An “expression of regret” made by or on behalf of a person in connection with any matter alleged to have been caused by the person does not constitute an admission of fault or liability by the person and is not relevant to the determination of fault or liability in connection with the matter. An expression of regret will be inadmissible in a claim arising from the incident which gave rise to the apology.

Other provisions

The Act thereafter amends the Personal Injuries Proceedings Act 2002, including the introduction of a two-stage notification procedure that will apply in respect of claims involving medical negligence.
Volunteer Protection in Queensland

Abstract

A minor element of current tort law involves the protection of volunteers from personal civil liability. Queensland has enacted the Civil Liability Act 2003 (Qld) protecting volunteers (including office holders) of community organisations from personal civil liability. America pioneered such legislation with all state and the federal jurisdiction enacting protection for volunteers from personal civil liability. This article examines the implications of the Queensland provisions and identifies issues for further consideration.

Professor Myles McGregor-Lowndes
Director
Centre of Philanthropy and Nonprofit Studies
Queensland University of Technology
GPO Box 2434
Brisbane, Queensland, Australia
Phone: +61 7 3864 2936
Fax: +61 7 3864 9131
E-mail: m.mcgregor@qut.edu.au
http://cpns.bus.qut.edu.au
Introduction

A minor element of the tort law reform sweeping Australia involves the protection of volunteers from personal civil liability. Queensland has enacted the Civil Liability Act 2003 (Qld) protecting volunteers (including office holders) of community organisations from personal civil liability in the course of their duties. America pioneered such legislation after their ‘civil liability crisis’ in the early 1990s with all states and the federal jurisdiction enacting provisions to protect volunteers from personal civil liability.

The Queensland provisions depart from both the American and other Australian jurisdiction models in a number of areas that are worthy of discussion. The article first places volunteer protection in a policy context of volunteering statements and then moves to examine the immediate civil liability issues in Queensland. A detailed examination of the legislation is then undertaken with emphasis on the issues community organisations and volunteers face in taking advantage of the provisions.

Volunteer statements

The International Year of the Volunteer in 2001 focused attention on a celebration of the thirty two percent of the Australian adult population that contributed 704.1 million hours of voluntary work. The equivalent wages would be $8.9 billion. The Year of the Volunteer also generated policy statements about volunteers in various places, from the United Nations to the Queensland Government.

A common feature of the volunteering statements is that volunteers should be protected from risk. The United Nations’ recommendations for the support of volunteering suggest that governments consider measures to provide "coverage and protection against risks, in a way fitting the particular society." The International Association for Volunteer Effort (IAVE) in its Universal Declaration on Volunteering calls on organisations and communities to "provide appropriate protections against risks for volunteers and those they serve", and for governments "to remove any legal barriers to participation."

In Australia, the National Agenda on Volunteering: Beyond the International Year of Volunteers states that:

---

1 Civil Liability Act 2003 (Qld), Part 3, Division 2.
2 The Volunteer Protection Act 1997 42 USC § 14503 (a)
3 The Civil Act 2002 (NSW); Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic); The Volunteer Protection Act 2001 (SA); Volunteer (Protection from Liability) Act 2002 (WA); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Civil Law (Wrongs) Act 2002 (ACT); Volunteers Protection Act 2003 (Cth). At the time of writing, Tasmania was proposing to introduce a Bill.
7 International Association for Volunteer Effort, The Universal Declaration on Volunteering, (adopted at the 16th World Volunteer Conference, Amsterdam, The Netherlands, January, 2001).
"Many volunteers are exposed to risk, injury, discrimination or prejudice in the absence of explicit mention in legislation. Others carry huge financial responsibility or are exposed to legal liability. It is in the interests of all Australians that volunteers are protected under law."\(^8\)

The Volunteering Australia model code of practice for organisations involving volunteer staff requires that the organisation will "provide volunteer staff with a healthy and safe workplace" and "appropriate and adequate insurance coverage for volunteer staff".\(^9\) The code of volunteer rights published by the same organisation states that a volunteer has the right "to be adequately covered by insurance".\(^10\)

The Queensland Government's volunteering policy states that:

"Government and volunteer organisations share an aspiration to ensure that volunteers are protected. This includes facilitating access to affordable and suitable insurance cover for volunteer involving organisations, ensuring that legislation does not create unnecessary impediments to volunteering, and considering legislative protection for volunteers. The outcome also relates to a broader goal of skilling organisations to ensure management of the kinds of risks that insurance cover (sic)."\(^11\)

The initial policy draft suggested a round table on risk management, insurance and indemnity issues and alternatives for volunteer insurance including legislative and policy approaches.\(^12\) The final policy simply states the "government will consider legislative mechanisms for ensuring volunteers are able to continue with their volunteering activities."\(^13\)

Such issues in these policy statements were a response to the general unease of volunteers about the prospect of civil liability litigation, expressed well before the tightening insurance market and the September 11 terrorist event. Although volunteers themselves may be injured in performing their activities, there are few reported cases of volunteers being sued for negligent acts or omissions,\(^14\) as will be discussed later in the article. This concern expressed by volunteers about their civil liability exposure was the driving force behind the South Australian Parliament passing the Volunteer Protection Act 2001 (SA). The South Australian Government identified that a major disincentive to volunteering is the prospect of a volunteer incurring serious personal liability for damages and legal costs in proceedings for negligence. It believed that a reasonable balance could be maintained between the rights of those injured to receive compensation and the need to protect a volunteer from personal liability:

---


\(^13\) Queensland Government, op cit n 11 at p 7.

\(^14\) Refer text below at notes 33 & 78.
"(a) by limiting the personal liability for negligence of a volunteer who works for a community organisation and transferring the liability that would apart from this Act attach to the volunteer to the community organisation:  
(b) by limiting the right to bring proceedings against the volunteer personally and hence reducing the risk to a volunteer of incurring legal costs as a result of the voluntary work."\textsuperscript{15}

The South Australian provisions are based on American provisions to protect volunteers from personal liability. In the late 1980s, several US federal politicians began proposing ways to remove the personal liability from volunteering.\textsuperscript{16} In 1990, President George H.W. Bush released a model act and called for its state-by-state adoption. State legislatures began to enact their own volunteer protection statutes and President Clinton signed the final version of the federal \textit{Volunteer Protection Act} into law on June 18, 1997.\textsuperscript{17} The federal \textit{Volunteer Protection Act} provides immunity for volunteers serving nonprofit organisations or governmental entities for harm caused by their acts or omissions if:

- the volunteer was acting within the scope of their responsibilities at the time;
- as appropriate or required, the volunteer was licensed, certified, or authorized to act; and
- the volunteer was not operating a vehicle, aircraft, or boat for which state law required a licence and insurance.

The Act pre-empts state laws to the extent that they are inconsistent with it, but it does not pre-empt state laws that provide greater protection from liability for volunteers. The federal legislation specifically does not pre-empt conditions in state laws that:

- make immunity available only to nonprofit organisations that adhere to appropriate risk management procedures;
- make nonprofit organisations liable for the acts and omissions of volunteers to the same extent that employers are liable for the acts and omissions of employees; or
- make immunity available only to nonprofit organisations that provide third parties with a financially secure source of recovery, such as liability insurance.

The protections do not apply if:

- the volunteer’s misconduct constitutes a crime of violence, a hate crime, a sexual offence, a violation of state or federal civil rights laws;

\textsuperscript{15} Volunteer Protection Act 2001 (SA), Preamble.  
\textsuperscript{16} For example, Congressman John Porter proposed a volunteer protection Act with the bill number 911 to draw attention to the issue.  
\textsuperscript{17} 42 U.S.C. §§ 14501-14504.
it was committed under the influence of drugs or alcohol or it constituted an act of international terrorism; or
the volunteer engages in wilful or criminal misconduct, gross negligence, reckless misconduct, or flagrant disregard for the rights and safety of the person harmed.

The provision neither provides protection to the nonprofit organisation or governmental body that organises the services of a volunteer, nor protects a volunteer from liability to the nonprofit organisation.

The American Non-Profit Risk Management Center believes that it was unlikely that large numbers of volunteers withdrew because of the fear of liabilities or that potential volunteers did not volunteer because of the liability issue. It maintains that the evidence shows a steadily increasing volunteer rate even during the period before the enactment of the provisions. It does acknowledge that there was considerable community concern about the issue of volunteers being caught in litigation. The Center’s research reveals that, three years after the legislation was introduced, the number of suits filed against volunteers had not declined. It explains this by reference to the limited nature of the protection and further that the provisions, “may be helpful to plaintiffs seeking damages from volunteers, in that it makes it clear how a suit must be styled to require a review of the facts by a judge or jury.”

While reported cases against Australian community organisations (rather than individual volunteers) receive general publicity in the popular press, there are few reported cases of volunteers being sued for actions arising out of their volunteer activities. However, as illustrated by the results of community consultations at international, national and state forums to produce statements for the International Year of the Volunteer, volunteers are concerned about their exposure to liability. It is volunteer officer holders of nonprofit organisations that have been involved in some very public reported cases involving personal liability. A successful action against the chair of the Victorian National Safety Council for allowing that organisation to trade whilst it was insolvent, resulting in $97 million in damages, is an exceptional case.

Volunteer office bearers have been subject to increasing legal proceedings for breaches of their duty to prevent insolvent trading, unfair dismissal claims by employees and internal disputes in nonprofit associations. However, this was not the immediate trigger for the Queensland volunteer protection provisions, which were part of a larger community concern about civil liability.

The immediate Queensland context

A long, soft insurance market cycle ended in early 2001 and all sectors of the economy started to experience the effects of a hard market. Insurance markets run in cycles. A ‘soft’ period is a buyer’s market where premiums are low and insurance companies actively compete for business. This is followed by a ‘hard’ period that is a seller’s market, where premiums rise without any relation to loss history or profile. Insurers leave parts of the market, or leave the market altogether, through insolvency. This was

19 Ibid, p 12
20 Ibid, p 12.
exacerbated in Australia by the collapse of HIH, which had a substantial share of the public liability market priced below a sustainable level. The September 11 attacks also impacted on the reinsurance market.

In 2001, a survey undertaken by Commerce Queensland of 1,400 mainly small to medium sized businesses revealed that around a quarter had faced premium increases of approximately 50% in 2001. In September 2001, the State Government requested the Queensland Events Corporation to investigate the difficulties being experienced by event organisers. The survey indicated that 41.6% of respondents had faced increases in premiums of more than 50% in the past three years and that 21% would have to cancel or scale down their events due to the cost or lack of viability of insurance. Sport and recreation organisations experienced rises of between 40-900% and others were not able to obtain insurance for some of their ‘high risk’ activities.

A Queensland Council of Social Services Survey of its 800 members, released in July 2001, reported that approximately 50% of 357 respondents indicated that premiums had increased, or would increase. The average rise was between 30-40%. Some organisations could not find an insurer; others decided to let policies such as property and volunteer protection lapse. Volunteering Queensland, the peak volunteering body in Queensland, also insisted that its members taking its referrals of potential volunteers have adequate insurance cover.

By the end of 2001, the State Government was forced into a number of pragmatic reactions to the fact that vital community organisations were unable to obtain or afford insurance cover. For example, in December 2001, the State Government pledged to underwrite public liability insurance premiums for Parents and Citizens’ Associations, which faced premiums as high as $1 million. It also provided $80,000 in emergency funding to ensure that the Blue Light discos for youth, conducted by the Queensland Police Service, were not cancelled by a 700% increase in insurance premiums.

A more measured policy response was the Queensland Government’s appointment of a Liability Insurance Taskforce to investigate the impact of public liability insurance premiums. On 3 February 2002, the Federal Government announced a national forum of State Ministers to gather data on premium increases and share information, and arrive at a range of proposals to be considered by the Council of Australian Governments in March 2002. The Assistant Treasurer, the Hon Helen Coonan, emphasised that the public liability insurance issue was one of State rather than Federal responsibility, but that the Federal Government was willing to provide a forum to facilitate a coordinated approach across jurisdictions.

---

The Queensland State Government Taskforce proposed a number of options to assist community organisations to obtain appropriate insurance cover and to reduce the cost of cover to these groups.\textsuperscript{29} It also considered legal reforms for capping personal liability, but volunteer protection was not specifically dealt with in the report.

The State and Federal National Forum’s \textit{Review of the Law of Negligence} (Ipp Report) devoted a chapter to nonprofit organisations\textsuperscript{30} and another section to the issue of volunteer liability. The Report recommended that such nonprofit organisations should not have their liability limited for negligently caused personal injury or death.\textsuperscript{31} The reason given for this position was:

“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.”\textsuperscript{32}

The review noted that nonprofit organisations provide a diverse range of services to the public with significant risks to the public of suffering and personal injury, often to the underprivileged and vulnerable members of society. The risks were no different from those facing for-profit organisations, and nonprofits should face incentives to take care in their operations and be responsible to those suffering injury because of their fault.

In respect of volunteer protection, the Ipp Report stated that:

“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.”\textsuperscript{33}

The Ipp Report examined the South Australian \textit{Volunteers Protection Act 2001} (SA) and the imposition of liability on the community organisation for the acts and omissions of the volunteer. It decided not to make a recommendation that this should be followed, as it would adversely “affect the interests of not-for-profit community organisations.”\textsuperscript{34} It characterises the South Australian provision as an exception to the basic rule that vicarious liability attaches to the relationship of employer and employee. Later in this article it will be argued that the current state of the law is not so clear as stated by the Review and community organisations may face the prospect of being vicariously liable.\textsuperscript{35}

The Ipp Report also recommended that there be no change to the case in which a Good Samaritan gives assistance in an emergency. It was unable to find cases, claims or insurance-related difficulties arising out of such situations.\textsuperscript{36}

\begin{footnotesize}
\footnote{31} Ibid, Recommendation 10, p 61.
\footnote{32} Ibid, p 60.
\footnote{33} Ibid, p 170.
\footnote{34} Ibid, p 170.
\footnote{35} See text accompanying note 78 below.
\footnote{36} Op cit n 30, Recommendation 16 at p 70.
\end{footnotesize}
However, at the second Ministerial Meeting on Public Liability Insurance on 30 May 2002, there was agreement for the protection of volunteers and nonprofit organisations despite the Ipp Report’s recommendations. The New South Wales Government acted promptly with the *Civil Liability Amendment Act 2002*, assented to on 18 June 2002, which the Joint Communiqué of the Ministerial Meeting of 15 November regarded as a model for other jurisdictions. Part Nine of the New South Wales Act deals with protection of volunteers from civil liability, and the Queensland provisions in respect of volunteers follow the general pattern of these provisions. There are, however, some differences, which will be noted below.

**Queensland Civil Liability Act 2003**

Part 3 Division 2 of the *Civil Liability Act 2003* deals with the protection of volunteers from civil liability while doing community work. It differs from provisions in other States, but shares a number of concepts with the New South Wales provisions.

Section 39 of the Act states:

“A volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work—
(a) organised by a community organisation; or
(b) as an office holder of a community organisation.”

The words ‘volunteer’, ‘community work’ and ‘community organisation’ are all further defined in section 38. These definitions confine the protection of the volunteer by an activity test and an organisational test.

The definition of a volunteer is quite traditional and section 38 defines ‘volunteer’ to mean a person who does community work on a voluntary basis. A volunteer can be reimbursed their reasonable expenses in doing their work without affecting their volunteer status. The reimbursement of reasonable travel or meal costs, for example, will not affect their status as a volunteer.

**Community work**

The activity test is found in the definition of ‘community work’. Community work means work that is not for private financial gain and is done for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose. The word ‘work’ in this context is widely defined to include any activity.

The widely drafted list of activities is not confined to charitable activities that must be for certain purposes and for the public benefit. The expression of activities is more concise than similar provisions in other jurisdictions. The Western Australian provisions specifically include conservation, environment and even more broadly “for any other purpose approved under section 4(1)(f) of the *Associations Incorporation Act 1987*.”

---

37 Press Release 15 Nov 2002
is likely that the definition of charity in Queensland would include a significant proportion of conservation and environmental activities. The Victorian provisions include ‘tourism’ in that jurisdiction’s list of activities.

Western Australia, New South Wales, South Australia, Northern Territory, Australian Capital Territory and Victoria all have provision to deal further with such activity classification by regulation. Queensland has not made provision for regulations and it is unlikely that section 74, which contains general regulation power, could be of any assistance to making regulations in this instance.

Before examining the types of organisations, it is worth noting that section 38 requires that the type of work must be ‘organised’ by the community organisation. The meaning of organised includes ‘directed or supervised’ by the community organisation. This would appear to exclude volunteers that act unilaterally to assist a community organisation without any prior recognition by the organisation. A volunteer who assists without the knowledge of the organisation may have difficulty in seeking protection from liability (unless the Good Samaritan provisions apply). For example, neither

- a person who starts collecting funds for an organisation without any prior notice to the organisation,
- a stranger who independently appears at a fire and works alongside volunteer rural fire brigade workers,

would come within the ordinary meaning of ‘organised’.

It is already a widespread practice to require volunteers to be formally identified before they begin an activity for a community organisation.

The organisational test contained in section 38 defines ‘community organisation’ to mean:

- a corporation;
- a trustee acting in the capacity of a trustee;
- a church or other religious group;
- a registered political party; or
- a government agency, local authority or public authority.

The definition of a corporation would include an Incorporated Association and a company limited by guarantee; the two most common legal forms for Queensland nonprofit organisations. Section 36 of The Acts Interpretation Act 1954 (Qld) defines

41 Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic), s 36.
42 The Civil Act 2002 (NSW) s 60(2); Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic) s 36; The Volunteer Protection Act 2001 (SA); Volunteer (Protection from Liability) Act 2002 (WA) s 3; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 7 (7); Civil Law (Wrongs) Act 2002 (ACT) s 7.
43 It is doubtful that the power to make a statutory instrument for the section would be within section 22 of the Statutory Instruments Act 1922 (Qld).
44 Other Good Samaritan provisions may apply.
‘corporation’ as including a body politic or corporate. A ‘body politic’ in modern legal usage refers to a political unit such as the Crown in right of the Commonwealth or a State or Territory. Government departments are not bodies politic in their own right, but part of the Commonwealth, State or Territory. It can also mean a foreign nation and its government. The term ‘body politic’ has, in the past, been applied to ‘other organized groups with a government’.45 However, it appears to have fallen into disuse.

‘Body corporate’ is not further defined in the Acts Interpretation Act 1954(Qld), but it does have a common law meaning. In common law, ‘body corporate’ and ‘corporation’ have the same meaning. A body corporate is an organisation or office that has been incorporated, for example by Royal Charter, letters of patent, or statute. Nearly six hundred Queensland nonprofit organisations have letters of patent under The Religious Educational and Charitable Institutions Act 1861 (Qld) and a number are established by Royal Charter.

The Corporations Act 2001 (Cth), which facilitates the registration of companies limited by guarantee, is only one of many statutes that establish corporations. Examples of body corporates created by other authorities are:

- Incorporated Associations;
- Cooperatives;
- Bodies created under the Roman Catholic (Incorporation of Church Entities) Act 1994 (Qld); and
- Organisations under the Industrial Relations Act 1999 (Qld).

Examples of body corporates created by their own special Act are:

- Uniting Church in Australia Act 1977 (Qld);
- The Brisbane City Council under (City of Brisbane Act 1924(Qld)); and
- Corporations Sole (eg. The Minister of Education pursuant to the Education (General Provisions) Act 1989 (Qld) which acts for Parents and Citizens’ Associations in State schools).

Trustees acting in their capacity of a trustee will also be a type of community organisation for the purposes of the provisions. Some organisations, often known as foundations, are charitable trusts. An example is the Queensland Community Foundation whose trustee is The Public Trustee in Queensland.

The definition of community organisations also includes ‘a church or other religious group’. In this context, a church would refer not to a building, but a “quasi-corporate institution which carries on the religious work of the denomination whose name it bears”.46 In many instances, the larger denominations have legal structures where the

46 MacLaughlin v Campbell [1906] 1 Ir R 877, per FitzGibbon LJ.
members of the church have a consensual compact based on a set of beliefs, which is, at best, an unincorporated association.\footnote{Scandrett v Dowling (1992) 27 NSWLR 483; McPherson, “The Church as Consensual Compact, Trust and Corporation” (2000) ALJ 159.} Other legal vehicles hold the property of the church on behalf of the members. McPherson J in Bailey v The Uniting Church in Australia 1984 1 Qd R. 42 at 46-47 wrote of the Letters of Patent of the Presbyterian Church of Queensland that it is:

“quite clear that what is incorporated are simply the holders for the time being of ...the association to which they belong, and not the members of the association as such.”\footnote{Bailey v The Uniting Church in Australia 1984 1 Qd R. 42 at pp 46-47}

A registered political party as defined under the Electoral Act 1992 (Qld) or the Commonwealth Electoral Act 1918 (Cth) will also be a type of community organisation.

The last type of organisation is a public or other authority that is defined in section 34 as:

“(a) the Crown (within the meaning of the Crown Proceedings Act 1980 (Qld)); or
(b) a local government; or
(c) any public authority constituted under an Act.”

It is not commonly recognized that governments do engage significant numbers of volunteers. Conroy recently surveyed Queensland Government departments to find that four of the larger departments had over 90,000 volunteers.\footnote{Conroy, Preliminary Research Findings: Volunteers in Queensland State Government, (Centre of Philanthropy and Nonprofit Studies Working Paper No 5, Brisbane 2002), p 5.}

**Volunteer office holders**

Queensland and New South Wales are the only jurisdictions where ‘an office holder of a community organisation’ is specifically mentioned in the volunteer protection provisions. This would include management committee members in an Incorporated Association and directors of a company limited by guarantee. In a Letters of Patent body, the corporators (usually by reference to a office such as Chair, Master of the College or Archbishop) mentioned in the letters patent would fall within the definition, and might extend to other offices not on the face of the Letters patent themselves, but included in the constitution of the organisation.

In most United States jurisdictions, the provisions also apply to office holders, although it is expressly stated that the organisation can still sue the office holder in spite of the legislative protection.\footnote{The US Federal Act protects volunteers from suit, but retains the ability for the organisation to sue the volunteer, The Volunteer Protection Act 1997 42 USC § 14503(a) Section 4 (b&c). The definition of volunteer includes “director, officer, trustee or direct service volunteer” S 6 (B).} Office holders may do injury to the organisation, particularly in respect of their duties owed primarily to the organisation. It is by no means clear whether, under the right circumstances, a nonprofit organisation might be prevented from suing its office holder for a breach of their duties to the organisation. It would be unusual public policy for such an action to be prevented.
Commencement of Volunteer Protection

The provisions take effect on 9 April 2003, the day the Act was given assent. The provisions would apply to volunteer activities after the 9 April 2003. Some other parts of the Act are retrospective in operation and some commence on a date fixed by proclamation. Although the courts will presume that mere procedural matters are retrospective, this is not the case in this instance because it deals with the rights of a party to seek redress for injury.\(^51\) It is clear that these provisions are not retrospective and so volunteers who have attracted civil liability claims before 9 April 2003 will still have to deal with such claims.

Matters outside the Civil Liability Act

Some matters are expressly excluded from the Civil Liability Act 2003 (Qld) and thus a volunteer will not be protected from any personal civil liability arising from such matters. Section 9 excludes any civil claim for damages for an injury:

- resulting from the breach of duty owed to the claimant, or including an injury as defined under the Workcover Queensland Act 1996;
- that is a dust-related condition; or
- resulting from smoking or other use of tobacco products or exposure to tobacco smoke.

The Workcover Queensland Act 1996 (Qld) ought not as a matter of public policy be overridden by the provisions of the Civil Liability Act 2003 (Qld). The Workcover Queensland Act 1996 (Qld) also contains provisions dealing with a number of volunteer situations, such as counter disaster volunteers, rural fire brigade members and persons in voluntary or honorary positions with religious, charitable, benevolent or nonprofit organisations.\(^52\) The provisions are expressed so that Workcover Queensland may insure such persons, but they fall outside the range of persons that employers are required by law to insure with Workcover Queensland, and thus the Civil Liability Act 2003 (Qld).

A complex situation could arise where, as part of a worker’s employment, the employer directed their employees to ‘volunteer’ for a community organisation. ‘Business – community partnership’ in 2000-01 involved some $182 million of such assistance from businesses to community organisations.\(^53\) Is the person a ‘volunteer’ or a ‘worker’? If the person is being directed by his or her employer as part of their duties to ‘volunteer’ for a community organisation, then it is likely that:

- the person will fall under the provisions in the Workcover Queensland Act 1996 (Qld); and

---

\(^{51}\) Maxwell v Murphy (1957) 96 CLR 261 and Azzopardi v South Johnstone Co-operative Sugar Milling Assoc Ltd [1953] St Qld 120.

\(^{52}\) Workcover Queensland Act 1996 (Qld) Division 3, Subdivision 1.

\(^{53}\) Australian Bureau of Statistics, Generosity of Australian Business, (Cat no 8157.0, Canberra 2002) p 3. Such arrangements normally involve the voluntary transfer of money, goods or services in exchange for strategic business benefits.
• be outside the definition of volunteer in the Civil Liability Act 2003 (Qld), as section 38(2) which defines a volunteer as not receiving any remuneration.

It is a matter worth considering in the provisions of business community partnerships, which are becoming more common. 54

**Acting outside the scope of activities or contrary to instructions**

Section 42 withdraws the protection of volunteers from personal liability if they knew or ought reasonably to have known that they were acting:

• outside the scope of activities authorised by the community organization; or
• contrary to instructions given by the community organisation.

As many organisations are formalising their volunteer processes with role descriptions, induction training, formal supervision review meetings and other policy documents, these written documents may well serve to provide evidence to the court about whether the provision applies in a particular situation.

**Liability not excluded for criminal acts**

A volunteer will be unable to claim the protection of the Act if, at the time of the act or omission giving rise to the liability, they were engaged in conduct that constitutes an offence. An offence refers to a criminal offence that is defined in The Criminal Code as “an act or omission which renders the person doing the act or making the omission liable to punishment.” 55 The term includes all types of illegal acts and omissions punishable under the criminal law of Queensland and this includes not only those offences in the Code, but also in other statutes. 56 It will not include an offence against the law of the Commonwealth. 57 The standard proof required is the civil standard, being on the balance of probabilities, rather than the more onerous ‘beyond reasonable doubt’.

**Liability not excluded if insurance required**

Section 43 denies a volunteer the protection of the provisions if a written Queensland law requires the liability to be insured against. The most common liability that is required by statute to be insured against by nonprofit organisations is ‘damage to property, death or bodily injury occurring upon the property of the incorporated association’. 58 However, it appears that this may not be an instance covered by the section as it refers to the liability of the association, not that of the Incorporated Association’s volunteers.

A more relevant example is s 36 of the State Counter-Disaster Organisation Act 1975 (Qld) where insurance is required to cover members of the State Emergency Service (SES) or local emergency service. A majority of serious accidents involving personal

---


55 The Criminal Code (Qld) s 2.

56 Hunt v Maloney 1959 Qd. R. 164 at 169.


58 Incorporated Associations Act 1981 (Qld) s 70.
civil liability occur in respect of motor vehicles. Section 44 of the Civil Liability Act provides that the provisions of volunteer protection do not apply where a CTP insurance policy under the Motor Accidents Insurance Act 1994 (Qld) applies.

**Intoxicated volunteers**

Section 41 provides that any claim where the volunteer was intoxicated when doing the work and failed to exercise due care and skill when doing the work will be excluded from protection. The meaning of ‘intoxicated’ includes a person under the influence of alcohol or a drug to the extent that a person’s capacity to exercise proper care and skill is impaired. This will include not only alcohol, but also medication, which may inadvertently affect the ability of a volunteer.

**Position of the community organisation**

The impact of the Civil Liability Act 2003 (Qld) on community organisations that engage volunteers is also worthy of examination. Some jurisdictions provide a specific provision that renders the community organisation vicariously liable for a volunteer’s acts and omissions, even though the volunteer is immune from legal action. In Queensland the provisions are silent on this aspect.

Although there are few reported cases about the duty of care of a community organisation to its volunteers, it appears that they owe them similar duties to those of their paid employees. In *Di Bella v La Boite Theatre Inc and Cairns City Council*, White J noted that a volunteer performer in the context of providing a safe workplace “was in the same position as an employee” to a community organisation. Workplace Health and Safety provisions in all jurisdictions make little distinction between employees, independent contractors, visitors and volunteers. The Federal Ipp Report, in response to the term of reference about exempting or limiting the liability of nonprofit organisations, made a strong recommendation that they not be exempted or given any concessions in respect of liabilities.

It is evident that community organisations are beginning to manage their responsibilities to volunteers with the same seriousness as required for employees. Volunteering Australia Inc, the peak body of volunteering organisations, has devised national standards for the human resource management of volunteers. These take in policies for recruiting volunteers including: pre-engagement reference checks; screening and interview; job descriptions to induction processes; ongoing training and development; grievance procedures; work appraisals; discipline and feedback; recognition; and even termination and exit interviews. It may appear that one difference from employee policies is that there would be no policies about remuneration of volunteers. Although

---

59 Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic) s 37(2); The Volunteer Protection Act 2001 (SA) s 5; Volunteer (Protection from Liability) Act 2002 (WA) s 7; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 7(3); Civil Law (Wrongs) Act 2002 (ACT) s 9.

60 No. 113 of 1999 District Court of Queensland, (15 February 2001) at p 6.

61 For example, Workplace Health and Safety Act 1995 (Qld) s 10


63 Volunteering Australia, National Standards for involving volunteers in not for Profit Organisations, (2nd ed, Volunteering Australia Inc, Melbourne 2001).
this is correct, there are policies on reimbursing volunteer expenses such as travel, meals and other personal expenditure and significant policies on recognising the efforts of volunteers and their service delivery performance. If community organisations are treating their volunteers on the same basis as employees, except that they are rewarded in different ways, will this influence the courts to extend the vicarious liability of community organisations for their employees to also include their volunteers?

Employers are vicariously liable for the torts of their employees. The vicarious liability arises because of the special relationship between the defendant and the wrongdoer and may not involve any element of fault on the part of the employer. Clearly volunteers are not employees, because there is no contract of employment and there is no consideration or payment for services. However, as indicated above, all the other incidents of employment are now being found in the relationship between a community organisation and a volunteer. Will the category of special relationships that constitute vicarious liability be widened to include the volunteer relationship?

The courts have recognized that the driving basis of vicarious liability is one of public policy, rather than common law principles. The policy justifications are numerous ranging from Bacon’s indulgence thesis and Pollock’s analogy, to other areas of strict liability, to economic theories of loss distribution. The Chief Justice of the Australian High Court in a consideration of three cases involving vicarious liability stated:

“The absence of a satisfactory and comprehensive jurisprudential basis for the imposition of liability on a person for the harmful acts or omissions of others – vicarious liability, as it is called – is a matter which has provoked much comment. It may be that the lack of a satisfactory jurisprudential bias is referable, at least in significant part, to the fact that certain cases have been decided by reference to policy considerations without real acknowledgement of that fact.”

An examination of whether the court could justify adding the volunteer relationship to other special relationships involving various liabilities is beyond the scope of this article, but there are some signs of judicial movement in that direction.

There are a number of authorities that consider the issue of whether volunteers are employees for the purposes of vicarious liability. Atiyah, in his early text on vicarious liability, notes that scoutmasters are not servants of the Boy Scouts Association. Nor is this the case for a member of a Salvation Army band. Trindade and Cane give an example of social service authorities and foster parents.

The Laws of Australia commentary on vicarious liability for criminal matters states that:

---


69 Murphy v Zoological Society (1962) Times, November 14th; London General Omnibus Co. v Booth (1983) 63 LJQB 244.

70 Trindade & Cane, op cit n 64 at p 734.
“It is unclear whether the vicarious responsibility extends to the conduct of a person who is not employed as an agent or employee but who performs a similar task as a friend, relative or volunteer.”

The doctrine of common employment also has what Atiyah describes as “one odd corner of the law” applicable to volunteers. In common employment, employers were protected from actions by their employees seeking to make the employer liable for the acts of fellow servants. This is now abolished by statute. There is a series of cases where a person renders voluntary assistance to an employee and in the course of doing so is injured. Volunteers could not invoke a relationship of vicarious liability with the employer as it would put them in a better position than the employee. Munkman in his text *The Employer’s Duty at Common Law* states that, after the abolition of this defence, the relationship of master and servant could be established where a volunteer was unpaid and the employer would be vicariously liable. He boldly states that:

“In principle, the relationship of master and servant is also created, and all of the usual consequences follow, where a plaintiff has volunteered to do work without pay under the orders of another person.”

He draws upon volunteer rescuer cases to support this statement.

In *Seely v Gray*, White J noted Munkman’s thesis about volunteers, but failed to consider it fully. In that case, a work experience student was injured leading a bull. He claimed that he was working in a voluntary capacity. The facts showed that the plaintiff, through persistent disobedience of instructions, was not under the control of the defendant and was neither an employee, nor volunteer.

More recently, Higgins J positively stated by way of *obiter dicta* that “Vicarious liability does not attach only to the actions of paid employees and agents. It also applies to volunteers.” In that case, a gym teacher used students as volunteers to assist in preventing injury to other students attempting handstand exercises. The school authority, through the teacher, instructed and supervised the volunteers and a vicarious relationship resulted between the wrongdoer and the school authority. Authority for the proposition was based on the case of *Pratt v Patrick* [1924] 1 KB 488 where the owner of a car was held vicariously liable for the negligence of a volunteer driver of the car in which he was a passenger. Eburn, who has written extensively in the area of legal liability of emergency service volunteers, states:

---


72 Atiyah, op cit n 66 at p 419.

73 *Degg v Midland Rly Co* (1857) 1 H & N 733.


75 Ibid, p 630.

76 For example, *Chadwick v British Transport Commission* [1967] 2 All ER 945.

77 (1987) 48 SASR 130 at p 146.

“Although volunteers are not employees, the principle is the same, they are acting for the benefit of their organisation and it would be unreasonable for them to pay, or the person harmed by their conduct to look to them to pay, so the organisation will be liable.”

The Ipp Report discussed the issue of whether community organisations should be vicariously liable for the torts of their volunteers as proposed by the Volunteers Protection Act 2001 (SA). The report noted that volunteers were not employees because there was no contract of service, not independent contractors as there was no contract for services and that they typically were not agents. It was decided to make no recommendation on the matter because to recommend vicarious liability would conflict with the objectives of their terms of reference to limit liability in negligence rather than expand it. This would specifically affect the interests of community organisations.

Despite the Ipp report, the provisions in Western Australia, South Australia, Victoria, Australian Capital Territory and the Northern Territory make the community organisation that is supervising the volunteer vicariously liable for the actions of the volunteer. This is omitted in New South Wales and Queensland and there is no indication about whether a community organisation is or is not vicariously liable for the tort of a volunteer.

If a community organisation is at common law vicariously liable not only for the torts of its employees, but also its volunteers, then can it be liable for the torts of a volunteer who is protected from suit by a volunteer protection provision? Does the immunity of a volunteer from civil suit also extinguish the various liability of the community organisation? Atiyah states that:

“as soon as the tort was committed a cause of action against both the master and servant vested in the plaintiff, and although the latter was destroyed, nothing has happened to take away the former”.

He bases this proposition on two authorities that concern mere procedural bars. One, that a felon cannot be sued in tort unless first prosecuted and the other where a servant obtains a certificate of discharge for the assault that also occasioned the tort. The cases of Broom v Morgan [1953] 1 QB 597 and Waugh v Waugh (1950) 50 SR (NSW) 210 were about the personal immunity of husband and wife from suit under the old common law. Although the plaintiff could not sue their spouse, could the spouse’s employer be sued vicariously? The English Court of Appeal in Broom v Morgan found that the situation was properly characterised as “immunity from suit and not an immunity

---

80 Ibid, op cit n 30, p 170.
81 Ibid, pp 170-171.
82 Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic) s 37(2); The Volunteer Protection Act 2001 (SA) s 5; Volunteer (Protection from Liability) Act 2002 (WA) s 7; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 7(3); Civil Law (Wrongs) Act 2002 (ACT) s 9.
83 Atiyah, op cit n 66 p 8
84 Osborn v Gillett (1873) L.R. 8 Exch. 88.
85 Dyer v Munday [1875] 1 QB 742.
from duty or liability". The employer was vicariously liable, not withstanding that the wife was unable to sue the husband. A similar view was taken in *Waugh v Waugh* by the New South Wales Court of Appeal.

It may well be that New South Wales and Queensland community organisations face vicarious liability for the torts of their volunteers, but the situation is unclear. This uncertainty is unfortunate as it creates a sense of apprehension among those who are charged with administering community organisations: in the main, volunteers, even if the volunteers might seek a personal indemnity under the Act.

The final issue that many community organisations may consider is the ability of such organisations to have an indemnity, agreement or understanding with volunteers whereby they would indemnify the organisation for any liability due to vicarious liability. The volunteer protection provisions in Victoria, Northern Territory and Western Australia make such indemnities of no effect. The Queensland provisions in section 7(3) positively state that it “does not prevent the parties to a contract from making express provisions for their rights, obligations and liabilities” to any matter to which the provisions apply. It appears that an appropriately worded agreement with indemnities between a volunteer and their community organisation may be permitted under the Queensland provisions.

**Conclusion**

The volunteer protection provisions, although minor in the scheme of current civil liability reform, will have an impact on the way in which community services are delivered. Volunteers should not be too complacent that they are simply protected for any volunteering activity that they perform, but look to the extensive restriction placed on such immunity from suit. Now that tort compensation in respect of the wrong doing of a volunteer is removed, the policy issue of financial support for those who suffer personal injury is yet to be resolved. In some jurisdictions it has been resolved by placing the burden on the community organisation. This may be a defective remedy for those reluctant to sue uninsured and asset poor nonprofit organisations. In Queensland, one view of the law is that it will be up to the injured party to make their own arrangements. This may also not be a socially desirable outcome given that volunteers often deal with the underprivileged and vulnerable members of society who are in the worst position to make such arrangements.

In those jurisdictions where the community organisation is liable for the torts of their volunteers, it can be expected that they will take far more care to appropriately manage the risks that this poses for the organisation. Ironically, many community organisations in New South Wales and Queensland will choose to act as if they were vicariously liable for the torts of their volunteers because the law is unsettled on this issue.

---

86 Broom v Morgan [1953] 1 All ER 849 at p 855.
87 *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic) s 40; *Volunteer (Protection from Liability) Act* 2002 (WA) s 8; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 7(5).
CIVIL LIABILITY ACT 2003

Act No. 16 of 2003
Extract of Legislation

The complete text of the Act can be obtained from the Queensland Government Web site http://www.legislation.qld.gov.au. (Look under Bills tab and then Bills introduced in 2003.)

Division 2—Volunteers

38 Interpretation

(1) In this division—

“community organisation” means any of the following that organises the doing of community work by volunteers—

(a) a corporation;
(b) a trustee acting in the capacity of trustee;
(c) a church or other religious group;
(d) a registered political party as defined under the Electoral Act 1992 or the Commonwealth Electoral Act 1918 (Cwlth);
(e) a public or other authority as defined under section 34.

“community work” means work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose.

“organised” includes directed or supervised.

“volunteer” means a person who does community work on a voluntary basis.

“work” includes any activity.

(2) For the purposes of this division—

(a) community work done by a person under an order of a court is not to be regarded as work done on a voluntary basis; and

(b) community work for which a person receives remuneration by way of reimbursement of the person’s reasonable expenses in doing the work is to be regarded as work done on a voluntary basis.

39 Protection of volunteers

A volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work—
(a) organised by a community organisation; or
(b) as an office holder of a community organisation.

40 Liability not excluded for criminal acts

This division does not confer protection from personal liability on a volunteer in relation to an act or omission of the volunteer if it is established (on the balance of probabilities) that at the time of the act or omission the volunteer was engaged in conduct that constitutes an offence.

41 Liability of intoxicated volunteer not excluded

The protection from personal liability conferred on a volunteer by this division in connection with any community work does not apply if the volunteer—

(a) was intoxicated when doing the work; and
(b) failed to exercise due care and skill when doing the work.

42 Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions

This division does not confer protection on a volunteer from personal liability in relation to an act or omission of a volunteer if the volunteer knew or ought reasonably to have known that he or she was acting—

(a) outside the scope of the activities authorised by the community organisation concerned; or
(b) contrary to instructions given by the community organisation.

43 Liability not excluded if insurance required

This division does not confer protection from personal liability on a volunteer if the liability is a liability that is required under a written law of the State to be insured against.

44 Liability not excluded for motor accidents

The protection from personal liability conferred on a volunteer by this division does not apply if the liability would, apart from this division, be covered by a CTP insurance policy under the *Motor Accident Insurance Act 1994*, or be recoverable from the Nominal Defendant under that Act.