
Do we need a sign on every rock in the water? Standard of care in negligence and the Tourism Industry in Western Australia

Dr Pauline Sadler,
School of Business Law
Curtin University of Technology

Abstract

If a tourist is accidentally injured while visiting Western Australia, he or she may seek damages in the tort of negligence. The *Civil Liability Act 2002* (WA) (*CLA 2002*), based on the Ipp Report, has altered the legal position with respect to such claims. This article examines the *CLA 2002*, and offers the tourism industry in Western Australia some insight into the effect of the Act. The *Occupiers' Liability Act 1985* (WA) is also discussed. Cases referred to include *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479, *Wyong Shire Council v Shirt* (1980) 146 CLR 40 and *Nagle v Rottneest Island Authority* (1993) 177 CLR 423.

Introduction

Fortunately most tourists and holidaymakers return home unscathed, but we often hear dire stories about visitors to an area who, for example, are lost in the outback, or who fall over cliffs, or who find themselves in difficulty in the sea or in rivers. 307 overseas visitors to Australia died accidentally between 1997 and 2000, mostly as a result of motor vehicle accidents or drowning.¹ From this statistic it may be assumed that a great many more were accidentally injured. What is not always appreciated, however, is that one of the outcomes of the accidental event may well be litigation if the injured person, or a relative of someone who has died, wants damages to compensate for the loss or injury he or she has suffered.

This article examines recent legislative changes to the law of negligence in Western Australia that will have an effect on the standard of care required of persons

involved in the tourism industry. The particular focus is on 'occupiers' liability', that is, the liability of those responsible for the 'premises,' in the loosest sense of that word, on which the tourist incurred the injury. This is the liability, for example, of a local council or authority that has responsibility for the seaside, river or lake where a tourist drowns, or is injured in a swimming or surfing accident.

It is the *Civil Liability Act 2002* (WA) (*CLA 2002*) that has brought about the changes to the law of negligence, and the sections on standard of care came into effect on 1 December 2003. There are as yet no decided cases to indicate how the courts will interpret these sections. This article will examine significant cases decided prior to the *CLA 2002* as these decisions may give an insight into the way the judiciary will approach the new legislation.

¹ J. Wilks & D. Pendergast, 'Accidental deaths of overseas visitors in Australia 1997-2000' (2003) 10(1) *Journal of Hospitality and Tourism Management*.

Background to the *CLA 2002*

In Australia the so called ‘insurance crisis’ brought about an explosive rise in premiums for some parties, for example medical specialists, and the absolute non-availability of insurance coverage for others, such as the organisers of high risk social activities, including many that are tourism orientated such as trail riding on horse back or sky diving. The insurance crisis was blamed on the way in which judicial decisions in negligence cases had become increasingly plaintiff-orientated at the expense of the defendant, with the defendant’s deep pocket insurer suffering the consequences.²

In 2002, as the result of a series of meetings involving Ministers from the Commonwealth, States and Territory governments, it was agreed that there should be a review of the law of the negligence by a Panel of four persons, chaired by the Honourable Mr Justice Ipp. The focus of the Panel’s terms of reference was primarily on liability for negligently caused personal injury and death. The Panel handed down its report in two parts, one in August 2002, the second in September 2002. The report as a whole is referred to as the Ipp Report.³

The Ipp Report’s first recommendation was that for the sake of uniformity across Australia all the recommendations should be incorporated into a single statute to be enacted in each jurisdiction. While the universal single statute has not eventuated, some or all of the proposed changes have been adopted, or will be adopted, in most states and territories. In Western Australia the changes are incorporated, with some modification, in the *CLA 2002*. The Ipp Report made many recommendations, but only the ones enshrined in the *CLA 2002* that are relevant to standard of care are considered here.

² J. J. Spigelman, ‘Negligence and insurance premiums: Recent changes in Australian law’ (2003) 11 *Torts Law Journal* 293.

³ *Review of the Law of Negligence Report* (2002) Canberra (referred to as the Ipp Report).

The legal requirement in a negligence action

In the situation where a tourist or other visitor is injured on ‘premises’, the tourist is the plaintiff and the occupier of the premises, whoever or whatever that occupier may be, is the defendant. The legal cause of action underlying such ‘occupier’s liability’ is the tort of negligence. To succeed in a negligence action, the plaintiff must prove all of the following:

- that the defendant owes the plaintiff a duty of care (**the duty of care**);
- that the defendant has failed to conform to the required standard of care (**the standard of care**);
- that there has been material damage to the plaintiff (**damage**), caused by the defendant and which is not too remote.⁴

Fleming defines the duty of care as, ‘an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others.’⁵ The history of the duty concept shows that the courts have always envisaged that there must be a closeness between the parties, a relationship neatly crystallised in Lord Atkin’s ‘neighbour’ speech in *Donoghue v Stevenson*.⁶ Lord Atkin said: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’⁷ Almost without exception an occupier will owe a duty of care to a person coming onto their premises, so this element of negligence will not be discussed further. ‘Damage’ (caused by the defendant which is not too remote) will also be assumed.

It is the standard of care that is most important in the context being examined here, because the issue is what the defendant should have done (or should not have

⁴ *Lochgelly Iron & Coal Co v M’Mullan* [1934] AC 1, per Lord Wright, 25.

⁵ J. Fleming, *The Law of Torts* (1998), 149.

⁶ *Donoghue v Stevenson* [1932] AC 562.

⁷ *Donoghue v Stevenson* [1932] AC 562, 580.

done) to prevent the injury occurring to the plaintiff. In other words, what should the local council, or the statutory authority, or the person, have done to prevent the tourist being drowned, lost or whatever injury it is that is the subject matter of the litigation?

Standard of care (how careful is careful enough?)

This is the negligence part of a negligence action. Baron Alderson described 'negligence' as follows:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.⁸

The history of occupier's liability used to be very complex when it came to establishing the required standard of care because the standard of care varied according to the class of 'visitor.' For example, the standard of care required where a trespasser, an unlawful entrant, was injured was not as demanding as the standard of care required where the occupier had invited the injured party onto the property. In the 1987 case of *Australian Safeway Stores v Zaluzna (Zaluzna)*⁹ the High Court dispensed with these differing requirements, imposing instead the ordinary principles of negligence. In *Zaluzna* the plaintiff (Mrs Zaluzna) was injured when she slipped on a wet supermarket floor. The supermarket clearly owed her a duty of care, but the issue revolved around the basis on which the standard of care was to be assessed. In *Zaluzna* this was expressed as a requirement that the appellant supermarket 'take reasonable care to avoid a foreseeable risk of injury to the respondent,' i.e. the plaintiff, Mrs Zaluzna.¹⁰

The situation in Western Australia is complicated by the fact that the *Occupiers' Liability Act 1985 (WA)* prescribes 'the standard of care owed by occupiers and landlords of premises to persons and property on the premises.'¹¹ In effect the legislation subjects occupiers' liability to the general principles of negligence, but includes some guidance as to how the court should assess the appropriate standard of care and other matters. The sorts of factors to be taken into account include, for example, the nature of the premises, the extent of the danger, the age of the injured person and what was done to eliminate the danger.¹² Since *Zaluzna*, however, it is likely that these are guidelines rather than directives. If they were to be treated as directives it would mean that the standard of care would vary from state to state, something that the High Court in the *Zaluzna* decision apparently intended to eliminate once and for all. Indeed it is *Zaluzna* and not the *Occupiers' Liability Act 1985* that is mentioned by the High Court in *Nagle v Rottneest Island Authority*,¹³ one of the seminal West Australian, and Australian, cases on occupiers' liability and standard care. In addition, and as is often the way, the *CLA 2002* apparently takes no account of the *Occupiers' Liability Act 1985*, but in any event the later legislation prevails if there is any conflict.

Before continuing with the specific requirements of standard of care under the *CLA 2002*, some particular aspects of liability under the *Occupiers' Liability Act 1985 (WA)* will be examined.

What is meant by 'premises' and who is an occupier?

The *Occupiers' Liability Act 1985 (WA)* defines an 'occupier of premises' as being a 'person occupying or having control of land or other premises' and 'premises'

⁸ *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex 781, 784.

⁹ *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

¹⁰ *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479, per Mason, Wilson, Deane and Dawson JJ, 488.

¹¹ *Occupiers' Liability Act 1985 (WA)*, Long Title.

¹² *Occupiers' Liability Act 1985 (WA)*, s 5(4).

¹³ *Nagle v Rottneest Island Authority* (1993) 177 CLR 423.

as including ‘any fixed or movable structure, including any vessel, vehicle or aircraft.’¹⁴

In a case involving occupiers’ liability, the defendant must be the occupier of the premises on which the plaintiff was injured. The question is, who has control over the premises? Sometimes this will be the owner, or if the premises are leased, it may be the tenant. Sometimes there may even be shared occupation.¹⁵ Where there is more than one ‘occupier’, each may be required to contribute towards any damages awarded against either one of them.¹⁶

Standard of care under the CLA 2002

The sections on standard of care in the *CLA 2002* are contained in Part 1A, headed ‘Liability for harm caused by the fault of a person’¹⁷ which came into operation on 1 December 2003. Part 1A is broken up into various sub-parts, the most important ones in the context of this article being ‘Duty of care’ (Division 2), ‘Recreational activities’ (Division 4), ‘Contributory negligence’ (Division 5) and ‘Assumption of Risk’ (Division 6).

Part 1A Division 2 is entitled ‘Duty of care’ but this appears to be a misnomer because it applies more to standard of care (breach of duty) than it does to duty of care.¹⁸ Section 5B, in Part 1A Division 2, sets out the requirements by which West Australian courts are to assess the requisite standard of care. Section 5B(1) says: ‘A person is not liable for harm caused by that person’s fault in failing to take precautions against a risk of harm

unless ...’.¹⁹ By thus referencing liability in the negative, it seems that the legislation is framed from the perspective of the defendant. The defendant need only take precautions against a reasonably foreseeable risk – and this is identified as, ‘a risk of which the person knew or ought to have known.’²⁰ The test is that ‘the risk was not insignificant; and ... in the circumstances, a reasonable person in the person’s position would have taken those precautions.’²¹

The following factors, known as the negligence calculus, are then to be used in determining whether a reasonable person in those circumstances would have taken precautions:

- the probability of the harm occurring;
- the likely seriousness of the harm;
- the burden of taking the precautions;
- and the social utility of the conduct that created the risk.²²

From this it can be seen that standard of care is split into two parts. First, is the risk foreseeable? If it is foreseeable the second part, the negligence calculus, comes into play and this refers to what the defendant should have done to prevent the risk from eventuating.

The reference to ‘a reasonable person’ indicates that objective, rather than subjective, standards apply: ‘in other words, the appropriate standard is not that which the defendant *could* have reached, but rather the standard which the law says *should* have been reached.’²³

¹⁴ *Occupiers’ Liability Act 1985* (WA), s 2. ‘Person’ is defined in the *Interpretation Act 1984* (WA) as including ‘a public body, company, or association or body of persons, corporate or unincorporated,’ s 5.

¹⁵ *Wheat v Lacon* [1966] AC 552.

¹⁶ This is facilitated by s 7 of the *Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA).

¹⁷ The *CLA 2002* does not define ‘person’ but s 5 of the *Interpretation Act 1984* (W.A) says: “‘person’ or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporated.’

¹⁸ *Review of the Law of Negligence Report* (2002) Canberra, 102, clearly distinguishes between the two elements.

¹⁹ *Civil Liability Act 2002* (WA), s 5B(1).

²⁰ *Civil Liability Act 2002* (WA), s 5B(1)(a).

²¹ *Civil Liability Act 2002* (WA), s 5B(1)(b) and s 5B(1)(c).

²² *Civil Liability Act 2002* (WA), s 5B(1) & (2).

²³ F. Trindade and P. Cane, *The Law of Torts in Australia* (1999), 436.

While there may be some conservatism in future decisions as a result of the *CLA 2002*, this process of conservatism may have been under way anyway regardless of any legislative signposts.²⁴

Reasonable foreseeability – the problem area identified in the Ipp Report

One of the leading, and most contentious, negligence cases in recent years is *Nagle v Rottnest Island Authority*.²⁵ In this case the plaintiff, who did odd jobs and drove tour buses, became a quadriplegic after diving into ‘the Basin’ on Rottnest Island (an island off the coast from Perth). The Basin is a relatively shallow swimming area, with a mostly sandy bottom and some submerged rocks. The photo of the Basin, taken in early 2004, shows a warning sign that was put up as a result of the *Nagle* case. Usually the water is clear, but on the day the plaintiff dived there was evidence that a glitter pattern on the surface may have reduced visibility of the bottom. The High Court found that the Rottnest Island Authority, the occupier, had been negligent in not providing an appropriate warning sign regarding the danger of diving. As discussed above, the defendant need only take precautions against risks that are reasonably foreseeable; the test of foreseeability used in *Nagle* being that the risk is ‘not far fetched or fanciful.’²⁶ This test was one adopted from the earlier High Court decision of *Wyong Shire Council v Shirt*.²⁷ In *Shirt* the ultimately successful plaintiff (Shirt), an

inexperienced water-skier, was rendered a quadriplegic after a water skiing accident on Tuggerah Lakes in NSW. The plaintiff fell off his water skis in shallow water and successfully claimed that his accident was due to the incorrect placement of a sign in the water bearing the words ‘Deep Water.’ An engineer (employed by the Council) had placed the sign in that position following the dredging of a deep water channel nearby.

In the *Nagle* decision it was appreciated by the High Court that ‘it may have been foolhardy or unlikely’ for a person to do what the plaintiff did, but it was, nonetheless, ‘not far-fetched or fanciful.’²⁸ The decision sent shock waves through local authorities, and their insurers across WA. WA is a vast State with a vast coastline encompassing recreational areas that vary from the suburban to the most remote imaginable – all of which attract visitors (tourists), some of whom are bound to do foolhardy or unlikely acts. The title of this article comes from a letter to the editor of *The West Australian* newspaper after the decision was handed down, and reflects the sentiment of a large part of the community.²⁹ It is worth making the point that no-one has anything but deep sympathy for the plaintiffs in these actions who have suffered appalling, life-shattering injuries. The hard question relates to the circumstances in which the loss (in terms of financial cost) should be shifted from the plaintiff to some other party with a deeper pocket.

The Ipp Report said that the problem with having a low threshold test for foreseeability (such as that posited in *Shirt* and *Nagle*) was that the lower courts would ignore the negligence calculus. The negligence calculus consists of the four factors mentioned earlier that are to be used in determining what action should be taken to

²⁴ On this see, for example, *Department of Natural Resources and Energy v Harper* [2000] VSCA 36; *Prast v Town of Cottesloe* [2000] WASCA 274 (*Prast*); J. J. Spigelman, ‘Negligence and insurance premiums: Recent changes in Australian law’ (2003) 11 *Torts Law Journal* 291. In *Prast* the plaintiff was dumped by a wave at Cottesloe Beach while body-surfing, and the injuries he sustained rendered him a tetraplegic. His claim that the defendant Council did not have in place adequate warning signs failed at first instance and on appeal to the Supreme Court of Western Australia. Leave to appeal to the High Court was refused.

²⁵ *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

²⁶ *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, per Mason CJ, Deane, Dawson and Gaudron JJ, 429 (citing *Wyong Shire Council v Shirt* (1980) 146 CLR 40, per Mason J, 48).

²⁷ *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

²⁸ *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, per Mason CJ, Deane, Dawson and Gaudron JJ, 430-431.

²⁹ *The West Australian*, 29 December 1994, letter to the editor written by R. Stewart.

prevent the foreseeable risk from eventuating. On this point the Ipp Report commented:

[T]here is a danger that *Shirt* may be used to justify a conclusion - on the basis that a foreseeable risk was not far-fetched or fanciful - that it was negligent not to take precautions to prevent the risk materialising, and to do this without giving due weight to the other elements of the negligence calculus. It is also widely believed that this approach has brought the law of negligence into disrepute, and that it may have contributed to current difficulties in the field of public liability insurance.³⁰

In recommending that the test for reasonable foreseeability be a risk that is 'not insignificant' the choice of a double negative was deliberate:

The phrase 'not insignificant' is intended to indicate a risk that is of a higher probability than is indicated by the phrase 'not far fetched or fanciful,' but not so high as might be indicated by a phrase such as a 'substantial risk' ... We do not intend the phrase to be a synonym for 'significant.' 'Significant' is apt to indicate a higher degree of probability than we intend.³¹

The negligence calculus

The Ipp Report recommended that the application of the negligence calculus should be included in the legislation as '[t]his might encourage judges to address their minds more directly to the issue of whether it would be reasonable to require precautions to be taken against a particular risk.'³² A brief look at some cases illustrates the operation of each factor in the negligence calculus.

The probability of the harm occurring

In *Bolton v Stone*³³ the plaintiff (Miss Stone) was injured when struck by a cricket ball that was hit for a six out of the defendant's cricket pitch. Cricket had

been played on the ground for nearly a century, and although balls had been hit over the two metre high fence in the past, it was a rare occurrence. The fact of cricket balls leaving the ground was foreseeable, because it had happened in the past, but it had happened so rarely that the defendant had not been negligent in not taking precautions against the risk. Indeed it seemed that the only precaution available was to stop playing cricket there altogether.

The likely seriousness of the harm

In *Paris v Stepney Borough Council*³⁴ the plaintiff (Mr Paris) was already blind in one eye when he commenced work with the defendant council as a motor vehicle mechanic. He was not provided with safety goggles. Paris was blinded in his good eye when a shard of rust entered it while he was hammering at a rusty bolt. For him the potential seriousness of the harm was greater than that for a person with sight in both eyes, and the defendant had fallen below the required standard of care. The provision of safety goggles would have been a simple measure to overcome the risk, and in the circumstances of the work should probably have been provided to all workers.

The burden of taking the precautions

This may be determined by assessing the expense and inconvenience to the particular defendant in preventing the risk from occurring. Bearing in mind the other factors (such as seriousness of the risk), a defendant with means, such as a company, might be differently treated to a defendant without means, such as an impecunious individual. In *Caledonian Collieries Ltd v Speirs*³⁵ the husband of the plaintiff (the plaintiff being Mrs Speirs) was killed on a railway crossing by a runaway train wagon owned by the defendant. The defendant was found to have been negligent in not

³⁰ *Review of the Law of Negligence Report* (2002) Canberra, 105 [footnote omitted].

³¹ *Review of the Law of Negligence Report* (2002) Canberra, 105.

³² *Review of the Law of Negligence Report* (2002) Canberra, 106.

³³ *Bolton v Stone* [1951] AC 850.

³⁴ *Paris v Stepney Borough Council* [1951] AC 367.

³⁵ *Caledonian Collieries Ltd v Speirs* (1957) 92 CLR 202.

installing safety mechanisms, even though the safety mechanisms posed a danger to the defendant's employees.

The social utility of the conduct that created the risk

In *Watt v Hertfordshire County Council*³⁶ the plaintiff (Mr Watt) was a fireman employed by the defendant. He was injured by an unsecured jack (a jaws of life mechanism) in the back of a utility in which he was traveling to an accident where an injured woman was trapped in a car. There was a vehicle set up specifically for the safe transportation of the jack, but it was out on another emergency call. The exigencies of the situation required the urgent transportation of the jack without waiting for the specialist vehicle to return, and Mr Watt was unsuccessful.

Recreational activities

The *CLA 2002* makes specific reference to recreational activities in Division 4 of Part 1A. Recreational activity is defined in s 5E as:

- (a) any sport (whether or not the sport is an organised activity);
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- (c) any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

The definition comprehensively includes most activities that a tourist would be pursuing in Western Australia, and it would include circumstances such as those that gave rise to *Nagle*. Section 5H is headed 'No liability for harm from obvious risk of dangerous recreational

activities,' and it applies whether or not the plaintiff knew of the risk.³⁷ A 'dangerous recreational activity' is one that involves a significant risk of harm, and obvious risks are those that 'would have been obvious to a reasonable person in the position of that person.'³⁸ An obvious risk includes those that are patent or a matter of common knowledge, and can be obvious even though it is not 'prominent, conspicuous or physically observable.'³⁹ Furthermore, '[a] risk of something occurring can be an obvious risk even though it has a low probability of occurring.'⁴⁰

Section 5I is headed 'No liability for recreational activity where risk warning,' and this is a warning 'given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.'⁴¹ The warning 'can be given orally or in writing (including by means of a sign or otherwise).'⁴² The section applies only to persons engaging in the recreational activity voluntarily, and there are provisions relating to children.⁴³ The defendant does not have to show that the plaintiff received or understood the warning, or was capable of doing so, although a risk warning to an incompetent person cannot be relied upon.⁴⁴

Contributory negligence

Contributory negligence allows apportionment of damages. This means that the judge is able to reduce the damages by however much the plaintiff is deemed to have contributed to his/her own injury. Contributory negligence occurs where there is a failure by the plaintiff to meet the standard of care for his/her own protection and that failure is a legally contributing cause together with the defendant's negligent act in bringing about the injury. Division 5 of Part 1A, headed

³⁶ *Watt v Hertfordshire County Council* [1954] 2 All ER 368.

³⁷ *Civil Liability Act 2002* (WA), s 5H(2).

³⁸ *Civil Liability Act 2002* (WA), s 5E & 5F(1).

³⁹ *Civil Liability Act 2002* (WA), s 5F(2) & (4).

⁴⁰ *Civil Liability Act 2002* (WA), s 5F(3).

⁴¹ *Civil Liability Act 2002* (WA), s 5I(4).

⁴² *Civil Liability Act 2002* (WA), s 5I(6).

⁴³ *Civil Liability Act 2002* (WA), s 5I(2), (3) & (11)

⁴⁴ *Civil Liability Act 2002* (WA), s 5I(5) & (13).

contributory negligence, applies to all of Part 1A, and the required standard of care of the plaintiff 'is that of a reasonable person in the position of that person.'⁴⁵ If the plaintiff is intoxicated, there is a rebuttable presumption that he or she was contributorily negligent.⁴⁶

Assumption of risk

Assumption risk, as expressed in Division 6 of Part 1A, was included in one of the late amendments to the *CLA 2002*, a matter that gave rise to some criticism in Parliament at the time.⁴⁷ Section 5N is headed 'Injured person presumed to be aware of obvious risk,' 'obvious risk' having the same definition as that already discussed above, but the effect of the section is negated if 'the person proves on the balance of probabilities that he or she was not aware of the risk.'⁴⁸ The intention of s 5N, as expressed in Hansard on 23 October 2003, is that 'the ... statute will overturn the decision made in that case [*Nagle*], which is our prerogative as a Parliament.'⁴⁹ However, the flaw in the provision was pointed out in Parliament:

I would have thought that someone who was in a similar position to Mr Nagle ... could argue that he had never been to Rottnest Island, had never stood on a similar rock, had never jumped into water in a similar environment, had no expectation or understanding that rocks were under water, had no way of knowing the risks that were involved and that no-one had ever taught him that such risks existed when jumping off a rock in similar circumstances. Bingo! I would have thought that proposed subsection (1) would apply and that the person would have found a legal loophole.⁵⁰

Section 5O(1) provides that there is no duty to warn of an obvious risk, but this is limited by s 5O(2) which

says the section does not apply if a plaintiff has requested advice or information from the defendant. Once again the potential legal pitfalls were debated in Parliament:

Is it the case that if I am on someone's premises or around facilities, all I need do is ask whether a risk is involved in order to provide myself with a future loophole? It means that any time someone goes to a facility with even the remotest risk he need only ask the owner or proprietor whether there is a risk. The provisions will not give an owner or proprietor too much comfort.⁵¹

Interestingly the corresponding recommendations in the Ipp Report are far more clearly articulated, and much less likely to give rise to these potential litigation minefields.⁵²

Public authorities

In recognition of the difficulties that public authorities have in allocating resources, one of the terms of reference of the Ipp Panel was to consider the liability in negligence of such bodies, for example local councils, national park authorities and the like. The recommendation of the Ipp Report that there be a policy defence has been incorporated into the *CLA 2002* (which refers to public bodies rather than public authorities). The policy defence means that a decision based on policy, for example a decision made for financial or political reasons, 'cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant's position could have made it.'⁵³

As well, the *CLA 2002* includes a list of principles relevant to the determination of whether or not the public body has fallen below the required standard of

⁴⁵ *Civil Liability Act 2002* (WA), s 5K(2)(a).

⁴⁶ *Civil Liability Act 2002* (WA), s 5L.

⁴⁷ 23 October 2003, *Legislative Assembly Hansard*, 12590 [Mr D.F. Barron-Sullivan].

⁴⁸ *Civil Liability Act 2002* (WA), s 5N(1).

⁴⁹ 23 October 2003, *Legislative Assembly Hansard*, 12592 [Mr M. McGowan].

⁵⁰ 23 October 2003, *Legislative Assembly Hansard*, 12593 [Mr D.F. Barron-Sullivan].

⁵¹ 23 October 2003, *Legislative Assembly Hansard*, 12591-2 [Mr D.F. Barron-Sullivan].

⁵² See for example *Review of the Law of Negligence Report* (2002) Canberra, Recommendation 32, 130.

⁵³ *Review of the Law of Negligence Report* (2002) Canberra, 158, and *Civil Liability Act 2002* (WA), s 5X.

care. These include, *inter alia*, whether its functions are limited by the resources that are available to it, and these functions are to be assessed by looking at all of its activities, not just the one giving rise to the case at hand.⁵⁴

Conclusion

It seems that the intention, and likely effect, of the *CLA 2002* will make it more difficult for potential plaintiffs (including tourists) to succeed in circumstances where they are accidentally injured, especially if they are engaged in a recreational activity at the time. The simple expedient of ensuring an appropriate warning sign is in place will shift the onus even further onto the plaintiff and away from the defendant. There are some areas, however, particularly in relation to ‘assumption of risk,’ that are likely to give rise to some unpredictable results in the future. It may well have been the government’s intention to overturn *Nagle* (bearing in mind that there was no warning sign at the time) – but only the passage of time will tell whether inventive lawyers thwart the intention.



⁵⁴ *Civil Liability Act 2002* (WA), s 5W.

