WHEN TO FOLD AND WHEN TO HOLD - *CIVIL LIABILITY ACT* 2003

PRESENTED BY

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AT THE

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INTRODUCTION

1. On the 9th of April 2003, shareholders and CEOs of insurance companies operating in Queensland were handed a bonus. Whilst an insurer could charge whatever premium it thought the market might bear – and I pause to remark that I have received quotes that differ by more than 100% - virtually all claims involving modest injuries without significant economic loss or substantial gratuitous services claims became uneconomic to bring.

2. On that date the *Civil Liability Act* was assented to. Significant provisions were backdated to 1 December 2002.

3. One thing you should not do is sell your shares in your insurance companies – my advice is to hold them.

4. The preamble to the panel's terms of reference read as follows:

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

5. The remarkable thing about these terms of reference is that they themselves are not supported by any evidence. No studies were done to demonstrate the truth of the premises that the committee were required to adopt. As Professor Luntz has recently observed in *The Australian Law Journal*, the terms of reference themselves made it clear that the assumptions contained in the preamble were "unchallengeable". The panel was given two months in which to do their work. It was required to ignore any existing empirical evidence and could not conduct any empirical studies of its own.

6. In a recent addition of *The Australian Financial Review* (12 July 2005), Michael Hawker, the president of the Insurance Council of Australia and the general manager of IAG, the leading insurer in Australia, and Gillian Davidson, an insurance partner in the Sydney office of National law firm

Sparke Helmore, provided short articles in which they debated the issue. Interestingly, Mr Hawker commented:

> "*It is important that we remain passionate as a community about this issue to ensure injured people continue to receive fair and equitable compensation.*"

7. As you all probably know, the worst case in Queensland in the personal injury field is now assessed at $250,000.00. With the greatest of respect to the eminent persons who set this scale, it simply does not reflect community values. That is exemplified by the $600,000.00 damages award given to Andrew Ettinghausen about 10 years ago in his defamation proceedings. His complaint was that a shadowy photograph of his penis was published.

8. Whilst the High Court was unimpressed with this largess, you might want to give some thought to Item 49 of Schedule 4 to the *Civil Liability Regulations*. Those of you who have a penis will be no doubt impressed to learn that the loss of part or all of it results in an ISV of between 5 and 25, ie damages of between $5,000.00 and $35,000.00 (Section 62 of the Act). I know that if I was given the choice, embarrassing though it would be – and I suspect I might have more to be embarrassed about than Andrew Ettinghausen – I would prefer to be photographed than chopped.

9. Incidentally, it used to be a topic of mild amusement amongst personal injury lawyers as to what the loss of a testicle might be worth. Item 51 of the schedule indicates a scale of 2 to 10, ie $2,000.00 to $11,000.00. Age, cosmetic damage and effect on reproductive capacity are the important features. One wonders who drew up the scale values.

10. If you don't know the list that is on the screen at the moment, then you haven't been going to any seminars for 3 years, you haven't bothered to read the Act and you are the sort of claims managers that I love. When you get to my age and find that they have changed everything you spent 25 years

learning, it is very depressing. The following matters generally favour insurance companies:

- Exemplary punitive or aggravated damages cannot be awarded unless the personal injury complained of was an unlawful intentional act done with the intent to cause personal injury or unlawful sexual assault or unlawful sexual misconduct (Section 52).

  This provision gets rid of the principle identified in *Lamb v. Cotogno* (1987) 164 CLR 1 where an insurer was exposed to exemplary damages in the massive sum of $5,000.00. I have never had a case where I have sought such damages.

- The loss of superannuation entitlements is to be determined by applying the minimum percentage required by written law to be paid on the employee's behalf as employer's superannuation contributions to the amount assessed for the deprivation or impairment of the earning capacity to which the entitlement relates (Section 56).

  This is largely in accordance with the practice that has risen up over the years.

- The discount rate to be applied for all future losses, including gratuitous services, is 5% (Section 57).

  This provision disposes of the decision of the Court of Appeal in *Mott v. Fire and All Risk Insurance Co Ltd* [2000] 2 Qd.R. 34 which required that the 3% discount tables were to be used for future gratuitous care even though the 5% tables were required for future paid care pursuant to Section 16(1) of the *Supreme Court Act* 1995.

- Interest cannot be awarded on the payment of awards for general damages (Section 60(1)).

- The appropriate rate of interest is the rate for 10 year treasury bonds published by the Reserve Bank of Australia under "Interest Rates and Yields – Capital Market" as at the beginning of the quarter in which the award of interest is made which is presently around 5.4%.

  This provision has effectively halved the interest rates that are applied.

These provisions came into force on 9 April 2003.

11. Provisions to a similar effect were contained in the *Motor Accident Insurance Act* (introduced in October 2000) and the *Personal Injuries Proceedings Act* (introduced on the 18th of June 2002).

SUMMARY

12. The three most significant effects that I can perceive that the *Civil Liability Act* will have on the assessment of damages are:

    (a) awards of general damages will roughly be at least halved. If the trial judge cannot be persuaded to uplift by 25% or more, then I think the awards for the general run of the mill case will be about a third of what they were;

    (b) damages for gratuitous care will be significantly affected. Only reasonably significant injuries result in the 6 hours per week / 6 months test being satisfied. Obviously, if the "threshold" argument is right, then the scope for damages under this head is increased. Nonetheless, it is a very significant limiting factor.

    (c) the liability provisions are an unknown quantity.

GENERAL DAMAGES

13. It is still early days. So far as I can establish, there have been 13 decisions in which general damages have been assessed under the *Civil Liability Act*. Of those, 4 have been decisions of the Supreme Court, 7 of the District Court and 2 by Magistrates.

14. I think what is of interest to this audience is not so much the mechanics of how the awards were arrived at but what difference the process makes to the awards likely to be made under common law principles.

15. I think it is now well known that a court is required to identify the dominant ISV (injury scale value). For a single injury there is little discretion outside the ISV range,

Multiple Injuries

16. Beware of cases involving multiple injuries – the judges' discretion still lives.

17. Where there are multiple injuries, the court has the power to make an assessment of the ISV that is higher than the maximum dominant ISV (Section 4 of the *Civil Liability Regulation* 2003). Section 4(3)(b) provides that the ISV for multiple injuries "should rarely be more than 25% higher than the maximum dominant ISV".

18. There used to be some discussion that the 25% ceiling would be difficult to break. I doubt it. There have been 3 cases of which I am aware in which the courts have decided that the maximum ISV is inadequate, even with an uplift of 25%: *Clement v. Backo* [2006] QSC 129 (Dutney J.) – 100% uplift; *Carroll v. Coomber* [2006] QDC 146 (McGill D.C.J.) – 80%; and *Johannsen* – 50% uplift (Jones J)

19. *Clement v Backo* is of interest for a number of reasons. First Dutney J. determined the appropriate award of general damages both under the common law and under the *Civil Liability Act*. Under common law, he assessed damages at $50,000.00. Mr Clement had suffered a significant injury to his spine such that the orthopaedic surgeons were agreed that his impairment was between 15% and 18%. His case was unusual in that he had equally severe injuries to 3 parts of his spine and the assessment was 5% to 6% in respect of each part of his spine (cervical, thoracic and lumbar) with

a dominant ISV in each case of 10. I observe that I can recall a case reaching the Court of Appeal (the Full Court as it then was) in the early 1980's in which an award of $50,000.00 for a significant injury to the lumbar spine for a manual labourer was upheld. Effectively, awards have hardly moved in 25 years.

20. Dutney J. allowed an ISV of 20 in *Clement's* case. The award of general damages allowed was therefore $26,000.00. Thus, awards for a significant back injury have effectively been halved by the *Civil Liability Act* provisions.

21. Secondly, Dutney J.'s analysis was of interest. He looked at several provisions in Schedule 4 of the Regulations and determined that the ISVs were generally proportionate to the percentage impairment of the whole person when considering orthopaedic injuries. Uniformly he thought the ISV exceeded the percentage impairment by at least 20%. He applied that 20% uplift to the 15% to 18% impairment that the orthopaedic surgeons had agreed which resulted in a range of 19 to 22.5. He then allowed for discounting to reflect the overlapping effect of multiple injuries but increased the amount to reflect the lesser injuries that were not yet taken into account. He thereby arrived at his ISV of 20.

22. In *Ballesteros v. Chidlow* [2005] QSC 280 White J. decided that in order to give effect to Schedule 3 Section 3(2) it was necessary that each injury had to be identified and assessed, even though it might be perfectly obvious which of the injuries is the dominant injury as defined. In the case before her, there were 8 separate injuries and she proceeded to assess each and every one of them. Her Honour accepted that the injuries suffered in the accident were as follows:

    - Grazed left shoulder
    - Bruising to left ankle

- Bruising to left lower leg
- Bruising to left hip
- Bruising to chest and stomach
- Dental injury (cracked tooth)
- Cervical spine injury with associated muscle tension headaches, ie whiplash injury

23. It is worth considering the damages awarded as it indicates the dramatic effect that these provisions will have on the item of general damages. The plaintiff was aged 35. Her Honour thought that items 88 and 89 were relevant but that her injury fell between the two descriptions. 88 was the more serious – "moderate cervical spine injury – soft tissue injury" with the comment being that the injury "will cause moderate permanent impairment, for which there is objective evidence, of the cervical spine" and with the further comment that "an ISV of not more than 10 will be appropriate if there is a whole person impairment of 8% caused by a soft tissue injury for which there is no radiological evidence".

24. Item 89 was "minor cervical spine injury" and the comment being "injuries with this item include whiplash injury with no ongoing symptoms, other than symptoms that are merely a nuisance, remaining more than 18 months after the injury is caused. There will be no objective signs of neurological impairment". The ISV range for item 89 was 0 to 4 and for item 88, 5 to 10. The range of assessments by the medical experts was from 1% (Dr Morgan for the defendant) and 8% (Dr Todman for the plaintiff). Her Honour assessed a notional ISV of 7. To take account of other injuries, including the loss of the tooth and the severe impact which her injuries had on her quality of life, she increased that ISV to 9. She applied the formula in Section 62(b) and came up with general damages of $9,800.00.

25. At common law I have little doubt that a plaintiff with such an injury would receive damages at least in the order of $25,000.00 and perhaps much more.

GRATUITOUS CARE

26. Section 59 of the Act is relevant. It provides:

> "***59 Damages for gratuitous services***
>
> *(1) Damages for gratuitous services are not to be awarded unless—*
>
> *(a) the services are necessary; and*
>
> *(b) the need for the services arises solely out of the injury in relation to which damages are awarded; and*
>
> *(c) the services are provided, or are to be provided—*
>
> *(i) for at least 6 hours per week; and*
>
> *(ii) for at least 6 months.*
>
> *(2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.*
>
> *(3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.*
>
> *(4) In assessing damages for gratuitous services, a court must take into account—*
>
> *(a) any offsetting benefit the service provider obtains through providing the services; and*
>
> *(b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution.*"

27. There are two features of the provision worth discussing. First, there is the 6 hours per week / 6 month requirement. Secondly, there is the question of what "services" are affected by the provision.

28. As to the 6 hours per week / 6 months requirement, there are several things to note.

29. Firstly, there are two regimes operating. Injuries that occurred before 9 April 2003 (the date of enactment of Section 59 of the Act) are governed by the

provisions contained in Section 55D of the *Motor Accident Insurance Act* or Section 54 of the *Personal Injuries Proceedings Act*. In *Grice v. State of Queensland* [2005] QCA 272 the Court of Appeal determined that the plaintiff would only be disentitled to damages for gratuitous services if both conditions were met – in other words it was sufficient for a claimant to satisfy one condition only.

30. However, the provisions of Section 59 are more onerous. A claimant must satisfy both of the requirements.

31. Botting D.C.J. in *Kriz v. King* (24/12/05)added a new twist to the argument. McGill D.C.J. took the same approach in *Carroll v. Coomber & Anor* [2006] QDC 146. His Honour held that Section 59 presents a threshold. Once a claimant has required services for at least 6 hours per week and for at least 6 months, then the threshold is passed. It matters not that the need thereafter might drop say to 4 hours a week. Damages are to be awarded according to the common law principles subject to the other requirements of Section 59 (see para. 67 of the judgment).

32. The decision in *Kriz v. King* is on appeal on this question of whether there must be an ongoing requirement of a minimum of 6 hours care per week or whether it is merely a threshold.

33. *Clement v. Backo & Anor* [2006] QSC 129 raised yet another issue. To what "services" does Section 59 apply? In that case, Dutney J. held that Section 59 applied to the determination of the award that he ought to make to a plaintiff who, in his spare time, had established a mahogany tree and fruit tree plantation. Because of the injuries to his spine, the plaintiff could not carry out the physical work required on the plantation.

34. The point that concerned Dutney J. was whether the provision of services by the plaintiff's wife, which were provided gratuitously and which not only

maintained the plantation but increased it, were "necessary" in the sense required by Section 59(1)(a). He determined at paragraph [55] of his judgment that the services gratuitously provided were "necessary" as "necessary in this case means necessary to avoid another and potentially greater loss". The greater loss that he had in mind was that if Mr Clement was unable to pursue his venture he would have been entitled to damages for loss of the opportunity to make a profit. A global sum of $40,000.00 was allowed.

35. The case has gone on appeal on this point. Suncorp argue that it is necessary that Section 59's requirements be satisfied, that they are not satisfied for a number of reasons, principally that:

    (a) the services are not "necessary" in the relevant sense;

    (b) that the need for services arises not solely out of the injury but by reason of the expansion of the plantation;

    (c) that the plaintiff did not satisfy the 6 hours per week / 6 month test;

    (d) that the court failed to take into account offsetting benefits that the service provider obtained – namely that the wife would one day benefit from the profit gained from selling the timber on the plantation.

36. I appeared in the case for the plaintiff and have settled the Outline of Argument on the appeal. Apart from arguing the various points raised, the principal matter that I asked the court to determine is whether Section 59 has anything to do with the claim at all. It seems to me that the claim, properly characterised, is one for damages for an impaired earning capacity. I argue that Section 59 is limited to the provision of gratuitous services in the sense of nursing and domestic services in the true *Griffiths v. Kerkemeyer* sense.

37. It is interesting to observe that Keith Wilson S.C., who is now a Federal Magistrate and who prepared the Outline for Suncorp, argued to precisely the same effect, ie that the provision dealt only with services in the traditional *Griffiths v. Kerkemeyer* sense. He asked that the court conclude that because the services were not within that type, then they could not be allowed at all. I argue that the *Civil Liability Act* was not a Code (see Section 7(5)) and that his conclusion was wrong.

LOSS OF EARNING CAPACITY

38. Section 54 of the Act, as initially drafted, imposed a significant limit on the assessment of damages for loss of earning capacity for the high earners.

39. No doubt you all know that the limit is now three times the average weekly earnings – which, on my calculations, is about $2,870.00 or $150,000.00 per annum. On my interpretation of the Act this equates to an income of about $200,000.00 gross more or less.

40. Your average barrister would be unaffected by Section 54.

41. Obviously, if any CEO of an insurance company in Australia falls into our clutches – without wishing harm on anyone – it would be poetic justice. If Michael Hawker really did get $3,000,000.00 in one year for managing IAG - $57,000.00 per week – then we would have to ignore $54,000.00 of it.

42. As originally passed, the Section required that "a court must disregard earnings" above that limit. McMurdo J. interpreted that provision in *Doughty v. Cassidy* [2005] 1 Qd.R. 462 as requiring that the court ignore entirely any earnings that might be above the limit and so apply any discounts for contingencies, residual earning capacity and the like to that limit.

43. Section 54 has been amended since that decision and now reads that "the maximum award a court may make is for an amount equal to the limit".

44. Section 55 of the Act deals with the situation where earnings cannot be precisely calculated. The Section provides as follows:

> ***"55 When earnings can not be precisely calculated***
>
> *(1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.*
>
> *(2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.*
>
> *(3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.*
>
> *(4) The limitation mentioned in section 54(2) applies to an award of damages under this section."*

45. I am not at all clear on what purpose the Section is designed to achieve. So far as I am aware courts only ever awarded damages if the court was satisfied, in the sense of satisfied on the balance of probabilities, that the person was likely to suffer loss and an essential aspect of the judicial function is to give reasons.

46. Perhaps the key phrase is "has suffered or will suffer loss". The argument might be that it is not simply enough that there is a chance in the *Malec v. Hutton* sense of loss but rather it must be shown that the loss is certain.

47. So far as I am aware, there has been no consideration of the Section by any superior court.

48. The Section can be contrasted with the provision in the New South Wales Act (*Civil Liability Act* 2002) Section 13 which provides that a court "cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury".

49. I point out that in New South Wales the courts have taken the view that it is permissible to award what would have been described as "buffer" or "cushion" awards based on an analysis that seems to me to be no different than the traditional analysis under the common law: See *New South Wales v. Zerafa* [2005] NSWCA 187; *Leichhardt Municipal Council v. Montgomery* [2005] NSWCA 432; *Penrith City Council v. Parks* [2004] NSWCA 201.

50. The argument that someone will mount one day is that Section 55(2) requires that the court be satisfied not that the plaintiff "may" suffer loss and allow for that chance but must be satisfied on the balance of probabilities that the loss will be suffered. Effectively, the argument will be that if the probability of loss is less than 50% then no amount can be allowed.

51. This provision can be contrasted with the provisions that appeared in the *WorkCover Queensland Act* 1996 that a claimant had to satisfy the court that there was "at least a 51% likelihood that the claimant will sustain the future economic loss or a diminution of future earning capacity" (Section 317).

52. I do not know of a case in which that provision had any effect on the amount awarded.

LIABILITY

53. I have been unable to find any Queensland cases applying the provisions of the *Civil Liability Act* that concern the issue of liability. There have, however, been decisions in other jurisdictions and I thought I might refer to those as providing some guidance.

54. In Queensland, the relevant and significant provisions are contained in Section 9 of the Act. It provided in Subsection (1) that:

> "*a person does not breach a duty to take precautions against a risk of harm unless –*
>
> *(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and*
>
> *(b) the risk was not insignificant; and*

(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions ."

55. The two significant changes are firstly that the requirements of what is "foreseeable" seem to be somewhat less than the common law position. At common law all that need be shown is that the risk was not "far fetched or fanciful" (*Wyong SC v Shirt).* Now the test is that the risk is one of which the person "ought reasonably to have known" which, to my mind, is a more demanding threshold.

56. The second change is that now the risk must be one which was "not insignificant". What that means remains to be seen. In *Eutick v. City of Canada Bay Council* [2006] NSWCA 30, the New South Wales Court of Appeal was called on to consider Section 5B(1)(b) of the *Civil Liability Act* 2002 (NSW) which placed the onus on the claimant to establish that the risk there was a "not insignificant risk". There, the plaintiff had tripped on the lip of a pavement which was about 1.8 centimetres high. It was claimed that the lip was on the edge of a gully or depression. Works carried out by the local council had left a depression in the pavement with the lip or edge complained of. The plaintiff's case was not helped by her evidence that she had frequently used the pedestrian crossing in the vicinity, that she had been aware of the existence of the gully or depression and the lip for months prior to the accident and had crossed it on about 80 occasions. The decision of the Court of Appeal, confirming the trial judge's decision, was that the council was entitled, having regard to the obviousness of the lip and the limited hazard it imposed, to expect that the exercise of reasonable care for their own safety by pedestrians would obviate the need for any further response.

New Liability Provisions

57. The second point I will make is that various new qualifications have been introduced which impact upon the relevant duties. We now have to work out what "obvious risk" means (Section 13) "dangerous recreational activity" (Sections 18 and 19), the limits of the good Samaritan provisions (Sections 25 to 27). How we are to go about establishing what "was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice" (Section 22) when bringing actions against professionals, and indeed what is the meaning of the phrase "a person practising a profession" (Section 20). How the proportionate liability provisions are to work will take a lot of thought and debate. The "intoxication" provisions (Sections 46 to 49) are far from clear in their effect. The rather startling provisions in Section 47 will need to be worked through – if you are intoxicated when you suffer harm, then you are 25% liable for your injuries unless you can prove (the onus is reversed) that the intoxication did not contribute to the breach of duty or that the intoxication was not self induced. There are many other comments that might be made.

58. Our experience with the now repealed provisions of the *WorkCover Queensland Act* dealing with breach of duty and contributory negligence was that interfering with the common law concepts didn't really work. All one does is to create a whole host of new problems. The same, I think we can confidently predict, will occur with the *Civil Liability Act.* As one of my colleagues said to me recently, the passing of the *Civil Liability Act* has at least assured him that he will be able to afford his children's education and see him through to retirement.

Dangerous Recreational Activities

59. One area of the law which was subject to significant change involved recreational activities. By Section 19 of the Act, a person is not liable in negligence for harm suffered by another as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm. It is not necessary that the person suffering the harm was aware of the risk.

60. "Dangerous recreational activity" is defined in Section 18 to mean an activity "engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person".

61. In New South Wales it has been held that spear fishing does not fall within the definition of dangerous recreational activity (*Smith v. Perese* [2006] NSWSC 288) and nor does the game of oz tag – a form of touch rugby: *Falvo v. Australian Oz Tag Sports Association* [2006] NSWCA 17.

62. In *Falvo*, as the plaintiff ran towards the opposing team's try line, he moved from a grassed area to a sandy one and his knee gave way and he collapsed. Thus, the case concerned the state of the grounds.

63. The definition in New South Wales is similar but slightly different. It defines dangerous recreational activity as "a recreational activity that involves a significant risk of physical harm". The approach of the court was as follows. Firstly, the expression "significant risk of physical harm" is coloured by the word "dangerous". Secondly, the likelihood of the harm occurring and the degree of harm likely to occur are significant factors. Thus, if a catastrophic injury is possible but the risk of it occurring very slight, then the "risk of physical harm" may not be "significant". If the likelihood of harm resulting and the degree of harm resulting are both more than trivial, that might be sufficient to be "significant". What was not sufficient is if the only significant

risk involved was pertaining to insignificant physical harm such as say a sprained ankle or a scratched leg.

64. In the spear fishing case, the spear fisherman was run over by the motorboat and suffered an amputation of his leg. It is interesting, to say the least, that the court held that the activity did not involve a "significant degree of risk of physical harm".

65. What cases there have been seem to me to suggest that there has been no great change in the approach that the court takes to these traditional problems.

66. In *Fallas v. Maurlas* [2006] NSWCA 32, the Court of Appeal in New South Wales considered the concept of "dangerous recreational activity" in the context of a kangaroo shooting expedition. One of the shooters was accidentally shot in the leg. A couple of points of interest emerge. One is that the onus is on the defendants to establish a defence under the Section.

67. Secondly, the test is objective – it does not matter whether the plaintiff appreciates the risks involved.

68. Thirdly, the court looked at the activity in question at a "relatively detailed level of abstraction". Rather than consider generally an activity of "shooting kangaroos by spotlight", the relevant question was to consider what the plaintiff was doing at the time he was shot, namely sitting in a vehicle holding the spotlight for the shooters outside within the context that from time to time shooters might leave or enter the vehicle with guns that may or may not be loaded.

69. Fourthly, it was held, only by a majority, that the activity fell within the concept of "dangerous recreational activity". The danger was held to be in the prospect that one of the men might handle a loaded gun in a negligent manner.

70. Interestingly, Ipp J.A. was not satisfied that the plaintiff was injured by an obvious risk – he held that the defendant's conduct was so extreme that it did not constitute an obvious risk as defined. He was in the minority.

71. The New South Wales Court of Appeal has considered the intoxication provisions in that State's version of the *Civil Liability Act* in *Russell v. Edwards & Anor* [2006] NSWCA 19. There, a 16 year old dived into the shallow end of a swimming pool in the back garden of a house whilst attending a party at the home of the defendants. He was intoxicated. He struck his head on the floor of the pool and was severely injured. It was held that the term "self induced" in Section 50(5) of the New South Wales Act is to be equated with the term "voluntary". Voluntariness was not negated by ignorance as to the quantity of the intoxicating alcohol required to make an individual intoxicated (which was the 16 year old's argument).

72. Our provision is Section 47(2)(b). The onus is on the plaintiff to rebut the presumption of contributory negligence of at least 25%.

LIFE EXPECTANCY

73. I point out that the New South Wales Court of Appeal has supported the use of "projection tables" rather than "historical tables" in determining life expectancy: *Yu Zang v. Golden Eagle International Trading Pty Ltd* [2006] NSWCA 25 at [51] – [55]. The former table endeavours to take into account the improving life expectancies over the decades.

PROPORTIONATE LIABILITY

74. I will conclude with a mention of the provisions relating to proportionate liability that were introduced. The provisions came into effect on 1 March 2005. The provisions do not apply to a claim for damages for personal injury. The provisions make, or potentially make, a very significant difference to the liability of defendants where more than one person is liable for the damages

claimed. Effectively, the legislation will force a claimant to pursue every possible defendant and provides for potential defendants to limit their exposure by apportioning blame to other defendants.