

Protecting volunteers?

Michael Eburn discusses how the negligence laws may impact Good Samaritans and volunteers.

by Michael Eburn

Australian Parliaments have introduced various provisions designed to modify the law of negligence as it applies to Good Samaritans and volunteers.

This paper will consider the perceived need that the parliaments were seeking to address and will consider the impact the legislation may have on the legal liability of people who come forward to assist in an emergency and the liability of emergency service organisations that have volunteer members.

Introduction

Various Australian governments have recently undertaken major reforms in the area of tort law, and in particular the law of negligence. In order to protect volunteers legislation has been introduced to limit the liability of 'Good Samaritans' and voluntary members of community organisations. Although directed at a broad range of people, this legislation will have significant application in emergencies where people come forward to assist. Some of these people will be simply at the scene of an emergency and others will be volunteer members of the emergency services who respond as part of their duties.

In introducing legislation in this area, the various parliaments were, to a greater or lesser extent, implementing a number of recommendations of the 'Review of the Law of Negligence' by a panel of eminent persons, headed by Mr Justice Ipp (the Ipp Committee). This paper will consider the perceived need that the parliaments were seeking to address and will consider the impact the legislation may have on the legal liability of people who come forward to assist in an emergency and the liability of emergency service organisations that have volunteer members.

Good Samaritans

There is, or has been, a widespread fear (Ipp 2002, 107; Gibson 2002, 6189, Cowley-Smith 1997) that anyone, and doctors and nurses in particular, face a great risk of being sued should they stop to render assistance in an emergency. This fear exists despite the fact that there are simply no cases of anyone being sued in these circumstances. The Ipp Committee reported that:

...the Panel is not aware, from its researches or from submissions received by it, of any Australian case in which a good Samaritan (a person who gives assistance in an emergency) has been sued by a person claiming that the actions of the good Samaritan were negligent. Nor are we aware of any insurance-related difficulties in this area. (Ipp 2002, 107)

The Ipp review, did not recommend the introduction of Good Samaritan legislation. They said:

... because the emergency nature of the circumstances, and the skills of the good Samaritan, are currently taken into account in determining the issue of negligence, it is unnecessary and, indeed, undesirable to go further and to exempt good Samaritans entirely from the possibility of being sued for negligence. A complete exemption from liability for rendering assistance in an emergency would tip the scales of personal responsibility too heavily in favour of interveners and against the interests of those requiring assistance. In our view, there are no compelling arguments for such an exemption. (Ipp 2002, 108).

Notwithstanding this finding, Good Samaritan legislation now exists in Queensland, New South Wales, South Australia and Victoria.

Queensland

The Queensland legislation, originally enacted as the *Voluntary Aid in Emergency Act 1973* and subsequently as the *Law Reform (Miscellaneous Provisions) Act 1995* is the oldest but its operation is limited to doctors and nurses. For the protection to apply a doctor or nurse must be rendering assistance at or near the scene of the emergency or providing assistance whilst a person is being transported from the scene of the emergency to hospital or other 'adequate medical care'. They must act in good faith and without gross negligence and without 'fee or reward' or an expectation of receiving a 'fee or reward'. (Eburn 2000, 66).

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New South Wales

The *Civil Liability Act 2002* (NSW) provides that a Good Samaritan can incur no personal civil liability in respect, of their acts or omissions (s 57), if certain requirements are met. The relevant conditions that must be met before the Act will apply there must be 'an emergency'; the Good Samaritan must be 'assisting a person who is apparently injured or at risk of being injured' (s 57); and the Good Samaritan must be acting in good faith and without expectation of payment or other reward (s 56).

The protection afforded by the Act will not apply if the Good Samaritan causes the injury in the first place, so the driver of the motor vehicle that runs over a pedestrian cannot rely on the section for protection when they provide first aid to the person they have injured; nor can a Good Samaritan rely on the section if they are intoxicated or if they fraudulently impersonate a professional rescuer (s 58).

South Australia

The *Wrongs Act 1936* (SA) protects any person who 'in good faith and without recklessness' comes to the aid of another who is in need or apparently in need of emergency assistance (s 38(2)). Emergency assistance is by definition, limited to medical assistance or other assistance to protect life and safety, not property (s 38(1)). The Act also protects a medically qualified person who, without expectation of payment, gives advice via telephone or other telecommunications device about the emergency treatment of a person (s 38(3)).

Victoria

The *Wrongs Act 1958* (Vic) is similar to the legislation in South Australia. Some key differences are that the 'advice' provision can be relied upon by any person, not just a 'medically qualified person' as in South Australia (s 31B(2)). The 'Good Samaritan' needs to act in good faith, but unlike South Australia, there is no requirement that the action be 'without recklessness'(s 31B(2)). Unlike New South Wales, the 'Good Samaritan' can rely on the legislation even if they created the emergency or accident in the first place (s 31B(3)).

Key concepts

Emergency

Although Emergency is not generally defined, the Acts are clearly directed at medical emergencies. They are intended to apply to good Samaritans who are providing first aid or medical care to a person. They will not apply to Good Samaritans who are acting to preserve property.

In terms of a medical emergency, a major accident or illness that is life threatening and requires urgent treatment is an emergency, but it is not clear whether a less drastic situation can be properly called an 'emergency'.

Good Faith

Henry (2000) has argued that what is meant by 'good faith' in statutory immunities depends on the statutory provision under consideration (Henry 2000, 11). There are two possible tests for 'good faith' the first is subjective, i.e. based upon what an individual knew or thought, the second is objective, which requires a consideration of whether the person seeking to rely on the section acted with the sort of diligence and caution that could have been expected of a reasonable person in the circumstances. Henry says:

Numerous cases demonstrate a subjective approach to assessing good faith. An appropriate basis for application of the test is arguably highlighted in the fire services cases where an immunity is required to protect an agency from liability in relation to what might otherwise be unlawful acts. (Henry 2000, 11).

In the context of a statute aimed to protect and encourage persons who come forward to assist in a medical emergency, the subjective test of good faith will be the relevant one. This is consistent with the approach taken in California where it was said, in relating to a Good Samaritan statute, that to act in good faith was to act with 'that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation' (*Lowry v Mayo Newhall Hospital* 64 ALR 4th 1191, 1196 (Cal 1986)). In the Australian High Court, McTiernan J, when considering a statutory immunity that applied to the New South Wales Fire Brigades, said that the concept of 'good faith' referred to an act that was done 'without any indirect or improper motive' (*Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105, 115). It would appear that a person who is providing emergency assistance acts in good faith when their honest intention is to assist the person concerned.

Without expectation of payment or other reward

The requirement that the Good Samaritan be acting 'without expectation of payment or other reward' would appear to exclude professional rescuers, ambulance officers, medical teams who have been dispatched as part of a disaster plan etc. Arguably all those persons are acting with the expectation of being paid their salary to perform these tasks and are therefore not Good Samaritans. Further a doctor that bills the patient or Medicare for services provided to a patient would be outside the protection of the Act.

Duty to treat

United States cases on Good Samaritan legislation have held that the legislation will not apply where there is a pre-existing duty to treat a patient. The argument goes that if the purpose of the Act is to encourage people to act when they might not otherwise act, then it need not and should not apply to persons who are under a legal

obligation to act in those circumstances. A person who acts when under a legal duty to act is not a 'Good Samaritan' intended to be protected by this sort of legislation (*Velazquez v Jiminez*, 798 A.2d 51, 64 (NJ, 2000); Moore 1999; Jackson & Vaurio 1999; Veilleux 2002).

The US courts take a very hard line on the rule that there is no duty to rescue, so they have held that doctors working in a hospital were not under a duty to come to assist other doctors treating a patient in the same hospital let alone to treat a stranger who might be injured on the street (Jackson and Vaurio 1999; Moore 1999b). This can be compared to the position in New South Wales. In New South Wales a doctor may be guilty of unsatisfactory professional conduct or professional misconduct if they fail to provide emergency assistance when requested to do so (*Medical Practice Act 1992* (NSW), s 36(1)(l)). This statutory provision has been relied on, in part, when finding a common law duty on a medical practitioner to provide emergency assistance when a direct request was made for that assistance (*Lowns v Woods* (1996) Aust Torts Reports (81–376). Unlike the United States, an Australian (or at least a New South Wales) doctor may be under a duty to render assistance when requested and could well be found to be outside the protection of the Act on the basis that he or she is not a 'Good Samaritan' when providing care that they are duty bound to provide. This argument will not, of course, apply where the Act is specifically directed to medical practitioners such as the Queensland Act.

A similar argument could be made with respect to volunteer members of rescue and first aid organisations. These organisations are established for the very purpose of providing emergency assistance and care and so, it could be argued, the members are not 'Good Samaritans' in the sense of a person who:

... comes, by chance, upon a victim who requires immediate emergency medical care, at a location compromised by lack of adequate facilities, equipment, expertise, sanitation and staff. (*Velazquez v Jiminez*, 798 A.2d 51, 65 (NJ, 2000)).

Notwithstanding this possible argument, the Premier of New South Wales said that the Good Samaritan provisions he was introducing '... will mean no liability for voluntary rescue organisations, such as surf life saving clubs, if a person is injured in the course of or in connection with a rescue' (Carr 2002, 5764). By this speech, the Premier must have intended that members of such organization are to be considered 'Good Samaritans' even if the very purpose of their organization is to provide first aid or other emergency medical care.



Volunteer members of emergency service organisations

New South Wales (*Civil Liability Act 2002*), Victoria (*Wrongs Act 1958*, ss 37–41), Queensland (*Civil Liability Act 2003*, ss 38–44), Western Australia (*Volunteers (Protection from Liability) Act 2002*) and South Australia (*Volunteers (Protection from Liability) Act 2001*) have introduced legislation to protect volunteer members of community organisations. In New South Wales for example, s 61 of the *Civil Liability Act 2002* says:

A volunteer does not incur any personal civil liability in respect of 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 clear objective of the Acts in Victoria, Western Australia and South Australia is to ensure that where a plaintiff alleges negligence by a volunteer, the volunteer is protected from personal liability but the organisation for which they are volunteering may still be liable. The effect of the legislation in New South Wales and Queensland is not so clear.

In New South Wales, the legislation provides that a volunteer is not personally liable but this section must be read in conjunction with the *Law Reform (Vicarious Liability) Act 1983* (NSW). (Vicarious liability is the doctrine whereby one person can be liable for the negligence of another. It is usually applied in employment situations so that an employer can be liable



Will volunteers be protected by the new laws?

to pay compensation where the employee's negligence causes damage.) Under this Act, when considering the vicarious liability of a defendant, any exemption provision, such as that found in the *Civil Liability Act 2002* (NSW) is to be ignored. This means that if, at common law, an organisation is vicariously liable for its volunteer members, the *Civil Liability Act 2002* (NSW) will ensure that the volunteer cannot be sued, but that the organisation can be.

The Ipp review, however, doubted whether an organisation that uses volunteers would be vicariously liable for their negligence. If an organisation that uses volunteers is not vicariously liable for the volunteers, then the New South Wales Act will excuse the volunteer from liability for negligence and, there being no vicarious liability, it will leave the injured plaintiff with no remedy. This does not appear to have been the Premier's intention, as he said, when introducing the Act into Parliament, that 'It is not intended to alter the potential liability of a community organisation by providing the individual members with immunity' (Carr 2002, 5764).

On the other hand, as I've argued elsewhere (Eburn 2000), if an organisation is vicariously liable for the action of its volunteers then this Act will not change the

practical status quo, plaintiffs will still seek damages from an organisation (that can pay or is insured) rather than an individual. If that is the case, the Premier's other stated objective of ensuring '...no liability for voluntary rescue organisations, such as surf life saving clubs, if a person is injured in the course of or in connection with a rescue' (Carr 2002, 5764) will not be achieved. Where a person is injured, and can show that this was due to the negligence of the rescuer, they would still be able to sue the rescue organisation even though they could not sue the volunteer rescuer personally.

Effectively the New South Wales Premier has set the New South Wales Act two, mutually inconsistent objectives. If the New South Wales Parliament had wanted to make sure that organisations that used the services provided by volunteers was vicariously liable for the torts of those volunteers it could, and should, have simply said so, as the Parliaments in Victoria (*Wrongs Act 1958* (Vic) s 37(2)), Western Australia (*Volunteers (Protection from Liability) Act 2002* (WA), s 7) and South Australia (*Volunteers (Protection from Liability) Act 2001* (SA), s 5) have done.

A series of ad hoc reforms

One problem that this legislation demonstrates is the mass of reform in this area that has only served to make the law more, not less, complex. A plaintiff or a defendant must sort through a mass of legislative provisions to try and understand the law that applies in their circumstances and this will often be impossible, and could lead to more, rather than less, litigation. Take for example, an honorary ambulance officer working for the Ambulance Service of New South Wales (*Ambulance Services Act 1990*, s 14) who comes to assist a person at a car accident. Is that officer a Good Samaritan, a volunteer or is his or her liability determined by the *Ambulance Services Act 1991* (NSW) that has yet another clause designed to limit liability (s 26). Most, if not all, of the emergency services that are established by an Act of Parliament have the benefit of some clause designed to limit liability and none of them are the same (Eburn 2000).

The fact that the Parliament has passed legislation designed to cover 'civil liability' whilst leaving so many other acts still in place, with special and different rules for various members of different organisations and professions, suggests an ad hoc approach to legislative reform, rather than the Principles-based approach argued for by the Ipp Committee. In the words of the Ipp committee:

Principle-based reform favours consistency and uniformity and requires special provisions for particular categories of cases to be positively argued-for and justified. (Ipp 2002, 30).

Conclusion

Parliaments across Australia have sought to introduce legislation to protect volunteers and Good Samaritans. Their motivation may be commendable, there is no doubt that people who come to the aid of others or voluntarily give their time to assist community organisations should be able to do so without fear of legal liability. What the Parliaments and presumably those that advocated for these reforms wanted was an absolute guarantee that deserving good Samaritans and volunteers would not be sued. The passage of legislation does not however stop litigation; it simply shifts the issues that are the subject of the litigation. Now we can foresee litigation to determine 'what is an emergency?' 'Who is a good Samaritan?', 'what is the law of vicarious liability?' etc. This series of ad hoc reforms to liability, with different rules for different classes of people and possibly many rules for one individual who may be categorised in different classes, does not lead to a principled development of the law but rather the ad hoc system of conflicting or confused rules that represent the current system of tort law reform.

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