Good Samaritans and volunteers

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Australian legislators have made significant reforms to negligence law in recent years. Provisions designed to limit the liability of good Samaritans and limit the liability of volunteer members of community organisations are two such reforms.

Good Samaritans

There is, or has been, a widespread fear that anyone, and doctors and nurses in particular, can face a great risk of being sued should they stop to render assistance in an emergency.¹ 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.²

Similar results were also reported by the Tino Review in 1995³ and the Victorian Law Reform Committee in 1997,⁴ but unlike the Ipp Review, these reviews recommended the passing of good Samaritan legislation in order to reassure medical practitioners in particular that they should stop to assist where assistance is required.⁵ The Ipp Review, on the other hand, recommended against the introduction of good Samaritan legislation, noting:

[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.⁶]

Notwithstanding this recommendation, all Australian jurisdictions other than Tasmania have enacted good Samaritan legislation.

Commentary on what effect this legislation will have is somewhat hypothetical. US jurisdictions have had good Samaritan legislation since 1959,⁷ but the terms of the legislation vary widely across the jurisdictions. Although US case law throws up some interesting issues, it cannot give clear guidance on the effect of the Australian provisions. Queensland has had a good Samaritan statute since 1973,⁸ but that statute only applied to doctors and nurses and has never been subject to judicial comment.⁹

In interpreting the legislation, it has to be borne in mind that these amendments represent a significant departure from the common law. The common law has established the principle that a person is negligent if they fail to act reasonably in the circumstances. If that failure causes damage to another, then the tortfeasor is liable to compensate the injured party for the damage they have caused. The civil liability reforms have created a category of people, good Samaritans, who are not
liable to compensate others for the injuries they cause even where those injuries are caused by gross negligence. There is a presumption that legislation will not invade common law rights unless it can be shown that the legislature clearly intended to do so.\textsuperscript{10} Clearly, recent legislative reforms amend common law, and reduce the rights of an injured plaintiff to recover, so it may be expected that the courts will read the section as strictly as its words allow.\textsuperscript{11}

With these limitations in mind, it is possible to identify some common themes across the jurisdictions and to make some predictions on how key terms will be interpreted.

The model adopted in the legislation is reasonably consistent across the jurisdictions, except for Queensland. A good Samaritan is someone who comes forward to render assistance in a medical emergency without an expectation of being paid. The good Samaritan is not liable for any damage caused by their well intentioned acts or omissions. Further, a medical practitioner (or in Victoria, any person) who provides advice on how to treat an injured person is not liable for any error or omission in that advice.\textsuperscript{12}

In each jurisdiction there are provisions that limit who may benefit from the protection in the Acts. In every jurisdiction other than Victoria, the good Samaritan is not protected if they are intoxicated.\textsuperscript{13} In NSW the person who causes the injury in the first place cannot rely on the protection, so the driver of the motor vehicle that runs over a pedestrian cannot rely on the good Samaritan provisions when they provide first aid to the person they have injured.\textsuperscript{14} Also, in NSW a person is not protected if they claim to have skills or training that they do not have.\textsuperscript{15}

The position in Queensland is different. The Queensland law only provides protection from civil liability for doctors and nurses\textsuperscript{16} and for members of an organisation that has been specifically identified as an ‘entity ... that provides services to enhance public safety’.\textsuperscript{17} Examples of entities that have been listed, and whose members therefore enjoy statutory protection, are the Queensland flotillas of the Australian Volunteer Coast Guard Association Inc, St John Ambulance Australia Queensland, Surf Life Saving Queensland, Volunteer Marine Rescue Association Queensland Inc and statutory authorities such as the Queensland Ambulance Service, State Emergency Service and Rural Fire Service. Although the Queensland law is limited in terms of who it applies to, it has similar features to the law in the other jurisdictions. In particular, to rely on the protection the person must be providing care in an emergency and, in the case of doctors and nurses, without an expectation of being paid.\textsuperscript{18}

Having identified the basic model of the legislation, there are key common terms that may have to be interpreted.

**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.

A major accident, or an illness that is life threatening and requires urgent treatment, is a medical emergency. However, it is not clear whether a less drastic situation can be properly called an ‘emergency’.

**Good faith**

What is meant by ‘good faith’ in statutory immunities depends on the statutory provision under consideration.\textsuperscript{19} There are two possible tests for ‘good faith’. The first is subjective, that is, 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.

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.\textsuperscript{20} This is consistent with the approach taken in California where it was said, in relation to a good Samaritan statute, that to act in good faith is 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. In the Australian High Court, McTiernan J, when considering a statutory immunity that applied to the NSW Fire Brigades, said that the concept of 'good faith' referred to an act that was done 'without any indirect or improper motive'. 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**

In jurisdictions other than Queensland, there is a requirement that the good Samaritan must be acting 'without expectation of payment or other reward'. This would appear to put professional rescuers, for example, ambulance officers or medical teams who have been dispatched as part of a disaster plan, outside the protection of the legislation. Arguably, those persons are all acting with the expectation of being paid their salary to perform these tasks and are therefore not good Samaritans. Similarly, a doctor that bills the patient or Medicare for services provided to a patient would be outside the protection of the legislation.

In Queensland, a doctor or nurse must act without an expectation of being paid if they are to be protected, but otherwise the legislation is specifically applied to members, including paid members, of prescribed organisations. The obligation to act without an expectation of being paid does not apply to them.

**Duty to treat**

US 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 good Samaritan legislation is to encourage people to act when they might not otherwise do so, 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 and is not protected by this sort of legislation.

The US courts take a very hard line on the rule that there is no duty to rescue. 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. This can be compared to the position, at least in NSW, where a doctor may be guilty of unsatisfactory professional conduct or professional misconduct if they fail to provide emergency assistance when requested to do so.

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. Unlike the US, an Australian (or at least a NSW) doctor may be under a duty to render assistance when requested, and could well be found to be outside the protection of good Samaritan legislation on the basis that he or she is not a good Samaritan when providing care that they are duty bound to provide.

**Vicarious liability for good Samaritans in NSW and Queensland**

The Civil Liability Act 2002 (NSW) (the NSW Act) says that the good Samaritan provision 'does not affect the vicarious liability of any other person for the acts or omissions of the good Samaritan'. On the other hand, the NSW Act also says at s 3C: 'Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.' Clearly these sections are mutually exclusive, but are likely to have limited application.

If a person who comes to the aid of another is paid to provide that service, for example an ambulance officer, they will not be a good Samaritan because they have an expectation of getting paid for doing their job. If it is not their job to provide such care, it is hard to see how their employer could be vicariously liable because they are not performing their job related tasks.

Despite these difficulties, some cases may be considered. A bus driver who stops at a car accident or a worker who, although not employed as the first aid officer, goes to assist an injured colleague are some examples.

If we assume that the employer is vicariously liable in either of these cases, we can consider what effect these mutually inconsistent provisions would have. If by virtue of s 57(1) of the NSW Act the good Samaritan attracts no personal liability, then s 3C of the NSW Act would mean that, as the liability of the good Samaritan has been excluded or limited, any vicarious liability of the employer has also been limited. Section 57(2), however, would say that there has been no effect on the employer's vicarious liability. Given these inconsistencies, the specific provision (s 57(2)) would have to override the general provision (s 3C), with the result that the employer of the good Samaritan would remain vicariously liable for the negligence of the good Samaritan.

In Queensland, neither a person who provides first aid as part of their duties to enhance public safety for an entity prescribed under a regulation that provides services to enhance public safety nor the prescribed entity itself are liable for damage caused during the provision of first aid or other assistance at a medical emergency. Accordingly, in that State too a person injured by a person protected by the Queensland legislation cannot look to the organisation they were working for to compensate them for any harm done.

**Volunteers**

The other relevant provisions deal with volunteers. The Ipp Review made no recommendation on the question of whether volunteers should be protected from liability, saying:

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. The Panel has decided to make no recommendation to provide volunteers as such with protection against negligence liability.
Unlike the good Samaritan provisions, where they reached a conclusion that such legislation should not be introduced, the Panel was less adamant about legislation to protect volunteers, simply finding that such a recommendation would be largely outside their terms of reference.\textsuperscript{33} Again, notwithstanding the finding of the Ipp Review, the NSW and other Parliaments did introduce volunteer protection legislation. The NSW Act says:

\begin{quote}
... if a volunteer negligently injures another person in NSW, neither the volunteer nor the organisation that they worked for is liable to pay compensation to the person injured.
\end{quote}

A voluntary does not incur any personal civil liability in respect of any act or omission done on the behalf of the volunteer in good faith when doing community work:

- organised by a community organisation;
- as an officer holder of a community organisation.\textsuperscript{34}

A community organisation is a group that "organises the doing of community work by volunteers and that is capable of being sued for damages in civil proceedings".\textsuperscript{37}

The protection provided in the NSW Act does not apply where the volunteer is engaged in criminal activities,\textsuperscript{38} is intoxicated,\textsuperscript{39} or is acting outside the scope of his or her duties or contrary to instructions.\textsuperscript{40} The provision does not apply if the risk that arises is one that the organisation was required to be insured against,\textsuperscript{41} nor does it apply to liability arising out of a motor vehicle accident.\textsuperscript{42} Similar legislation has also been introduced in all jurisdictions.\textsuperscript{43}

One issue that arises with the use of volunteers is whether the organisation that uses them is vicariously liable for their negligence. The issue is not in doubt where there is an employer/employee relationship, but is not clear with respect to volunteers. The Ipp Review doubted whether an organisation that uses volunteers would be vicariously liable for them. In jurisdictions other than NSW and Queensland, the legislation gives a clear statement that although a volunteer is protected from personal liability, the organisation for which they are volunteering may be liable.\textsuperscript{44} These provisions will have the desired effect of reassuring volunteers that they can give their time and effort to the community without fear of personal liability, but still ensure that persons injured by the negligent but well meaning actions of volunteers can seek compensation from that organisation. The provisions also ensure that plaintiffs are not denied compensation because of the status of the tortfeasor, something the plaintiff has no control over, and that organisations are not tempted to make use of volunteers, rather than employees, in order to limit their legal liability.

In NSW, on the other hand, a volunteer is protected from personal liability,\textsuperscript{45} and so is anyone who might otherwise be vicariously liable for their conduct.\textsuperscript{46} The result is that if a volunteer negligently injures another person in NSW, neither the volunteer nor the organisation that they worked for is liable to pay compensation to the person injured.

Traditionally it would have been possible to argue that a community organisation was liable in any event, due to its non-delegable duty of care. A person who comes to a St John first aid post seeking first aid, or a Lions club barbeque seeking a steak sandwich, is entitled to expect that the organisation will take steps to ensure that the volunteers take reasonable care in the provision of their services. If the volunteer does not properly treat the injured, or if the food is not hygienically prepared, the organisation could itself be sued for that failure. The NSW Act has also cut off that avenue for compensation. The NSW Act provides that an alleged breach of non-delegable duty:

\begin{quote}
... is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.\textsuperscript{47}
\end{quote}

Given that the effect of s 3C of the NSW Act is to provide that there is no vicarious liability for volunteers, it follows that there could also be no breach of a non-delegable duty, and so no liability.

Queensland legislation says a volunteer is not liable in negligence for the work they do as part of a community organisation, but it is silent on whether the organisation itself is liable.\textsuperscript{48} If organisations are not vicariously liable for the negligence of their volunteers, then there may be no liability. Equally, if they are vicariously liable, the fact that the Civil Liability Act 2003 (Qld) ensures that the volunteer is not liable would also mean that there is no liability to be attached to the organisation. The result, as in NSW, is that a person injured by the negligence of a volunteer has no remedy.

\textbf{Conclusion}

Whether the reforms discussed here were in any sense required is beyond the scope of this discussion. As indicated above, there was no evidence presented that the law as it stood was causing legal difficulties for good Samaritans or volunteers. However, there was a public perception that the law required amendment in order to encourage people to come forward and contribute to their community, whether in an emergency or more generally.

One advantage of the law reform has been that, with the exception of Queensland and NSW, there are now relatively uniform legal provisions across Australia. Those provisions have also clarified whether or not an organisation that uses volunteers is liable for the negligence of those volunteers, and has done so in a way that will benefit both the volunteers and potential plaintiffs.

Queensland has taken a very different
approach to the protection of people who provide medical or first aid care in an emergency, limiting that protection to doctors, nurses, and members of prescribed organisations. Moreover, both Queensland and NSW have departed from the other jurisdictions on the issue of vicarious liability for volunteers, leaving potential plaintiffs with no remedy if they are injured by volunteers. This could lead to incongruous results. For example, where two people are injured in a nursing home, one by a staff member and the other by a volunteer, one will be able to recover damages and the other will not. The result will not depend on the nature of the injuries or how they are caused, but on the status of the tortfeasor.

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Endnotes
2. Ipp and others, above note 1, at 107.
5. Above note 3; above note 4 at 27-8.
6. Ipp and others, above note 1, para 7.24.
9. As above at p 144.
10. Civil Law (Wrongful) Act 2002 (ACT), s 3; Civil Liability Act 2002 (NSW), ss 53-8; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 8; Law Reform Act 1995 (Qld), ss 15 and 16; Civil Liability Act 1926 (SA), s 74; Wrongs Act 1958 (Vic), ss 31A-31D; Civil Liability Act 2002 (WA), ss SAB and SAD.
11. Civil Law (Wrongful) Act 2002 (ACT), s 8; Civil Liability Act 2002 (NSW), s 58(2); Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 8; Civil Liability Act 1926 (SA), s 74(4); Civil Liability Act 2002 (WA), s SAE.
13. Section 58(3).
17. Civil Liability Act 2003 (Qld), s 18.
19. As above.
20. Lowry v Mayo Newhall Hospital 64 ALR 4th 1191, 1196 (Cal 1986).
22. Civil Law (Wrongful) Act 2002 (ACT), s 53(3); Civil Liability Act 2002 (NSW), s 56; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 8; Civil Liability Act 1926 (SA), s 74; Wrongs Act 1958 (Vic), s 31B.
30. Civil Liability Act 2002 (NSW), s 57(2).
31. This would also be consistent with s 10 of the Law Reform (Vicarious Liability) Act 1983 (NSW), which provides that in ‘determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded’.
33. Section 27.
34. Ipp and others, above note 1, para 11.21.
35. As above.
37. Section 60.
38. Section 62.
39. Section 63.
40. Section 64.
41. Section 65.
42. Section 66.
43. Civil Law (Wrongful) Act 2002 (ACT), ss 6-11; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 7; Civil Liability Act 2003 (Qld), ss 38-44; Volunteers Protection Act 2001 (SA); Civil Liability Act 2002 (WA), ss 44-9; Wrongs Act 1958 (Vic), ss 37-41; Volunteers (Protection from Liability) Act 2002 (WA).
44. Civil Law (Wrongful) Act 2002 (ACT), s 9; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 73(3); Volunteers Protection Act 2001 (SA), s 5; Civil Liability Act 2002 (WA), s 48; Wrongs Act 1958 (Vic), s 37(2); Volunteers (Protection from Liability) Act 2002 (WA), s 7.
45. Civil Liability Act 2002 (NSW), s 61.
46. Section 3C. When these provisions were originally enacted, they did not clearly identify what the legal position of the organisation was. This was rectified by the insertion of s 3C by the Civil Liability Amendment Act 1993 (NSW), which commenced on 19 December 2003.
47. Civil Liability Act 2002 (NSW), s SQ.