You are an attorney for a US corporation faced with litigation in Australia. A wealthy Australian investor is claiming that someone at your company gave him misleading investment advice, causing him millions of dollars in damages when his investment failed. You are preparing a defense to this suit when you learn of a vast legal reform that has recently taken place in Australia. The collapse of a major insurer and a medical indemnity organization, spiralling premiums, and some highly publicized plaintiffs' verdicts, have all led to unprecedented tort law reform in Australia. You realize that you are in need of a quick update. This article will help you, as an attorney outside Australia, to navigate the recent changes in Australian tort law. (For a quick review of the basics of Australian law, see “An Overview of the Australian Legal System,” on p. 49.)
TORT REFORM DOWN UNDER

Australia has been through a remarkable period of tort reform. The real engine for reform was the federal government’s Review of the Law of Negligence, which was established to recommend a series of proposals for a principles-based approach to reforming the law of negligence. The review panel, chaired by the Honorable Justice David Ipp, released its final report (the “Ipp Report”) in October 2002. This has resulted in a substantial wave of state and territory legislation.

Major reforms of the liability system have been implemented in an extraordinarily short period, compared to the usual slow pace of legislative change. If you are a prospective defendant, you should be aware of some important consequences of these changes. (For a list of the areas highlighted in this article, see “Key Reforms to Australian Tort Law,” on p. 48.)

In particular, you should be aware that the old rules and assumptions regarding the value of a claim may not necessarily apply. Major changes have taken place in the assessment of damages for noneconomic loss, limitations on interest for certain categories of damages, the applicable discount rate, and the assessment of damages for past and future economic loss and for gratuitous care.

STATE AND TERRITORY REFORM

The main aim of the Review of the Law of Negligence was to assist governments in developing a consistent national approach to implementing measures to tackle rising premiums and the reduced availability of public liability insurance. While the states and territories have not introduced uniform legislation, and some of the details and the title and timing of the statutes differ, the overall approach has been consistent.

A detailed analysis of the legislative changes made by the various states and territories is beyond the scope of this article. Because New South Wales (NSW) is the most populous and litigious state in Australia, the article focuses on some of the highlights of the reforms introduced in that state. If faced with litigation in another Australian state, be sure to review any recent changes or reforms within that region.

Restatement of the Law of Negligence

In NSW, a defendant now will not be liable for negligence resulting from “failing to take precautions against a risk of harm” unless:

• the defendant knew or ought to have known of the risk (that is, the risk was foreseeable);
• the risk was “not insignificant”; and
• a reasonable person in the defendant’s position would have taken precautions against the risk.

In determining what a reasonable person would have done in response to the risk, a court must consider (1) the probability that the harm would occur if care was not taken, (2) the likely seriousness of the harm, (3) the extent of the burden created by taking precautions to avoid the risk of harm, and (4) the social utility of the activity that creates the risk of harm.

The law of causation has also been reformed.

• A plaintiff in NSW bears the onus of proving factual causation, in the sense that the negligence was a necessary condition of the occurrence of the harm. In determining the exceptional case that raises the issue of whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (among other relevant things) whether and why responsibility for the harm should be imposed on the negligent party.
A plaintiff in NSW now also bears the onus of proving that it is appropriate for the scope of the defendant’s liability to extend to the harm so caused. For the purpose of determining the scope of liability, the court is to consider, among other relevant issues, whether and why responsibility for the harm should be imposed on the negligent party.

**Proportionate Liability for Non-personal Injury Cases**

The introduction of a system of proportionate liability means that joint tortfeasors will be liable only to the extent of their actual responsibility for the relevant harm. You are probably aware of the “joint and several liability” system for recovering damages in Australia. This system still applies to claims arising from personal injury or death (for example, product liability claims), and allows plaintiffs to recover the whole of their loss from a concurrent wrongdoer who was a cause of the loss, regardless of whether any other wrongdoers may be liable for the loss.

The new system of proportionate liability is quite different: Plaintiffs may now have to sue each and every defendant responsible for their loss before they can recover 100 percent of their loss. In this sense, defendants will arguably benefit more from a system of proportionate liability than plaintiffs, who face the burdensome task of locating each prospective defendant.

**Key Features of Proportionate Liability**

As a defendant preparing to litigate in Australia, you should be aware of the key features of the system of proportionate liability. In summary,

- Proportionate liability applies to a limited number of non-personal injury claims, referred to as “apportionable claims.”
- “Apportionable claims” are defined as:
  
  a) a claim for economic loss or property damage in non-personal injury matters arising out of a failure to exercise reasonable care, whether in contract, tort, or otherwise;
  
  b) a claim for economic loss or damage to property in an action for damages for contravention of § 42 of the *Fair Trading Act 1987* (NSW) (a provision prohibiting misleading or deceptive conduct).

- Proportionate liability is excluded where the defendant intended the loss or was fraudulent. It also does not apply where the claim arises out of a strict liability offence, rather than a mere failure to take reasonable care.

- In giving judgment in a way which “apportions liability” between defendants, the court will have regard to the “amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss.”

- In apportioning responsibility between defendants, a court may take into account the comparative responsibility of any other tortfeasor who is not a party to the action.

- Where a plaintiff has been awarded damages against one tortfeasor for an apportionable part of the relevant harm, the legislation allows that plaintiff to commence other proceedings against

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**KEY REFORMS TO AUSTRALIAN TORT LAW**

For corporate counsel, the key areas of change in the recent wave of Australian tort reform include the following:

- A restatement of the law of negligence.
- The introduction of a proportionate liability scheme for certain claims at both the state and federal level.
- The requirement that claims be certified as having a “reasonable prospect of success.”
- A redefinition of the standard of care owed by a person practicing a profession.
- Limitations on noneconomic damages in personal injury cases.
- Changes to the valuation of economic losses in personal injury cases.
- Changes to the limitation period in actions for the recovery of damages for personal injury or death (other than in auto accident claims).
- Exclusion from liability for harm suffered in various specific circumstances, e.g., recreational activities involving an “obvious risk.”
- A limit on legal cost recovery for small claims.
- A shift in focus for plaintiffs’ lawyers to product liability and shareholder litigation—particularly in the form of class actions.
a joint tortfeasor with respect to the harm caused by that person.

- The defendant also has a duty, under penalty of costs, to help identify other potential defendants who may have contributed to the loss. This is designed to ensure that defendants who fail to identify other potential wrongdoers early in the proceedings do not disadvantage plaintiffs.
- Parties can expressly contract out of the operation of the proportionate liability provisions.

**The Bottom Line of the Proportionate Liability Reforms**

As corporate counsel, you may be wondering how these changes will affect your company. Until now, you will have been used to a system where liability is “joint and several.” With contracts, joint and several liability is important, particularly where the same promises are made severally by two companies. For example, in situations where one company is of substance and the other is not, the parties receiving the benefit of the joint promise have comfort in knowing that at least one of the promisors is capable of meeting a damages claim if that promise is not fulfilled.

As a defendant in an action for damages, your company will benefit from the move to a system of proportionate liability. In particular, the move will mean that plaintiffs can no longer target only defendants with the deepest pockets. More often than not, under the previous system of joint and several liability, plaintiffs ignored parties with limited funds to meet losses. As a consequence, large corporations and other institutions often faced meeting 100 percent of the claims. A system of proportionate liability will ensure that each defendant, including your company, will be liable only to the extent that they are responsible for the plaintiff’s losses.

The downside of these reforms is where your company is in the position of a plaintiff. In an action for damages, you will be required to sue each defendant for the proportion of damages for which they are each liable. Although the effect of “joint and several liability” protected plaintiffs from insolvent defendants, the system of proportionate liability does not. This means that a plaintiff may not be able to recover 100 percent in a claim for damages, particularly in circumstances where some of the defendants are uninsured, insolvent, or simply unable to pay their share of the loss.

**AN OVERVIEW OF THE AUSTRALIAN LEGAL SYSTEM**

Australia is a federation of six states and two self-governing territories. The Australian Constitution specifies a range of matters that are the responsibility of the federal government. The balance of legal issues remains the responsibility of the various state and territory governments.

Australia’s laws and legal system have their foundation in the common law of England. However, while the judgments of the House of Lords and English Court of Appeal are of persuasive authority, they are not binding on Australian courts. Australia has both a federal court system and a hierarchy of courts in each of the states and territories. In all cases, the ultimate appellate court is the High Court of Australia.

Actions heard by Australian courts proceed on an adversarial basis. The practice and procedure, including the rules of evidence, are similar to those in English courts. A judge sitting without a jury generally hears civil proceedings in Australia, although it is possible to have some causes of action heard by a judge and jury in most of the state and territory supreme courts.

The bottom line for corporate counsel: You have an increased need to review contracts and agreements to ensure that promisors have the capacity to pay damages in the event that they fail to deliver.

**Reasonable Prospects of Success**

The reforms also attempt to deter lawyers from commencing frivolous claims or pursuing ill-founded defenses. The reforms prohibit the provision of legal services unless the lawyer reasonably believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or the defense has a reasonable prospect of success. This prohibition is not limited to personal injury claims but extends to any claims for damages. The prohibition is bolstered by the requirement that lawyers certify, at the time of filing the statement of claim or defense, that such reasonable grounds exist; and if the court finds those grounds are absent, the lawyer may be ordered to pay the client’s costs and those of the other party.
In addition, the lawyer may be held to have committed an act of professional misconduct.

Professional Negligence

The standard of care owed by a person practicing a profession has been redefined. While the new rule will cover traditional professionals such as medical practitioners, lawyers, and accountants, it is uncertain how far it will extend. Will it, for example, extend to a professional company director, a teacher, or a journalist? Are tradespeople professionals? Undoubtedly, the rule will be tested as those near the likely limits try to argue that they should fall within it.

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Defendants in professional negligence claims are now entitled to rely on the fact that they acted in a manner that, at the time the professional service was provided, “was widely accepted in Australia by peer professional opinion as competent professional practice.” (This protection does not apply to any duty to warn of the risk of personal injury or death associated with the provision of a professional service.) Note that “widely accepted” does not mean “universally accepted.” If differing peer professional opinions are widely accepted in Australia, one or more (or all) of these opinions can be relied upon for the purposes of the provision. However, a court may disregard a peer professional opinion it considers irrational. (The test of rationality, rather than reasonableness, was adopted in an effort to make it more difficult for a court to disregard the opinions of experts in the field.)

Noneconomic Damage Restrictions on Personal Injury Claims

Although proportionate liability has not been extended to personal injury cases, the reform process did have as one of its major aims the tightening of controls on damages awarded in personal injury claims. These of course include product liability claims. The NSW legislation restricts damage awards for noneconomic loss in the following ways:

- No damages may be awarded to a claimant for noneconomic loss unless the severity of that loss is at least 15 percent of the most extreme case.
- The maximum amount of damages for noneconomic loss is currently fixed at $AUD416,000 (approximately $US319,978). This maximum amount is to be awarded only in a most extreme case.
- A court cannot order the payment of interest on damages awarded for noneconomic loss. This provision is based on the rationale that general damages do not represent financial loss to the injured person.

Assessment of Economic Losses in Personal Injury Cases

A number of changes have also been made to the law with respect to assessment of damages in personal injury claims for past and future economic loss.

Key Features of Economic Loss Assessment

Some of the key features of the recent changes to the law include:

- The maximum amount of damages for economic loss due to loss of earnings or the deprivation or impairment of earning capacity is fixed at a rate of three times the average weekly earnings in NSW for the most recent quarter before the date of the award.
- Future economic loss predictions, for the purpose of making an award, must be based on assumptions that accord with the claimant’s most likely future circumstances but for the injury. If the court makes an award for future economic loss, it must adjust the amount determined by reference to the percentage possibility that, but for the injury, certain events may have occurred that would have resulted in economic loss. In delivering its judgment, the court must state the assumptions on which the award was based and the relevant percentage by which the damages were adjusted.
If an award for damages includes a lump-sum component for future economic loss, that amount must be discounted by 5 percent or some other percentage rate prescribed by the regulations. The scope of damages that may be awarded for attendant care services provided on a gratuitous basis, such as nursing or domestic help, has also been defined and limited. (See “Limits on Damages for Attendant Care Services,” on this page.)

Finally, note that exemplary, punitive, and aggravated damages may no longer be awarded in personal injury actions.

The Bottom Line of Economic Loss Assessment

The bottom line for corporate counsel: These changes mean that over time corporations will see a reduction in the number of personal injury claims. There is evidence that the New South Wales reforms have significantly reduced the number of civil cases brought in the District Court—the primary forum for personal injury litigation—from a record 20,784 in 2001 to just under 6,800 in 2004. The Chief Judge of that court attributes this reduction to the tort law reforms.

Anecdotal evidence also suggests that the reduction in the level of personal injury litigation in the District Court and beyond is mainly due to the caps on damages (which have eliminated a significant number of small claims) and a reluctance on the part of plaintiff lawyers in all but the most clear-cut cases to certify that a particular claim has reasonable prospects of success. The requirement that certification be provided, coupled with the prospect of the profession’s regulatory body taking action alleging a professional misconduct if a claim is wrongly certified, has had a truly chilling effect on at least part of the profession. In some respects this is difficult to understand, but nevertheless there is a widespread view among the profession that it is the case.

The Bottom Line for Corporate Counsel: These Changes Mean That Over Time Corporations Will See a Reduction in the Number of Personal Injury Claims. There Is Evidence That the New South Wales Reforms Have Significantly Reduced the Number of Civil Cases Brought in the District Court.

Limits on Damages for Attendant Care Services

One example of the ways in which the recent tort reforms in NSW have limited damages for personal injury actions is the limitation of damages for attendant care services provided on a gratuitous basis, such as nursing or domestic help.

- Such damages cannot be awarded unless the court is satisfied that there is (or was) a reasonable need for the services, which has arisen solely as a result of the injury sustained. The court must be of the mind that the services would not be (or would not have been) provided to the claimant but for the injury.
- No damages may be awarded for gratuitous attendant care services if the services are provided, or are to be provided, for less than six hours per week and for less than a total period of six months.
- There are certain restrictions on the amount of damages that can be awarded for gratuitous attendant care services. Such limitations hinge upon whether services are provided for more or less than forty hours per week.
- The court is not permitted to order the payment of interest on gratuitous attendant care services.

Limitation Period for Personal Injury Actions

The limitation period in actions for the recovery of damages for personal injury or death (other than in auto accident claims) has been amended in line with the recommendations of the Ipp Report. Consequently, the new limitation period is the earlier of:

- three years from when the cause of action was discoverable, called the “three-year post-discoverability limitation period”—that is, when the plaintiff first knew or ought to have known that the injury or death has occurred, that the injury or death was caused by the fault of the defendant and, in the case of injury, that the injury was sufficiently serious to justify the bringing of an action; or
- twelve years from the occurrence that gives rise to the claim, called the “twelve-year long-stop limitation period.”

The twelve-year period can be extended at a court’s
discretion, but not beyond three years after the cause of action was discoverable. In exercising this discretion, a court must consider certain factors, including the length and reasons for the delay and the extent to which the delay has caused or may cause prejudice to the defendant because relevant evidence is no longer available. These principles also apply to survivor actions and compensation to relative actions.

Legal Costs for Small Claims

In an attempt to reduce the role that lawyers have played in the explosion of claims, the law now limits the legal costs recoverable for small claims. In this context it is important to remember that Australia follows the so-called English rule: In general terms, the loser pays the winner’s costs of the action. The term “costs” includes both attorneys’ fees and any out-of-pocket expenses (disbursements).

Where the amount received in respect of a claim for personal injury damages in NSW does not exceed $AUD100,000, the maximum amount of costs recoverable for legal services provided to either the plaintiff or defendant is 20 percent of the amount recovered or $AUD10,000, whichever is greater.

There are, however, a number of exceptions to this provision, such as where the lawyer and client have entered into a costs agreement that provides for the payment of an amount in excess of that specified; where pursuant to court orders, additional costs may be recovered by reason of the way the other party to the proceedings conducted the case; and where a reasonable offer of compromise has been refused and the outcome of the matter is no less favorable than the offer. In this last situation the court may order the party who has rejected the offer of compromise to pay the other party’s costs on an indemnity basis from the time the offer was made to the completion of the matter. The ability of a lawyer to contract out of this provision has severely limited its effectiveness.
REFORM AT THE FEDERAL LEVEL

The federal legislative response to the Ipp Report, which is crucial to any successful tort reform process, has been much slower than that of the states and territories. Without consistent federal legislation, the reforms at the state and territory level are of limited value because plaintiffs may engage in forum shopping, particularly as, in the wake of these tort reforms, the plaintiffs’ bar is looking for alternative, less-traditional modes of litigation.

To date, the principal federal response has aimed to prevent the Trade Practices Act 1974 (Cth) (TPA) from being used as such an alternative basis for plaintiffs to pursue claims for negligently caused personal injury or death. The federal reforms thus far include:

• The Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004 (Cth) applies, with some amendments, to the rules relating to limitation of actions and quantum of damages recommended by the Ipp Report. This reform applies to any claim for personal injury or death brought under Part IVA (unconscionable conduct), Part V Division 1A (product safety and product information), Part V Division 2A (product liability), and Part VA (product liability-strict liability regime) of the TPA.
• The adoption of proportionate liability for defendants in certain actions for economic loss or property damage.

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lies in the reformulation of the law of negligence, most of which still remains to be tested. The revision of the law of professional responsibility (discussed above) will create additional opportunities, as will the provisions limiting or excluding liability in certain circumstances and for certain classes of defendant.

As plaintiffs’ lawyers search for less traditional approaches to litigation, we anticipate that they will shift their focus to more complex (higher-value) product liability and shareholder litigation—particularly in class actions. Therefore, at an early stage companies should arm themselves with strategies to prevent class actions. Some useful tips are:

- Do not dismiss small claims; get in early and fix them. A claim for $1,000 becomes a big problem if there is a potential class of thousands or tens of thousands.
- Ensure that effective compliance systems are in place.
- Ensure that appropriate warnings are placed on products manufactured or distributed by your company.

Tort reform in NSW has limited or excluded liability in a number of specific circumstances.

- In line with the Ipp Report, a defendant bears no liability for harm suffered from recreational activities involving an “obvious risk.” Further, there is no duty of care owed by a defendant, in cases involving recreational activity, to take care with respect to a risk of that activity if the risk was the subject of a warning to the plaintiff. The legislation also provides protection where the defendant is a public or other authority.
- The reform process has gone further than the Ipp Report in extending protection from civil liability to good samaritans, food donors, and volunteers. This protection extends both in relation to claims for personal injury and other forms of loss and damage.
- NSW has also adopted a number of other miscellaneous reforms, ranging from provisions limiting the ability of intoxicated plaintiffs or those engaged in criminal activity to recover damages for personal injury or property damage, to ensuring that apologies and other expressions of regret cannot be treated as admissions of liability or as otherwise relevant to questions of liability.
- A number of reforms were introduced in response to two court decisions that caused community outcry. These include:
  - restricting the damages awarded to people who are injured while committing what would otherwise be a serious offence but who cannot be found criminally responsible because they were mentally ill. Such persons are precluded from recovering damages for noneconomic loss such as pain and suffering and loss of earnings, but can recover damages for medical and future care needs; and
  - excluding the right to recover damages for the costs of rearing and maintaining a healthy child or for any loss of earnings while the claimant rears and maintains the child. But the legislation does not preclude the recovery of additional costs associated with rearing or maintaining a child who suffers from a disability which costs arose by reason of the disability.

Exclusion or Limitation of Liability in Specified Circumstances

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Notes