



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

CIVIL LIABILITY OF GOOD SAMARITANS AND VOLUNTEERS

(LRC 93 – 2009)



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Law Reform Commission

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernize the law. Since it was established, the Commission has published over 140 documents containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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Full responsibility for this publication lies, however, with the Commission.

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Sullivan v Creed	[1904] 1 IR 488	Irl
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Velazquez v Jiminez	798 A2d 51, 64 (NJ 2000)	USA
Ward v McMaster	[1988] IR 337	Irl
Watt v Hertfordshire County Council	[1954] 2 All ER 368	Eng
Woods v Lowns	(1995) 36 NSWLR 344	Aus
Yania v Bigan	(1959) 397 Pa 316	USA

INTRODUCTION

A Request by the Attorney General

1. On 30 January 2006, the Attorney General requested the Commission, under section 4(2)(c) of the *Law Reform Commission Act 1975*, to make such recommendations as the Commission considered appropriate for reform of the law on the following matters:

- Whether the law should be reformed, by statute, so as to impose a duty on citizens and members of the caring professions and members of an Garda Síochána or the Defence Forces (when not engaged in duties in the course of their employment) to intervene for the purposes of assisting an injured person or a person who is at risk of such an injury and the circumstances in which such a duty should arise and the standard of care imposed by virtue of such a duty.
- Whether the law in relation to those who intervene to assist and help an injured person (Good Samaritans) should be altered in relation to the existence of a duty of care by such persons to third parties and/or the standard of care to be imposed on such persons towards third parties.
- Whether the law in relation to the duty of care of voluntary rescuers should be altered, by statute, and if so the nature of such change in that duty and/or standard of care owed by voluntary rescuers to third parties.
- Whether the duty of care and/or the standard of care of those providing voluntary services, for the benefit of society, should be altered by statute and, in particular, whether in what circumstances a duty of care should be owed by such persons to third parties and the standard of such care.

B General background and consultation process

2. The Attorney General's request arose against the immediate background of a Private Members Bill, the *Good Samaritan Bill 2005*, which was debated in Dáil Éireann on 6 and 7 December 2005.¹ The 2005 Bill proposed to

¹ See Vol.611 Dáil Éireann Debates cols.1139-1165 (6 December 2005) and Vol.611 Dáil Éireann Debates cols.1455-1483 (7 December 2005).

provide an exemption from civil liability for any injury caused by a person (other than health care professionals acting in the course of their employment) who (a) provided emergency first aid assistance to a person who is ill, injured or unconscious as a result of an accident or other emergency; (b) provided assistance at the immediate scene of the accident or emergency; and (c) had acted voluntarily and without reasonable expectation of compensation or reward for providing the services described. The 2005 Bill also proposed that this exemption would apply unless it was established that the injuries were caused by the gross negligence of the person.

3. The 2005 Bill was presented with a view to providing a level of protection from civil liability for those who volunteer or otherwise intervene to assist injured persons, including where defibrillators are used by community and voluntary groups who act as first responders where cardiac arrest occurs. The debate on the 2005 Bill in Dáil Éireann also included references to similar Good Samaritan legislation enacted, for example, in the United States, Canada and Australia in recent years. Giving the Government's response to the 2005 Bill the Minister for Justice, Equality and Law Reform stated that the Government had decided to refer the legal issues raised to the Law Reform Commission.²

4. In November 2007, the Commission published its *Consultation Paper on the Civil Liability of Good Samaritans and Volunteers*,³ which set out its provisional recommendations on the issues raised in the Attorney General's request. In May 2008, the Commission held a seminar on the Consultation Paper and is extremely grateful to the participants for their assistance in this respect. This Report sets out the Commission's final recommendations on the issues raised in the Attorney General's request, together with a draft *Civil Liability (Good Samaritans and Volunteers) Bill* intended to implement those recommendations.

C Outline of this Report

5. Chapter 1 sets out the background to and general policy setting against which the request of the Attorney General was received. In this regard, the Commission examines the particular issue of sudden cardiac death and the use of automated external defibrillators (AEDs), and the more general issue of volunteering and active citizenship. The chapter concludes by emphasising the importance generally of active citizenship and volunteerism.

6. In Chapter 2 the Commission discusses the concept of a general legal duty to intervene to assist persons in danger. The chapter examines the

² See Vol.611 Dáil Éireann Debates cols.1158-1159 (6 December 2005) and Vol.611 Dáil Éireann Debates col.1475 (7 December 2005), available at www.oireachtas.ie

³ LRC CP 47-2007, available at www.lawreform.ie. This is referred to as the Consultation Paper in the remainder of this Report. Specific references to paragraphs in the Consultation Paper are preceded by "LRC CP 47-2007."

extent to which current law in Ireland recognises a duty to intervene in specific circumstances. It also contains a discussion of the position in other States where a duty to intervene exists. The chapter concludes by setting out the Commission's final recommendations on whether the law should include a positive duty to intervene in the context of rescue or voluntarism in general.

7. Chapter 3 examines the current common law duty of care as applied to Good Samaritans, voluntary rescuers and voluntary service providers. The Commission explores the extent to which a duty of care is likely to arise depending on the category of person intervening and the type of intervention made. It also examines the issues raised in relation to the standard of care to be applied to Good Samaritans and volunteers. The Commission concludes that it is appropriate to set out this duty and standard of care in legislative form.

8. Chapter 4 sets out the detail of the Commission's proposed legislation on the civil liability of Good Samaritans and volunteers, drawing on the content of comparable legislation enacted in other States. The Commission discusses the extent to which any proposed legislation in this State should differentiate between the liability of individuals as opposed to the liability of organised entities engaged in activities of benefit to the community.

9. Chapter 5 is a summary of the Commission's recommendations.

10. The Appendix contains a draft *Civil Liability (Good Samaritans and Volunteers) Bill 2009* to give effect to the Commission's recommendations.

CHAPTER 1 BACKGROUND AND POLICY SETTING

A Introduction

1.01 In this Chapter the Commission discusses the Attorney General's request and the background to it in a wider policy setting. In Part B, the Commission notes the main features of the Private Member's Bill, the *Good Samaritan Bill 2005*. In Part C, the Commission discusses a specific aspect of the wider policy setting, the prevalence of sudden cardiac death and the use of automated external defibrillators as a response. In Part D the Commission discusses the wider policy setting, the importance of volunteering and active citizenship in Ireland and internationally. In Part E, the Commission draws conclusions on the impact of this policy setting to its analysis of the Attorney General's request.

B *Good Samaritan Bill 2005*

1.02 The Attorney General's request to consider the civil liability of Good Samaritans and volunteers arose following the publication of a Private Member's Bill, the *Good Samaritan Bill 2005*,¹ and the debate on the Bill in Dáil Éireann in December 2005.² The Long Title of the 2005 Bill stated that it proposed "to protect from liability, persons who act in good faith to provide assistance to a person who is ill or has been injured as a result of an accident or emergency and for that purpose to alter the position at common law."

1.03 The Bill's Explanatory Memorandum stated that, if enacted, it would ensure that those who intervene to give assistance to others, and who offer this assistance in good faith, could not be penalised or held liable as a result of their intervention. Health care professionals acting in the course of their employment were exempted from the terms of the 2005 Bill.³ Furthermore, any other person

¹ Bill No. 17 of 2005, available at www.oireachtas.ie

² See Vol.611 Dáil Éireann Debates cols.1139-1165 (6 December 2005) and Vol.611 Dáil Éireann Debates cols.1455-1483 (7 December 2005), available at www.oireachtas.ie

³ Explanatory Memorandum to the *Good Samaritan Bill 2005*.

who may have had a “reasonable expectation of compensation or reward” were also excluded.

1.04 Section 2 of the 2005 Bill proposed to provide an exemption from civil liability for any injury caused as a result of negligence in acting or failing to act by a person (other than health care professionals acting in the course of their employment)⁴ who:

- (i) provided emergency first aid assistance to a person who was ill, injured or unconscious as a result of an accident or other emergency;
- (ii) provided assistance at the immediate scene of the accident or emergency; and
- (iii) had acted voluntarily and without reasonable expectation of compensation or reward for providing the services described.

1.05 The 2005 Bill stated that the exemption would apply unless it was established that the injury was caused by the gross negligence of the person.

1.06 It is worth noting that the *Good Samaritan Bill 2005* dealt solely with the question of whether individual Good Samaritans could be found liable for negligence arising out of an intervention. It did not consider issues such as the duty or standard of care pertaining to individuals, whether they are Good Samaritans or volunteers, or organisations providing assistance to a person in need of such assistance.

1.07 The purpose of the *Good Samaritan Bill 2005* was to protect any person - other than a health care professional - acting in the course of his or her employment so long as that person had provided first aid assistance at the immediate scene of the accident or emergency voluntarily and without expectation of compensation or reward.⁵ Thus, to the extent that such activities must be of a medical nature and urgent or undertaken in the context of an emergency, while at the scene of the accident or emergency, the proposed scope of the 2005 Bill was limited. In addition, to the extent that first aid assistance is by nature usually reactive rather than pre-emptive, the 2005 Bill considered only those situations where the recipient of the assistance was already ill, injured or unconscious. Good Samaritans who might render different types of assistance including pre-emptive assistance and other types of

⁴ Section 2(2) of the 2005 Bill stated that a health care professional is acting in the course of employment if he or she is providing emergency health care services or first aid assistance to a person who is ill, injured or unconscious as a result of an accident or other emergency, having being summoned or called to provide services or assistances for payment or reward.

⁵ *Good Samaritan Bill 2005*, section 2(1)(a) to (c).

volunteers would not have been able to avail of the protections contained in the 2005 Bill. In the Consultation Paper, the Commission also pointed to problems that might arise with the use of the words “ill” and “injured” contained in section 2(1)(a) of the 2005 Bill.⁶ The Commission observed that it could not always be assumed that a person described as “ill” or “injured” would require emergency first aid assistance as opposed to other forms of assistance.

1.08 As was noted in the Consultation Paper,⁷ the 2005 Bill was presented with a view to providing a level of protection from civil liability for those who volunteer or otherwise intervene to assist injured persons, including where defibrillators are used by community and voluntary groups who act as first responders where cardiac arrest occurs. The debate on the 2005 Bill in Dáil Éireann also included references to similar Good Samaritan legislation enacted, for example, in the United States, Canada and Australia in recent years. Giving the Government’s response to the 2005 Bill the Minister for Justice, Equality and Law Reform stated that the Government had decided to refer the legal issues raised to the Law Reform Commission.⁸ This was followed by the Attorney General’s request to the Commission in 2006, which has already been set out in the Introduction to this Report. The Commission now turns to examine the wider policy setting against which that request, which concerns the civil liability of Good Samaritans and volunteers, should be considered. In Part C, the Commission discusses a specific aspect of the wider policy setting, the prevalence of sudden cardiac death and the use of automated external defibrillators as a response. In Part D the Commission discusses the wider policy setting, the importance of volunteering and active citizenship in Ireland and internationally.

C The policy setting: (1) sudden cardiac death and defibrillators

1.09 In terms of the wider policy setting, the Dáil Éireann debate on the *Good Samaritan Bill 2005* discussed in some depth that it was intended to provide a level of protection from civil liability for those who volunteer or otherwise intervene to assist injured persons, including where defibrillators are used by community and voluntary groups who act as first responders where cardiac arrest occurs. This reflects the increased reported incidence of sudden cardiac death syndrome in recent years, particularly among young people (notably those taking part in sports), and the resulting increased use of automated external defibrillators (AEDs) as a response to the problem.

⁶ LRC CP 47-2007 at paragraphs 1.26-1.29

⁷ LRC CP 47-200 at paragraph 3 of the introduction.

⁸ See Vol.611 Dáil Éireann Debates cols.1158-1159 (6 December 2005) and Vol.611 Dáil Éireann Debates col.1475 (7 December 2005), available at www.oireachtas.ie

1.10 The 2006 Report of the National Task Force on Sudden Cardiac Death Syndrome, *Reducing the Risk: A Strategic Approach*,⁹ noted that the incidence of sudden cardiac death in Ireland is very high. The Report estimated that over 5,000 people die of sudden cardiac death in Ireland each year, many of them young people.¹⁰

1.11 The Report recommended a strategy to reduce the causes of sudden cardiac deaths. The Report emphasised the importance of timely responses to improving the survival rate of those succumbing to cardiac arrest and the incidental need for training in life support techniques. The Report referred to the “golden hour”, that sudden cardiac death most commonly occurs within one hour of the onset of symptoms. The Report noted that survival rates following cardiac arrest are directly related to the period of time that elapses before resuscitation and, in particular, defibrillation and that the chances of successful defibrillation decrease with each minute that passes.¹¹

1.12 If a person who has suffered a sudden cardiac arrest is defibrillated within 5 minutes, survival rates are approximately 50%, and potentially higher with younger patients. If time to defibrillation is 10 minutes or more, virtually no one survives without cardiopulmonary resuscitation (CPR). This increases to between 10% and 20% if CPR is used. Therefore, a speedy and effective response is required if the chances of survival are to be increased. As a result, the 2006 Report recommended the roll out of a training programme for health care professionals, occupational first-aiders and members of the public in Basic Life Support (BLS) and in the operation of AEDs.¹² Noting the importance of volunteer organisations, the 2006 Report stated that further consideration should be given to the role of voluntary organisations and the use of their ambulances particularly in rural communities in order to improve the chances of survival.¹³

1.13 The 2006 Report therefore attached great importance to the need for a significant proportion of the population to be trained in the use of automated external defibrillators (AEDs). The Commission notes that training in AEDs has

⁹ Department of Health and Children, *Reducing the Risk: A Strategic Approach* (Report of the Task Force on Sudden Cardiac Death, 2006), available at www.dohc.ie.

¹⁰ *Ibid*, at 19.

¹¹ *Ibid*.

¹² *Ibid*, at 93-94.

¹³ *Ibid*, at 96.

been incorporated into the 2008 FETAC-accredited occupational first aid training qualification.¹⁴

1.14 The 2006 Report also recognised that some organisations or communities who wished to purchase AEDs, and to develop subsequent training programmes, had expressed concern over potential civil liability concerning their use. The 2006 Report noted:¹⁵

“Ireland has no ‘Good Samaritan’ law to protect members of the public who go to the aid of another person. Similarly there is no general legal requirement or obligation for a lay person to go to the aid of another. Although credible legal opinion has advised that the likelihood of successful litigation arising from a ‘Good Samaritan’ act is remote,¹⁶ the Task Force recommends that the legal situation be reviewed to protect rescuers from any possible litigation.”

1.15 The Health Service Executive (HSE) has been involved in implementing the recommendations in the 2006 Report. In its 2008 Report, *Continuing to Reduce the Risk: First Progress Report*,¹⁷ the HSE noted that a great deal of progress had been made in improving first response to a cardiac event. This has included the launch of the HSE’s *Cardiac First Response Guide*,¹⁸ which provides detailed guidance for local communities and groups who wish to establish a first response team, including the use of defibrillators.

¹⁴ See paragraph 2.53, below, discussing the Health and Safety Authority’s 2008 *Guidelines on First Aid at Places of Work*, available at www.hsa.ie. See also Byrne, *Safety, Health and Welfare at Work Law in Ireland*, 2nd ed (Nifast, 2008), at 554-556.

¹⁵ Department of Health and Children, *Reducing the Risk: A Strategic Approach* (Report of the Task Force on Sudden Cardiac Death, 2006), at 104-105, available at www.dohc.ie.

¹⁶ See Craven, “Civil Liability and Pre-hospital Emergency Care” *PHECC Voice* (Newsletter of the Pre-Hospital Emergency Care Council) February 2004, p.5, available at www.phccit.ie. This is a Memorandum prepared in 2003 by Dr Ciaran Craven BL for the Pre-Hospital Emergency Care Council, which was also reproduced in: Health Service Executive, *Cardiac First Response Guide* (2008), Appendix B, available at www.hse.ie

¹⁷ Health Service Executive, Implementation of Sudden Cardiac Death (SCD) Task Force Report (2006) Recommendations, *Continuing to Reduce the Risk: First Progress Report* (HSE, 2008), available at www.hse.ie

¹⁸ Health Service Executive, *Cardiac First Response Guide* (2008), available at www.hse.ie

Work had also been done on planning a structure for coordinating first response and improved resuscitation training around the country and a spatial analysis of ambulance provision had been carried out resulting in clarity on priority locations for development. The 2008 Report also noted that the Pre-Hospital Emergency Care Council (PHECC), the statutory body with responsibility for training in pre-hospital medical qualifications, had prepared a Guide to the preparation of a Cardiac First Response Report (CFR Report),¹⁹ which would inform the Out of Hospital Cardiac Arrest Register (OHCAR), instigated in 2007.

1.16 The HSE's 2008 *Cardiac First Response Guide*²⁰ also reiterated the view in the 2006 Task Force Report that "one of the main stumbling blocks to communities purchasing AEDs and developing programmes has been concern over legal indemnity." The 2008 *Guide* also noted that "Ireland has, as yet, no Good Samaritan Act but this is being addressed by the Law Reform Commission," pointing out that the Commission had, at that time, published the *Consultation Paper on the Civil Liability of Good Samaritans and Volunteers*²¹ and was preparing this Report. Equally, the 2008 *Guide* reiterated the view expressed in the 2006 Task Force Report that legal opinion it had obtained in 2003 had concluded that "should a pre-hospital emergency care provider act in accordance wholly with their training status and not act in a grossly negligently fashion then it is unlikely that any litigious claim would be successful."

1.17 The HSE's 2008 *Guide* also noted that, while concern over possible civil liability was a real stumbling block for some communities, the provision of insurance cover for any potential claims had alleviated this to some extent. The *Guide* noted that "[a] number of insurance companies now also offer insurance for trained first responders involved in first responder programmes."²² In this respect, the *Guide* also pointed out that the Clinical Indemnity Scheme (CIS) under the auspices of the State Claims Agency covers trained members of the Emergency Medical Services (EMS) in their duty "and also indemnifies them for 'Good Samaritan' acts when in an off-duty capacity." The *Guide* pointed out that the CIS "does not apply to members of the public (including uniformed personnel, such as fire fighters and the Gardai) who receive CPR training only."

¹⁹ Pre-Hospital Emergency Care Council, *Cardiac First Response Report (CFR Report) Completion Guide* (2008), available at www.phecit.ie

²⁰ Health Service Executive, *Cardiac First Response Guide* (2008), p.31, available at www.hse.ie

²¹ LRC CP 47-2007.

²² Health Service Executive, *Cardiac First Response Guide* (2008), p.31, available at www.hse.ie

As to general practitioners (GPs), the *Guide* noted that the CIS advises GPs to seek their own cover under their medical malpractice policies.

1.18 The views expressed in the 2006 and 2008 Reports and in the HSE's 2008 *Guide* reflect the views and comments received by the Commission prior to the publication of the Consultation Paper and during the consultation period leading to this Report. In that respect, the Commission is aware that the potential risk of liability presents an obstacle to some community and voluntary groups who are involved in establishing first responder programmes, but that the Commission agrees that this is probably a remote risk and has not represented an insurmountable obstacle. Indeed, the Commission is also aware from its discussions that the presence of public sector indemnity provision – such as the Clinical Indemnity Scheme (CIS) under the auspices of the State Claims Agency – and arrangements for private insurance cover has greatly assisted in ensuring that there has, in reality, been fairly widespread development of first responder teams in the State.

D Volunteering and Active Citizenship

1.19 The development of first responder teams – trained in the use of defibrillators – in response to sudden cardiac death provides a specific policy setting against which the Attorney General's request must be considered. The Commission is conscious that a wider policy setting should also be considered in this respect, the value of volunteering and active citizenship in the State.

1.20 The Commission recognises the importance of volunteering both in Ireland and internationally. Ireland has a long, rich and diverse history of voluntary work and there is a strong culture of volunteering among Irish citizens. Similarly, internationally, there is huge recognition of the role volunteering has to play in the fulfilment of international obligations. UN General Assembly Resolution 52/17 proclaimed 2001 the International Year of Volunteers. This resolution also underlines the value of volunteerism in many different fields such as those covered by the Millennium Development Goals. The UN General Assembly also recognised the responsibility of governments to develop strategies and programmes to support volunteering at a national level.²³ In 2008, the European Union proposed the launch of an initiative to create more opportunities for younger people to volunteer across Europe.²⁴

²³ UN General Assembly Document of 24th Special Session World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalising World – UN General Assembly Resolution s-24/2, annex.

²⁴ See http://ec.europa.eu/youth/youth-policies/doc30_en.htm

1.21 The Irish Government's 2000 *White Paper on Voluntary Activity*²⁵ defines volunteering as "the commitment of time and energy, for the benefit of society, local communities, individuals outside the immediate family, the environment and other causes." The White Paper emphasised that "voluntary" in this context means activities undertaken without payment, except for reimbursement of out-of-pocket expenses.

1.22 The Commission notes that volunteering – and the voluntary sector – involves much more than a handful of individuals engaged in small activities in the State. Research carried out by the National College of Ireland indicates that 33% of the adult population volunteered in some capacity in 1999²⁶ and, based on this, the total amount of time given to voluntary work per year would be equivalent to approximately 96,450 full-time workers.²⁷ The Special Olympics World Summer Games, held in Ireland in June 2003, involved the recruitment and training of around 30,000 volunteers in preparation for this event alone. The 2006 Census²⁸ indicated that over 553,000 persons, representing 16.4% of the population aged 15 and over, were involved in voluntary activity. The 2007 *Report of the Taskforce on Active Citizenship*²⁹ supported the Census indications that volunteering had not declined in the period of the Celtic Tiger economy, but that the pattern of participation might have involved relatively short activity-specific involvement, such as the Special Olympics.³⁰ In early

²⁵ Department of Social, Community and Family Affairs *White Paper on a Framework for Supporting Voluntary Activity and for Developing the Relationship between the State and the Community and Voluntary Sector* (2000), available at www.welfare.ie

²⁶ Out of a total population of about 4 million, this indicates that approximately 1.3 million people volunteered.

See <http://www.eu2004.ie/templates/standard.asp?sNavlocator=7,98,113>.

²⁷ "Reaching out: charitable giving and volunteering in the Republic of Ireland", Ruddle, Helen & Mulvihill, 1999, National College of Ireland.

²⁸ See Census 2006, Volume 11 – Disability, Carers and Voluntary Activities available at www.cso.ie

²⁹ *Report of the Taskforce on Active Citizenship* (2007), available at www.activecitizen.ie

³⁰ The Report noted that although most people thought volunteering was declining, when asked about their own organisation only one half said that it had become more difficult to recruit new volunteers. The Survey of Civic Engagement commissioned by the Taskforce showed an apparent increase in both volunteering and community involvement in the four years since the last such survey had been conducted in Ireland.

2009, a 102% increase in volunteers registering in Volunteer Centres across the country was reported, which was attributed to the economic downturn and the rising rates of unemployment affecting Ireland and most other countries in the world.³¹

1.23 Volunteering and voluntary activity involve the provision of essential services in the State, and includes the provision of social care, childcare, care of older persons, health services, education, environmental, sport, cultural, advocacy, artistic and other activities. In that respect, volunteering constitutes a major pillar of Irish society, which requires high standards of management – and of funding. In recent years, Government support for the community and voluntary sector has been in excess of €5 billion per annum.³² This is in addition to the taxation arrangements concerning contributions to charitable organisations, many of which are engaged in volunteering activities.³³

1.24 Given this importance, it is not surprising that the Government’s 2000 *White Paper* aimed to clarify the relationship between the Government and the voluntary and community sector and examined how the Government could provide an enabling framework to help volunteer activities. The White Paper noted that:

“The Irish Constitution recognises the right to associate. Overall, however, there is an underdeveloped legal and policy framework in Ireland for the support of voluntary work and the contexts in which it takes place.”³⁴

1.25 This commitment to support volunteer activity in Ireland was further strengthened by the establishment of the National Committee on Volunteering (NCV), which was given responsibility for the task of developing a long term strategy to promote and expand volunteering in Ireland.

1.26 In 2002, the NCV published *Tipping the Balance: Report and Recommendations to Government on Supporting and Developing Volunteering in Ireland*,³⁵ which analysed the voluntary sector in Ireland and made

³¹ See www.volunteer.ie/news_Increaseinvolunteers2009.htm

³² Speech by Mr John Curran T.D., Minister of State, for “Give it A Swirl Day,” the National Day of Volunteering, 25 September 2008, available at www.volunteer.ie

³³ The *Charities Act 2009* sets out the first comprehensive regulatory framework for the charity sector.

³⁴ *Ibid* at 13.

³⁵ Report of the National Committee on Volunteering, *Tipping the Balance: Report and Recommendations to Government on Supporting and Developing Volunteering in Ireland* (2002), available at www.volunteer.ie

recommendations to the Government on how to support and develop volunteering in Ireland. The 2002 Report called for the development of a national policy on volunteering that would be integrated with other social policies. Protection of volunteers and financial support should be provided by the State, as well as active promotion of, and removal of barriers to, volunteering. While the Report commended the work of individual organisations in developing policies and procedures, it noted that the development of norms at a national level may be a more appropriate means of providing guidance to both volunteers and organisations involving volunteers.

1.27 These Reports recognised the importance of developing a clear policy framework on volunteering. Other important developments include the establishment of Volunteering Ireland, the National Volunteer Development Agency, which promotes volunteering in Ireland,³⁶ and Volunteer Centres Ireland (VCI),³⁷ the national umbrella organisation for volunteer centres. Both Volunteering Ireland and VCI are funded by the Department of Community, Rural and Gaeltacht Affairs to ensure that this advice and support would continue.

1.28 In 2005, the European Volunteering Centre (EVC) published a *Country Report on the Legal Status of Volunteers in Ireland*,³⁸ in conjunction with the European-wide Association of Voluntary Service Organisations (AVSO). The 2005 Report observed that, while policies are in place to support the development of volunteerism, no volunteer-specific legislation exists in Ireland. In particular, the Country Report remarked on the absence of legislative norms relating to the reimbursement of out-of-pocket expenses and the insurance of volunteers. The Report referred to the recommendation of Volunteering Ireland that volunteer organisations should draft policies stating, amongst other things, that volunteers are insured against risks of illness, accident and third party liability.³⁹

³⁶ See www.volunteeringireland.ie

³⁷ See www.volunteer.ie. The website explains that volunteer centres act as 'brokers' between individuals who wish to undertake voluntary activity and organisations that seek to involve volunteers. Their primary function is, therefore, to match individuals and groups interested in volunteering with appropriate volunteering opportunities and to offer advice and support to volunteers and organisations through a range of services.

³⁸ Association of Voluntary Service Organisations & Centre Européen du Volontariat *Country Report on the Legal Status of Volunteers in Ireland 2005*, available at www.cev.be/Legal%20Status%20Ireland%202005.pdf.

³⁹ *Ibid*, at 5.

1.29 The Government's ongoing commitment to the concept of volunteering, and its connection with active citizenship (which encompasses formal and non-formal, political, cultural, inter-personal and caring activities),⁴⁰ was illustrated by the establishment in 2006 of the Taskforce on Active Citizenship. The 2007 *Report of the Taskforce on Active Citizenship*⁴¹ accepted that a wide range of initiatives were required to encourage active participation in community and society activities, and recommended the establishment of an Active Citizenship Office. On foot of this, the Active Citizenship Office was established in the Department of the Taoiseach and a Steering Group was established in 2008 to oversee implementation of the Taskforce's recommendations.⁴² Echoing the comments in the 2006 Report of the National Task Force on Sudden Cardiac Death Syndrome, *Reducing the Risk: A Strategic Approach*,⁴³ the 2007 *Report of the Taskforce on Active Citizenship* noted that the increasing availability of insurance cover had overcome some obstacles to volunteering activity in what it described as an increasingly litigious society. However, the Taskforce also points out that there is little evidence of a decline in the quantity of voluntary activity. It also "welcome[d] the Law Reform Commission's current examination of a number of aspects of the legal duty of care and the associated standard of care imposed on those who provide voluntary services, and has made an input to its work."⁴⁴

1.30 The comments by the *Taskforce on Active Citizenship* were supported in the views expressed to the Commission by a number of organisations in the volunteering sector during the consultation process leading to this Report. It is clear that the wide availability of insurance cover has removed the most significant block to individual participation in organised volunteering activity in the State. Nonetheless, the potential for civil liability, which the Commission accepts is likely to be a relatively remote risk (and which the Commission discusses in detail in Chapter 3), remains a real worry for some potential volunteers. In that respect, voluntary organisations expressed the view

⁴⁰ *Taskforce on Active Citizenship, The Concept of Active Citizenship (2007)*, p.2, available at www.activecitizen.ie

⁴¹ *Report of the Taskforce on Active Citizenship (2007)*, available at www.activecitizen.ie

⁴² See www.activecitizen.ie (homepage, accessed 7 May 2009).

⁴³ Department of Health and Children, *Reducing the Risk: A Strategic Approach* (Report of the Task Force on Sudden Cardiac Death, 2006), available at www.dohc.ie, discussed at paragraphs 1.10ff, above.

⁴⁴ *Report of the Taskforce on Active Citizenship (2007)*, p.18, available at www.activecitizen.ie

that the enactment of legislation setting out clearly the scope and extent of the civil liability of Good Samaritans and volunteers would have the value of clarifying the law for potential volunteers and voluntary organisations. It was also suggested that such legislation might have some implications on the level of insurance premiums payable by such bodies.

E Conclusions

1.31 The Commission fully appreciates the policy of encouraging individuals to give assistance that is of benefit to society, whether as Good Samaritans or as volunteers in an organised setting. In this light, the Commission accepts that any recommendations it makes should, where possible, be consistent with supporting rather than discouraging volunteering generally as well as participation in additional activities of benefit to society.

1.32 At the same time, the Commission notes that there remains an important competing policy, namely that those who are injured through the carelessness of others are entitled to expect suitable recompense. It is clear to the Commission that this second policy objective has been recognised in the 2006 Report of the National Task Force on Sudden Cardiac Death Syndrome, *Reducing the Risk: A Strategic Approach*, and in the 2007 *Report of the Taskforce on Active Citizenship*, both of which support the availability of suitable indemnity or insurance arrangements. Indeed, the organisations with whom the Commission consulted in the preparation of this Report all accepted the importance of this policy objective. Whether the introduction of any legislation in this area will actually affect the cost of insurance remains outside the scope of the Attorney General's request to the Commission.

1.33 In the remainder of the Report, therefore, the Commission fully bears in mind this policy context while focusing on the specific legal issues on which the Attorney General requested the Commission's views.

CHAPTER 2 A DUTY TO INTERVENE AND RESCUE

A Introduction

2.01 In Chapter 1 the Commission discussed the background to and policy setting in which the Attorney General’s request to examine the civil liability of Good Samaritans and volunteers arises. The Commission concluded that any recommendations it makes should, where possible, be consistent with supporting rather than discouraging volunteering generally as well as participation in additional activities of benefit to society. In this Chapter the Commission discusses one of the issues on which the Attorney General sought the Commission’s views, whether the law should require individuals to intervene to assist an injured person or a person who is at risk of an injury. As noted in the Consultation Paper,¹ the Commission approaches this matter in two parts: to what extent the law currently recognises a positive duty to intervene and, whether the law should be amended to recognise a general duty to intervene. The Attorney General’s request is limited to an examination of this in terms of civil liability.²

2.02 In Part B the Commission discusses the absence of a general legal duty to intervene and rescue in Irish law. In Part C the Commission discusses the specific situations in which Irish law currently imposes a duty to rescue and intervene in specific situations. In Part D the Commission discusses whether a general duty to intervene and rescue should be imposed, including whether such a duty could or should be confined to “easy” rescue situations.

B No general duty to intervene and rescue in Irish law

2.03 In this Part, the Commission discusses the absence of a general legal duty to intervene and rescue in Irish law. The Commission begins with a discussion of the moral dimension to this duty, derived from the biblical parable or story of the “Good Samaritan.” The Commission then notes that Irish law does not impose a *general* duty to intervene but goes on to describe the *specific*

¹ LRC CP 47-2007 at paragraph 2.01.

² For discussion of criminal liability for omissions and failure to rescue see Glanville Williams, *Textbook of Criminal Law* 2nd ed (London, Stevens, 1983), p.149.

circumstances in which a duty to intervene and rescue have been imposed by decisions of the courts and in specific legislation.

(1) *The Good Samaritan and the moral duty to intervene*

2.04 The concept of a person being under an obligation to rescue or care for another person, or in other words to volunteer to help a person who is in need, has its origins in the biblical parable of the Good Samaritan that one should love one's neighbour as he or she would love themselves.³ This parable sets out the religious and moral doctrine which teaches that in order to love "thy neighbour as thyself" one must show compassion towards all other people. The parable of the Good Samaritan, then, supports a moral obligation on all persons to rescue another person in need. One should feel morally compelled as a bystander who can swim, to dive into a river to save a drowning person. Similarly, persons who are medically qualified or trained in first aid should render treatment to someone in distress.

2.05 In the biblical telling of the parable of the Good Samaritan, in answering the lawyer's question of "who is my neighbour?" Jesus told the story of a man - presumed to be Jewish - who was travelling between Jerusalem and Jericho, who fell among thieves, who stripped and wounded him and departed, leaving him half dead. Both a priest and a Levite (who might be described as pillars of the Jewish community at that time) passed him by. But a man from Samaria (the original "Good Samaritan"), and who would at that time have been on unfriendly terms with the Jewish community, saw him and had compassion on him. He went to him and bound up his wounds and carried him to an inn and took care of him. On the following morning when he departed, he gave some money to the innkeeper, and asked him to take care of the injured man. Jesus stated that the neighbour was the person who showed mercy to the injured man and that we are morally obliged to do likewise. The Commission notes that the parable, in effect, therefore, places a moral demand on all persons to help a neighbour who is in need of help.⁴

³ The Bible, New Testament, Gospel of St Luke 10:25-37.

⁴ In New York in December 2007, a 20 year old Muslim Bangladeshi accountancy student, Hassan Askari, was hailed as a modern-day "Good Samaritan" when he came to the aid of three Jewish people who were attacked by a group of 10 men on a train. It appeared that the group of 10 men – presumed to be Christian – had been yelling "Merry Christmas" on the train and that the Jewish people wished them a "Happy Chanukah." The group of 10 then violently attacked the three Jewish people and, at this stage, Mr Askari intervened to assist, allowing one of the people being attacked to pull the emergency cord and alert the police. Mr Askari was reported to have received "two black eyes and a sore nose - but no regrets." He was subsequently conferred with awards by representatives of the

2.06 In determining whether the *moral* duty to intervene to assist another person in danger should be translated into a *legal* duty to rescue, courts in different countries have often referred to the biblical story of the “Good Samaritan.”⁵ Indeed, legislation to deal with the civil liability, if any, of those who intervene to assist others in danger is often given the title “Good Samaritan Act,” and this was used in the 2005 Private Members Bill that preceded the Attorney General’s request to the Commission.⁶

(2) *The Good Samaritan and a general legal duty to intervene*

2.07 Many moral principles can, of course, be translated into broadly comparable legal prohibitions so that, for example, the moral perspectives concerning killing and stealing largely translate into comparable legal prohibitions on homicide and theft. Equally, not all moral principles can be translated into legal principles. In that respect, the majority of common law States (the family of legal systems derived from the British legal system), including Ireland, do not impose a general legal duty to intervene, whether as a “Good Samaritan”, to rescue somebody who might be in trouble or to intervene as a volunteer of any kind. Common law States have, in general, limited the law to stating that, *if* the person decides to rescue or assist (to be a Good Samaritan or volunteer in that sense), the rescuer must do so with all due care and that, if he or she causes injury arising from carelessness (negligence), civil liability could be imposed in that context.⁷

2.08 By contrast, many civil law States (the family of legal systems derived from the Code-based systems of Continental Europe) and other States (for example, those based on Sharia law) have imposed positive legal duties to intervene to rescue. A positive duty to intervene is included in the legislative codes of Belgium, France, Germany, Greece, Italy, the Netherlands, Poland,

Jewish community and by the mayor of New York. See http://news.bbc.co.uk/2/hi/south_asia/7149916.stm. This individual story of assistance of those in danger is replicated many times in Ireland, many of which are publicly recognised through, for example, Rehab’s “People of the Year” awards.

⁵ For example, *Buch v Amory Manufacturing Co*, 69 NH 257 (1897) (United States: New Hampshire Supreme Court) and *Donoghue v Stevenson* [1932] AC 562 (United Kingdom: House of Lords).

⁶ It is even notable that one of the proprietary brands of automated external defibrillators (AEDs) in regular use in Ireland is called the “Samaritan® Pad defibrillator.”

⁷ The duty of care that arises where the individual *chooses* to intervene or volunteer is discussed in Chapter 3, below.

Russia, Switzerland and a number of countries of the Middle East. For example, the French Civil Code requires an individual to rescue another in situations where “he can give his assistance without risk for himself or other persons, either by his personal action or by prompting the rescue.”

(3) *The reluctance of common law States to impose a general legal duty to intervene*

2.09 The Commission turns now to discuss in detail the reluctance of the common law States (including Ireland), in contrast to civil law States to imposing a general duty to intervene and rescue.⁸ McMahon and Binchy note that the common law has historically been completely opposed to the imposition of affirmative duties and, in particular, to the imposition of a positive duty to intervene to protect or to come to the aid of another in peril.⁹ Similarly, it has been pointed out that “the common law, first for historical reasons and later on philosophical grounds, has taken a hostile view towards imposing tortious liability for pure omissions”.¹⁰ The Commission agrees with the view expressed in a Canadian case that the position that there is no general legal duty to intervene is “deeply rooted in the common law”.¹¹

2.10 An example of this traditional reluctance to impose a general duty can be seen in the 19th century English decision *Gantret v Egerton*.¹² Here the defendants owned land, which was intersected by a canal, cuttings and bridges leading to “certain docks of the defendants.”¹³ Mr. Gantret, who was lawfully

⁸ For a discussion of the position in civil law jurisdictions see LRC CP 47-2007 at paragraphs 2.17 – 2.24. See also McMahon and Binchy *Irish Law of Torts* 3rd ed (Butterworths, 2000) at 169, who cite the following: Anon, “Failure to Rescue: A Comparative Study” (1952) 52 Colum LR 631; Dawson ‘Negotiorum Gestio: The Altruistic Intermeddler’ (1961) 74 Harv LR 1073; Ratcliffe (ed), *The Good Samaritan and the Law* (Chicago: Anchor Books, 1966); and von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), Vol 2, pp. 208-232. The Commission has also had the benefit of the analysis in Kortmann, *Altruism in Private Law* (Oxford University Press, 2005), chapter 4.

⁹ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 169.

¹⁰ Markesinis “Negligence, Nuisance and Affirmative Duties of Action” (1989) 105 LQR 104 at 104.

¹¹ *Horsley v MacLaren* [1970] O.R. 487 at 499 (Ont C.A.).

¹² (1867) 16 LT 17, reported as *Gautret v Egerton* (1867) LR 2 CP 371. The case is cited in Kortmann, *Altruism in Private Law* (Oxford University Press, 2005), p.53.

¹³ *Gantret v. Egerton* (1867) 16 LT 17 at 17, cited in Kortmann, *Altruism in Private Law* (Oxford University Press, 2005), p.53.

passing over and using this land and these bridges, fell into one of the cuttings and drowned. His wife claimed that the defendants had wrongfully and improperly kept and maintained their land, canal, cuttings and bridges. She claimed that the defendants had allowed them to continue to be in a condition that rendered them unsafe for persons lawfully passing along. The plaintiff argued that the defendants would have to prove that they did not owe a duty of care towards the plaintiff. Willes J stated, however, that “[t]here is no duty to do anything, but there is a duty to abstain from doing anything that would injure.”¹⁴ Kortmann notes that, in another reported version of the case in the Law Reports, Willes J is recorded as also stating that “[n]o action will lie against a spiteful man who, seeing another running into a position of danger, merely omits the warning.”¹⁵ As the plaintiff’s declaration did not reveal the breach of a specific affirmative duty, Willes J held that the plaintiff had no cause of action.¹⁶

2.11 The courts also explicitly noted their hesitance to transform moral duties into legal duties. In 1903, in *Union Pacific Railway. Co. v Cappier*, the Supreme Court of Kansas stated:

“For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law...”¹⁷

2.12 It remains the case in the early 21st century that, in the majority of common law States, there is no general legal duty to go to the aid of another person who is in danger.¹⁸ McMahon and Binchy note that this appears to extend even to situations where the injured person’s life might depend on intervention and where to give assistance would involve no danger or real

¹⁴ *Gantret v Egerton* (1867) 16 LT 17 at 18. As Kortmann notes, p.53, this quote does not appear in the report of the case, under the name *Gautret v Egerton*, in (1867) LR 2 CP 371.

¹⁵ *Gautret v Egerton* (1867) LR 2 CP 371 at 375. Conversely, as Kortmann also notes, p.53, this quote does not appear in the report of the case, under the name *Gantret v Egerton*, in (1867) 16 LT 17.

¹⁶ Kortmann *Altruism in Private Law* (Oxford University Press 2005), p.53.

¹⁷ 6 Kan 649, 72 Pac. 281, 282 (1903). See also section 312 of the American Law Institute’s *Restatement (Second) of Torts*: “The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”

¹⁸ See McMahon and Binchy *Irish Law of Torts* 3rd ed (Butterworths 2000) at 169, in particular the references in footnote 3.

inconvenience to the would-be-rescuer. They refer to examples of cases where doctors have passed road accidents without stopping to help, even though the assistance of a doctor may have been urgently required¹⁹ and where adults have let toddlers drown in shallow waters without making an effort to help them.²⁰ McMahon and Binchy note, however, that where the adult is also the parent of a child, a duty to rescue arises and the Commission discusses this below in the context of other specific examples of a legal duty to rescue.

2.13 Smith and Burns note that the courts have established that “there is a basic difference between doing something and merely letting something happen”.²¹ It would therefore appear that no matter how cold-blooded and repulsive it would be to stand by idly and watch the person drown there are no legal repercussions for such immoral conduct.

2.14 This position has not, however, always been certain and since the early development of the legal concept of negligence (in essence, a duty of care, a failure in the duty of care and an injury caused by this failure) it was understood to cover both acts (feasance) and omissions (nonfeasance). In *Blyth v Birmingham Waterworks Company*,²² Alderson B defined negligence as follows:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do”.²³

2.15 On the face of it, this definition did not indicate that there was any difference in the law’s approach to acts (feasance) and omissions (nonfeasance) and that both types of behaviour were measured against the standard of the reasonable man. However, as Pollock pointed out,²⁴ Alderson B’s definition must have been based on the presumption that the party whose conduct was in question was already under a ‘duty of taking care’. It was at this

¹⁹ *Smith v Rae* 46 OLR 518 (CA, 1919); *Hurley v Eddingfield* (1901) 156 Ind 416, 59 NE 1058, cited in McMahon and Binchy at p.170.

²⁰ *Osterlind v Hill* (1928) 263 Mass 73, 160 NE 301; *Yania v Bigan* (1959) 397 Pa 316, 155 A 2d 343, cited in McMahon and Binchy at p.170.

²¹ Smith and Burns, ‘*Donoghue v Stevenson* – The Not so Golden Anniversary’, (1983) 46 MLR 147, at 154.

²² (1856) 11 Ex. 781.

²³ (1856) 11 Ex. 781 at 784.

²⁴ Pollock, *The Law of Torts* (1887), p.355, cited in Kortmann, *Altruism in Private Law* (Oxford University Press, 2005) at 52.

'duty' stage of the trial that the judicial approach in cases of omissions (nonfeasance) differed from cases of acts (feasance). For acts and their results, Pollock explained, the actor was generally held answerable. For mere omission he was not, unless he was under some specific duty.²⁵

2.16 In the UK decision *Donoghue v Stevenson*,²⁶ in which a general legal duty of care in negligence was developed, the leading opinion delivered in the case by Lord Atkin drew directly on the biblical parable of the Good Samaritan. For this reason, the duty of care developed in the case is commonly known as the "neighbour principle." The duty of care developed in *Donoghue v Stevenson* has been applied many times in Irish courts²⁷ and has acted as a "general road sign" for the development of this area of civil liability.²⁸ The Commission notes two aspects of Lord Atkin's opinion for the purpose of this Report. First, he discussed the connection between moral principles and legal principles. Second, he referred to omissions in setting out the legal duty of care of a manufacturer (the defendant) whose defective product (ginger beer) caused injury (gastroenteritis) to a consumer (the plaintiff).

2.17 As to the connection between law and morality, Lord Atkin pointed out in *Donoghue v Stevenson* that there are many legal principles which have a moral basis but that it was not possible to impose legal sanctions for failing to meet private moral principles to which others might subscribe. He stated:

"The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy".²⁹

²⁵ Kortmann *Altruism on Private Law* (Oxford University Press, 2005) at 53 also refers to *Bulman v Furness Railway Company* (1875) 32 LT 430 at 432, where a distinction is made between 'active' and 'passive' negligence, and Piggott, *Principles of the Law of Torts* (1885), p.208, who distinguishes 'positive' and 'negative' duties.

²⁶ [1932] AC 562.

²⁷ See McMahon and Binchy *Irish Law of Torts* 3rd ed (Butterworths, 2000), p.118, fn20.

²⁸ McMahon and Binchy, p.119.

²⁹ [1932] AC 562 at 580.

2.18 Lord Atkin then went on to explain that civil liability in negligence might specify that one had a duty of care to a “neighbour” but that the “neighbour” of whom he spoke is a more restricted category than the neighbour referred to in the Christian parable of the Good Samaritan. Lord Atkin explained this distinction in the following passage, which has been cited many times since:

“The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer’s question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts *or omissions* which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts *or omissions* which are called in question.”³⁰

2.19 There is little doubt that Lord Atkin did not intend the legal rule of civil liability in negligence to equate to the moral rule set out in the biblical parable of the Good Samaritan, though equally it can be said that the legal rule clearly contains elements derived from moral principle.³¹ The moral principle that we are to *love* our neighbour becomes in law the duty not to *injure* our neighbour, and the scope of “neighbour” also appears to be less extensive than the biblical concept, which appear to be potentially global in scope.

2.20 Given that Lord Atkin drew this distinction between moral principles and legal duties, and that he specifically narrowed the scope of the concept of “neighbour” in framing the legal duty of care, it could be concluded that individuals have no legal duty to intervene – to act as a Good Samaritan or, indeed, as a volunteer.

2.21 There is one obstacle to this conclusion, the inclusion by Lord Atkin of the word “omissions” twice in this passage setting out the duty of care. Later judicial comments on this part of Lord Atkin’s opinion take the view that the use of “omissions” is either too broad or that it must be seen as being limited to situations where a person who has already taken some active step – such as manufacturing a product, and who thus has a duty to be careful – omits to do something which lead to them to injuring the “neighbour.” In that respect, it has been said that the neighbour principle was never intended to cover ‘pure’ omissions.³² In the 1970 UK House of Lords decision *Home Office v Dorset*

³⁰ [1932] AC 562 at 580 (emphasis added).

³¹ See Byrne and Binchy, *Annual Review of Irish Law 2007* (Round Hall, 2008), p.391.

³² Smith and Burns, ‘*Donoghue v. Stevenson – The Not So Golden Anniversary*’ (1983) 46 MLR 147 at 155-156 suggest that the neighbor principle was never

*Yacht Co. Ltd.*³³ Lord Diplock stated clearly that omissions give rise to no legal liability:

“The very parable of the Good Samaritan which was evoked by Lord Atkin in *Donoghue v Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and the Levite would have incurred no civil liability in English law.”³⁴

2.22 This approach was followed in the 1987 House of Lords decision *Smith v Littlewoods Ltd.*³⁵ in which Lord Goff stated:

“Why does the law not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties? The fundamental reason is that the common law does not impose liability for what are called pure omissions.”³⁶

2.23 In the 1996 decision *Stovin v Wise*,³⁷ the UK House of Lords again confirmed this approach. Lord Nicholls noted:

“The recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother’s keeper and have legal obligations in that regard. When this additional reason exists, there is said to be sufficient proximity.”³⁸

2.24 In conclusion, the Commission reiterates that there is a long-standing reluctance in common law States, including Ireland, to impose a general duty to

intended to cover ‘pure’ omissions. Kortmann *Altruism on Private Law* (Oxford University Press, 2005) notes, of course, that Lord Atkin drew directly on the biblical parable of the Good Samaritan, itself unquestionably a case of ‘pure’ omissions.

³³ [1970] AC 1004.

³⁴ [1970] AC 1004 at 1060.

³⁵ [1987] AC 241.

³⁶ [1987] AC 241 at 271.

³⁷ [1996] AC 923.

³⁸ [1996] 3 All ER 801 at 806.

intervene and rescue.³⁹ This has been supported by the comments made by many courts since the decision in *Donoghue v Stevenson*, in particular through the emphasis on the requirement of proximity. The Commission notes in this respect that the Irish Supreme Court has affirmed, in cases such as *Glencar Exploration plc v Mayo County Council*,⁴⁰ that the duty of care in negligence in Irish law is, equally, limited by the requirement that there be proximity between the parties, in other words, that there is a sufficiently close relationship between the parties that it would be reasonably foreseeable that the careless person's actions (or inactions) would be likely to cause injury to the "neighbour". In that respect also, if mere moral wrongdoing was all that was required, the proximity test would not be required and liability could be imposed on the wrongdoer in respect of persons who were in no way connected to the wrongdoer. It is thus clear that there is no general legal duty to intervene and rescue.

C A duty to intervene and rescue in Irish law in specific instances

2.25 While there is currently no general duty to intervene and rescue in Irish law, a number of specific instances to do so have been established both in common law (judge made law) and legislation.

(1) Relationships of dependency

2.26 A clear example of where the law recognises a duty to intervene and rescue is that of the parent and child. The basis for this is that the law recognises a special dependency, allied to the creation of a duty arising from the fact of being a parent. A similar rationale lies behind the recognition of a specific duty to intervene in the following relationships: occupier of land and visitor;⁴¹ transport carrier and passenger; hotel proprietor and guest; and prison authorities and prisoner.⁴²

2.27 It has been suggested that the duty to protect another in a special relationship arises only where the relationship exists and the harm develops in the course of that relationship.⁴³ In the absence of a special relationship or the

³⁹ See paragraph 2.09, above.

⁴⁰ [2002] 1 IR 84.

⁴¹ *Occupiers Liability Act 1995*, replacing similar common law rules.

⁴² Nowlin "Don't just stand there: Help me!" (2003-2004) 30 Wm Mitchell L Rev 1001 at 1004-1005; Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 68-69. See also Newnham "To assist or not to assist: The Legal Liability of Midwives acting as Good Samaritans" (2006) 19 *Women and Birth* 61 at 61.

⁴³ Nowlin "Don't just stand there: Help me!" (2003-2004) 30 Wm Mitchell L Rev 1001 at 1004-1005

termination of an existing special relationship, a party is under no duty to protect or aid the other. Thus, a transport carrier would owe no duty to an individual who has left the vehicle and ceased to be a passenger and a hotel proprietor would owe no duty to a guest who is injured or endangered while he or she is away from the hotel premises.

2.28 Other commentators have also supported this view, noting that the position at common law is such that “except when the person endangered and the potential rescuer are linked in a special relationship, there is no such duty [to intervene]”.⁴⁴ The Commission agrees that it is more likely that liability for omissions (nonfeasance) would be imposed where a special relationship exists between the parties. This is particularly so where the relationship may be described as one of dependency, such as between a parent and a child, an employer and an employee, a shopkeeper and a customer, spouses, and a physician and a patient.⁴⁵ This “special relationship” argument has been employed to deny that parties are really “strangers”. In this respect, Gregory notes:

“For it is clear at common law that nobody has to lift a finger... to help a stranger in peril or distress. I say “stranger” because there are relationships which require people to help others or avert danger toward them.”⁴⁶

2.29 The Commission has already noted that it is generally accepted that the parent and child relationship may give rise to a duty to protect one’s children.⁴⁷ Furthermore, a special relationship of this type may also give rise to

⁴⁴ Weinrib “The Case for a Duty to Rescue” (1980) 90 Yale LJ 247, quoting Prosser *The Law of Torts* § 56 at 338-43 (4th ed. 1971) (special relationships include husband-wife, shipmaster-crew, proprietor-customer, carrier-passenger, educator-pupil, and employer-employee).

⁴⁵ Weinrib notes the relationships of landlord/trespasser and boat operator/passenger have given rise to duties. See Weinrib “The Case for a Duty to Rescue” (1980) 90 Yale LJ 247 at 248.

⁴⁶ Gregory “The Good Samaritan and the Bad: The Anglo-American Law” in Ratcliffe (ed) *The Good Samaritan and the Law* (Chicago: Anchor Books, 1966) at 24.

⁴⁷ McMahon and Binchy *Law of Torts* (3rd ed Butterworths 2000) at 170, fn6. In *Surtees v Royal Borough of Kingston upon Thames* [1992] PIQR 101 at 111, it was held that a foster parent owed a duty to her foster child.

a duty to control the conduct of others. As was stated in the Australian case *Smith v Lears*.⁴⁸

“... it is incumbent upon a parent who maintains control over a young child to take reasonable care to exercise that control as to avoid conduct on his part, exposing the person or property of others to unreasonable danger.”

2.30 A school may be liable for releasing students before it is expected to close,⁴⁹ or, more generally, for failing to take reasonable care in ensuring the safety each student's person and property.⁵⁰ Likewise, an employer is responsible for ensuring safety and health in the workplace and looking after an employee who becomes injured or ill in the workplace.⁵¹ In the United Kingdom, it has been held that prison authorities owe a common law duty to provide medical care to prisoners.⁵²

(2) Creation of risk and duty to minimise risk

2.31 If a person creates a situation or risk of danger, however blamelessly, the law requires him or her to prevent the danger from culminating in harm.⁵³ In such circumstances the courts will usually classify the case as one of act (feasance) as opposed to omission (nonfeasance). A pertinent example of this relates to the situation where a car driver fails to brake and injures a pedestrian. Such a failure will be regarded by the courts in most cases as active conduct or as Fleming explains it, “the element that makes his active conduct – driving – negligent”.⁵⁴ This allows the courts to impose liability without having to consider the more difficult issue of liability for nonfeasance.

2.32 However, in the English case *Johnson v Rea*⁵⁵ the defendants were found liable for their failure to clean a floor on which slippery material had fallen, and the plaintiff as a result fell and suffered injury. The court stated that:

“if any person creates a danger, it his duty to do something more than to warn people coming on to the premises or coming within the

⁴⁸ (1945) 70 CLR 256 at 262.

⁴⁹ *Barnes v Hampshire County Council* [1969] 1 WLR 1563.

⁵⁰ See Kortmann *Altruism in Private Law* (Oxford University Press, 2005).

⁵¹ See the discussion of safety and health at work, paragraphs 2.50ff, below.

⁵² *Knight v Home Office* [1990] 2 All ER 237 at 243.

⁵³ See Kortmann, *Altruism in Private Law* (Oxford University Press, 2005), at 55-58.

⁵⁴ Fleming *The Law of Torts* (9th edn 1998) p.163.

⁵⁵ [1961] 1 WLR 1400.

ambit of the danger that it exists. He must take reasonable steps, if such steps can be taken, to obviate the danger to people likely to encounter it.”⁵⁶

2.33 The Commission notes that in *Union Pacific Railway Co. v Cappier*⁵⁷ the Supreme Court of Kansas refused to impose liability on a railway company for failing to render aid to an injured trespasser.⁵⁸ However, during the 20th century, this ruling and similar rulings came under strong criticism.⁵⁹ The Commission notes that it is now generally recognised that a duty to act arises where the defendant’s prior conduct, though blameless, has caused an injury.⁶⁰ In such cases the defendant is not merely one of a large number of possible people who can intervene but an easily identifiable party. In addition, the Commission notes that there is a stronger causal connection between the defendant’s actions and the harm which has occurred than in other cases of nonfeasance.

(3) Professional rescuers

2.34 In the Consultation Paper, the Commission pointed out that for those professional rescuers governed by statute, there is a distinction between a statutory power of discretion and a statutory duty.⁶¹ The Commission noted that a duty to intervene will not usually arise in the case of a statutory power of discretion, while a duty may be owed to the public at large rather than to a particular individual in the case of a statutory duty.

2.35 Where an intervention occurs in an accident or emergency situation, the Commission notes that the rescue body is not generally held to have

⁵⁶ [1961] 1 WLR 1400 at 1405. See also the US case *Montgomery v National C. & T. Co* 195 SE 247 (1937), in which it was held that two truck drivers whose trucks had stalled were liable for an accident resulting from their failure to post a warning: cited in Gregory “The Good Samaritan and the Bad: The Anglo-American Law” in Ratcliffe (ed). *The Good Samaritan and the Law* (Chicago: Anchor Books, 1966), at 27.

⁵⁷ 66 Kan. 649, 72 Pac. 281 (Sup. Ct. of Kansas, 1903).

⁵⁸ See also *Turbeville v Mobile Light & R. Co.* 221 Ala. 91, 127 So. 519 at 521 (Supreme Court of Alabama, 1930), with further references.

⁵⁹ Gregory “The Good Samaritan and the Bad” in Ratcliffe, (ed.) *The Good Samaritan and the Law* (Chicago: Anchor Books, 1966) at 26-27.

⁶⁰ See Honoré “Are Omissions Less Culpable?” in Cane and Stapleton *Essays for Patrick Atiyah* (1991) at 43-45.

⁶¹ LRC CP 47-2007 at paragraph 2.27. See McMahon and Binchy *Law of Torts* (3rd ed Butterworths 2000) at 534.

voluntarily assumed responsibility for the rescue. Therefore, even where the rescue is performed carelessly or negligently, the body will not be held liable. In this regard, the Commission notes that a number of cases in the 1990s in the United Kingdom held that certain emergency services were not duty bound to go to the aid of persons in peril, for example, the fire services,⁶² the police⁶³ and the coastguard.⁶⁴ In *Capital and Counties plc v Hampshire County Council*⁶⁵, for instance, it was held that by taking control of the operations at the scene of a fire, the senior fire officer was not held to have voluntarily assumed responsibility, regardless of whether there was reliance on the fire service on the part of the owner. As a result, no liability attached to the fire service unless they made the situation worse than it already was. This can be contrasted with the decision in *Barnett v Chelsea and Kensington Hospital Management Committee*,⁶⁶ where it was held that a doctor-patient relationship was effectively created when a person, who was ill, managed to present himself at an open hospital accident and emergency unit. He was, therefore, entitled to reasonably careful treatment.

2.36 The Commission notes that the position in Scotland appears to be different. In one case, it was held that fire services, which have been found to have been negligent, do not enjoy immunity from liability.⁶⁷ In another case, the police force was found liable when it assumed responsibility to warn motorists of a collapsed bridge and abandoned the task before the risk was alleviated.⁶⁸

2.37 In *Kent v Griffiths*,⁶⁹ which involved consideration of whether there was a duty on an ambulance service when summoned to an emergency, the English Court of Appeal held that an unreasonably delayed response could amount to actionable negligence, and in that case, the defendants were held liable for damages that would not have occurred but for the delay. Delivering the leading judgment in the case, Lord Woolf MR equated the ambulance services with hospitals and other health service providers who do owe duties of care. It was held that proximity was established as soon as the GP had phoned

⁶² *Capital and Counties plc v Hampshire County Council* [1997] Q.B. 1004.

⁶³ *Alexandrou v Oxford* [1993] 4 All ER 328.

⁶⁴ *OLL Ltd. v Secretary of State for Transport* [1997] 3 All E.R. 897.

⁶⁵ [1997] Q.B. 1004 at 1035.

⁶⁶ [1969] Q.B. 428.

⁶⁷ *Duff v Highlands and Island Fire Board* [1995] S.L.T. 1362.

⁶⁸ *Gibson v Chief Constable of Strathclyde* 1999 S.C. 420.

⁶⁹ [2001] Q.B. 36.

the emergency services, giving the ambulance services notice of the emergency status of the call.

2.38 The Commission acknowledges that the reasons set out for the no-duty rule are unconvincing when applied to certain professional and equipped emergency and rescue services such as health services and ambulance services.⁷⁰ Such services are paid from public funds to save persons in difficult circumstances. Thus, they are distinct from altruists who happen upon a situation unexpectedly and without adequate resources. In this regard, it has been convincingly asserted that:

“[A]rguably the sacrifice of individual liberty, implicit in affirmative duties on private individuals, has no counterpart in the case of public authorities specifically entrusted with powers and resources for the sake of public health and safety....”⁷¹

2.39 Until recently the position pertaining to the emergency services seemed to apply to healthcare professionals as well. With regard to the two categories, it appeared that there was no obligation to provide emergency medical care unless the person seeking medical attention was already a patient of the practitioner in question: “A doctor may flout his Hippocratic Oath and deny aid to a stranger.”⁷²

2.40 The decision of the New South Wales Court of Appeal in *Lowns v Woods*⁷³ appears to mark a departure from this position. In that case, the Australian court found a doctor liable in negligence for refusing to attend and treat a boy who was having an epileptic fit, even though there was no pre-existing doctor-patient relationship. The Court found that, in the particular circumstances of the case, there was “physical”, “circumstantial” and “causal” proximity which justified the imposition of a duty on the doctor and the doctor breached this duty by refusing to attend. Dr. Lowns was nearby, had the

⁷⁰ Williams “Litigation against English NHS Ambulance Services and the Rule in *Kent v Griffiths*” (2007) 15 *Med Law Rev* 153

⁷¹ Fleming *The Law of Torts* 8th ed (Law Book Company Ltd. 1992) at 211 fn. 485.

⁷² *Ibid* at 147. In the Irish case *O’Doherty v Whelan*, High Court, 18 January 1993 (discussed in McMahon and Binchy, *Irish Law of Torts* (3rd ed Butterworths 2000), at 371) O’Hanlon J held that a doctor has a duty to make a visit to the home of a person who was already their patient.

⁷³ [1996] Aust. Torts Reports 81-376 (NSW C.A.).

competence and ability to treat the child and had no other commitments at the particular time.⁷⁴

2.41 The Commission notes, however, that no general duty to assist appears to have been created in *Lowns v Woods*. The Commission considers that the comments of the judge at the original trial, reported as *Woods v Lowns*, are of interest.⁷⁵ The judge explained negligence and foreseeability in terms of assisting strangers in an emergency as follows:

“In general terms, the common law does not impose a duty to assist a person in peril even when it is foreseeable that the consequence of a failure to assist will be the injury or death of the person imperilled... It has been held in other common law jurisdictions that a doctor is under no duty to attend upon a person who is sick, even in emergency, if that person is one to whom the doctor has not and never has been in a professional relationship of doctor and patient ... Although there is no Australian authority in which the general proposition has been specifically applied in respect of a medical practitioner the general principle is clear, and there is certainly no Australian case in which a doctor has been held liable for damages because of a failure to attend upon and treat someone who was not already his patient.”

2.42 Furthermore, Crowley-Smith suggests that the duty in *Lowns v Woods* is restricted to doctors only, by virtue of the specific provisions in the NSW *Medical Practitioners Act 1938* (since replaced) and the specific facts of the case.⁷⁶ The decision of the Court of Appeal in the case does not, according to Abadee, “do violence to the general principle that a medical practitioner is under no legal duty to attend upon and treat someone who was not already his or her patient.”⁷⁷ The finding was based on the particular circumstances of the case which established a duty of care by the defendant to the plaintiff.

2.43 In 1997, a year after the Australian decision, the English Court of Appeal, in *Capital and Counties plc v Hampshire County Council*,⁷⁸ and without

⁷⁴ Cf *Egedebo v. Windermere District Hospital Association* (1993) 78 BCLR. (2d) 63 where a Canadian off-duty doctor was held liable when he failed to arrange treatment.

⁷⁵ [1995] 36 NSWLR 344 at 354.

⁷⁶ Crowley-Smith “The Duty to Rescue unveiled a Need to indemnify the Good Samaritan Health Care Professionals in Australia? (1997) 4 *J Law Med* 352

⁷⁷ Abadee “A Medical Duty to Attend?” (1997) 3 *J Law Med* 306 at 308.

⁷⁸ *Capital and Counties plc v Hampshire County Council* [1997] QB 1004, 1035.

referring to *Lowns v Woods* reasserted the view that mere physical proximity between a doctor and a sick person, of itself, does not create a duty to treat. On this view, doctors who happen upon road accidents are not bound to help and, if they do stop, can be liable only if they make the casualty's condition worse. Williams notes that this denial of a patient-status (and the consequent "worsening" rule) probably results from a desire to encourage rescues and to protect Samaritans who inadvertently botch them.⁷⁹ Williams argues, however, that the risk of facing a writ is more theoretical than real. If an action were to be brought, it is likely that the courts would be sensitive to the fact that the treatment had been provided in "battle conditions" and would, thus, be reluctant to hold that there had been a breach of the duty of care.⁸⁰

2.44 In this regard, the Commission acknowledges that the specific setting, including any relevant statutory duties, have played a significant role in determining whether any liability arises in these kind of cases. As has been pointed out, certain statutory functions are essential for the effective functioning of society. Therefore, it is reasonable for society to insist that those functions be discharged properly, under sanction of damages where this is appropriate.⁸¹

(4) Road traffic accidents

2.45 The Commission pointed out in the Consultation Paper that Irish law does not impose a duty to intervene in situations involving road traffic accidents.⁸² This may be contrasted with the approach taken in other common law jurisdictions such as the United States, where many States impose a duty on drivers to assist persons involved in road traffic accidents. Similarly, in Canada the majority of Provinces have enacted legislation requiring a driver involved in a road traffic accident to render assistance to those who are injured in the accident.

2.46 The closest to such a duty in Irish law is the obligation, under section 106 of the *Road Traffic Act 1961*, to report a road traffic accident involving personal injury or injury to property to the Garda Síochána.⁸³ Section 106(1)(d) of the 1961 Act⁸⁴ provides that, where injury is caused to a person or

⁷⁹ Williams, "Medical Samaritans: Is There a Duty to Treat?" (2001) 21 *Oxford Journal of Legal Studies* 393

⁸⁰ Williams, "Medical Samaritans: Is There a Duty to Treat?" (2001) 21 *Oxford Journal of Legal Studies* 393

⁸¹ McMahon and Binchy *Law of Torts* (3rd ed Butterworths 2000) at 534.

⁸² LRC CP 47-2007 at paragraph 2.30.

⁸³ See Piers *Road Traffic Law* 3rd ed (First Law, 2008).

⁸⁴ As amended by the *Road Traffic Act 1986*.

property in a public place and a vehicle is involved in the occurrence of the injury (whether or not it is the cause):

“the driver of the vehicle, or, if he is killed or incapacitated, the person then in charge of the vehicle shall report the occurrence as soon as possible to a member of the Garda Síochána and, if necessary, shall go for that purpose to the nearest convenient Garda Síochána station and also shall give on demand the appropriate information to the member.”

2.47 It has been held that this duty means remaining at the scene of an accident long enough to allow information to be noted.⁸⁵ The report must be made officially to a member of the Garda Síochána.⁸⁶ Where the driver stops and gives information to an entitled person on the scene, then, except in the case where there is an injured person, there is no duty to report to a member of the Garda Síochána. Where there is a delay in reporting and no proper explanation is given, the defendant should be convicted.⁸⁷ The duty to report arises where there is a connection between the presence of the vehicle and the accident.⁸⁸

2.48 *The English case R v Kingston upon Thames County Council ex parte Scarll*⁸⁹ shows the importance of reporting an accident involving injury to the Gardaí. A superintendent police officer gave assistance to a girl who had been hit by his car through no fault of his own. While he had spoken to the girl's father, who was a friend, it was held that this was not sufficient.

2.49 The duty in section 106 of the 1961 Act is limited in scope to a duty to report certain types of accidents. The Commission notes in this respect that this duty to report has been extended in a number of other common law jurisdictions, such as the United States and Canada, to include a duty to intervene and assist an injured person at the scene of the accident. The Oireachtas has not, to date, chosen to do so.

(5) Safety and health at work legislation, including first aid

2.50 The *Safety, Health and Welfare at Work Act 2005* imposes significant duties on employers which extend beyond a duty to act in a reasonably careful

⁸⁵ *Temelling v Martin* [1971] RTR 196.

⁸⁶ *Mutton v Bates* [1984] RTR 256.

⁸⁷ *Balman v Larkin* [1981] RTR 1. In *Vigus v. Mann* [1961] WAR 1, it was held that a lapse of 3 hours was not “as soon as practicable”.

⁸⁸ *Quelch v Phipps* [1955] 2 QB 107, where a passenger fell off a bus platform.

⁸⁹ [1990] Crim LR 429.

manner towards employees.⁹⁰ Section 8(1) of the 2005 Act requires every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all of his or her employees. Section 8(2) sets out a non-exhaustive list of duties under this general provision, which includes a duty to provide for the welfare of employees, and this encompasses the positive duty to provide first-aid assistance to employees who are injured at work. This clearly involves a statutory duty to assist and rescue.

2.51 These duties, therefore, clearly extend to the obligation to avoid omissions which are likely to cause injury both to employees who may be affected by the employer's activities. In addition, sections 18 to 20 of the 2005 Act require that certain precautions and preventative measures must be taken by the employer in order to ensure safety and health of employees, which must be set out in writing in a safety management document called the Safety Statement.

2.52 As regards first aid in particular, Part 7, Chapter 2 of the *Safety, Health and Welfare at Work (General Application) Regulations 2007*⁹¹ (the *First Aid Regulations 2007*), made under the 2005 Act, sets out a specific duty on employers to make first-aid equipment and qualified occupational first aiders available to assist injured employees. The 2007 Regulations define "first-aid" as "treatment for the purpose of preserving life or minimising the consequences of injury or illness." While the 2007 Regulations do not define first aid specifically to include, for example, the use of automated external defibrillators (AEDs), the authoritative *Guide to the 2007 Regulations* published by the Health and Safety Authority (HAS, the key regulator in this area) states that:

"The provision of automated external defibrillators (AEDs) in workplaces to prevent sudden cardiac death should be considered, and early defibrillation using an AED is one of the vital links in the "chain of survival". Ideally, wherever there is an occupational first aider(s) in a workplace, provision of an AED should be considered. The training of other employees who are not occupational first-aiders in the use of AEDs is also encouraged.

Whereas it may be practicable and desirable to have an AED in every workplace, due to cost considerations it would be unreasonable to expect all employers (especially small and medium size enterprises (SMEs)) to have one on their premises, even if there

⁹⁰ See generally Byrne, *Safety, Health and Welfare at Work Law in Ireland* 2nd ed (Nifast, 2008) and Shannon, *Health and Safety: Law and Practice* 2nd ed (Round Hall, 2008).

⁹¹ SI No 299 of 2007.

is an occupational first-aider present. These costs not only include the purchase price but also the cost of maintenance of the equipment and refresher training for those trained in how to use AEDs.

However, different employers at the same location, such as in shopping centres, small business enterprise centres etc., where relatively large numbers of employees or other persons are likely to be habitually present, might find it feasible to co-operate in the provision of shared AED equipment, training and assistance.”⁹²

2.53 It is also notable that, in 2008, the FETAC⁹³ qualification in occupational first aid includes a mandatory module in the use of automated external defibrillators (AEDs).⁹⁴ This development is linked to the increased use of AEDs in response to sudden cardiac death (SCD), including the 2006 *Report of the Task Force on Sudden Cardiac Death*,⁹⁵ which forms part of the wider policy context against which the Attorney General’s request is to be considered. The Commission considers that the specific reference in the HSAs’ 2007 *Guide to the First Aid Regulations 2007* to the prevention of sudden cardiac death indicates that, in specific instances, a duty to rescue and assist may be appropriate.

(6) Safety of Children: A Duty to Notify?

2.54 In Ireland there is no statutory provision for the mandatory reporting of child abuse in general, and child sexual abuse in particular. This remains the position although in recent years there have been numerous revelations involving not only instances of abuse but also systematic cover-up. Concern about the apparent impunity with which the perpetrators had acted and the immunity which seemed to attach to those who had failed to intervene led to the establishment of a number of public inquiries and the publication of several reports. This has led to the renewed vigour of those who advocate for mandatory reporting.

⁹² *Guide to the Safety, Health and Welfare at Work (General Application) Regulations 2007 Chapter 2 of Part 7: First-Aid* (HSA, 2007) p.7, available at www.hsa.ie

⁹³ FETAC is the Further Education and Training Awards Council, established under the *Qualifications (Education and Training) Act 1999*.

⁹⁴ See Byrne, *Safety, Health and Welfare at Work Law in Ireland 2nd ed* (Nifast, 2008), p.556; and *Health and Safety Review*, June 2008, available at www.healthandsafetyreview.ie

⁹⁵ See the discussion in Part C of Chapter 1, above.

2.55 The issue of whether to impose a duty on persons to report instances of child abuse has attracted much public debate. However, the Oireachtas has not moved to impose such a positive duty. The approach taken to date has been to protect those persons who do, in fact, report their concerns. This protection is enshrined in the *Protection for Persons Reporting Child Abuse Act 1998*. In the Commission's view, the absence of further legislative developments in this particular area indicates the difficulty of developing a general rule in this respect.

(7) Conclusions

2.56 The Commission considers that the specific duties to intervene discussed in this Part have developed by reference to quite distinct rationales, each of which have validity. It is clear that their precise scope is fairly settled but that they are also capable of further development, as the comparative analysis makes clear in connection with those developed through judicial case law. In the case of legislative duties requiring an obligation to assist and rescue, it is clearly a matter for the Oireachtas to determine their scope and development. The Commission considers that it is appropriate that the courts and the Oireachtas should be left to decide these matters in connection with these specific instances. This can be achieved without prejudice to whether a more general duty to intervene and rescue is developed.

2.57 The Commission does not, therefore, propose to make any recommendation on these existing specific duties, and turns now to consider whether, as the Attorney General requested, a general duty to intervene should be put in place.

D Consideration of a general duty to intervene and rescue

2.58 As the Commission has already noted, most common law States have maintained the view that there should be no general legal duty to intervene, subject to a number of specific exceptions. The Commission notes, however, that some States have enacted legislation providing for positive duties in certain circumstances. The Commission now turns to consider these and then to discuss whether such an approach should be taken in Ireland.

(1) States that have imposed a duty to intervene

(a) Canada

2.59 Quebec is unique in Canada in imposing a duty on everyone to help a person in peril.⁹⁶ The duty to take action stems from the *Quebec Charter of Human Rights and Freedoms 1975*. Article 2 of the Charter states that "every

⁹⁶ LRC CP 47-2007 at paragraph 2.16.

human being whose life is in peril has a right to assistance". This imposes an obligation on all persons to render aid if it can be accomplished without serious risk to that person or a third person or if there is no other valid reason for not rendering it. Aid can be rendered personally by giving necessary and immediate physical assistance or by calling for assistance.

(b) United States⁹⁷

2.60 Chapter 604A.01, subdivision 1, of the *Revised Minnesota Statutes 2007*, which imposes an affirmative duty to assist in an emergency (at the scene of an emergency), is an exception to the general rule that there is no duty to intervene. Minnesota has thus created a statutory duty to render assistance at the scene of an emergency where a person knows that another person is exposed to or has suffered grave physical harm. He or she must only render reasonable assistance if they can do so without danger or peril to themselves or others. A person who violates this rule will be guilty of a petty misdemeanour. The meaning of "reasonable assistance" and the immunity associated with the statutory duty was challenged in *Swenson v Waseca Mutual Insurance Co.*⁹⁸ The interpretation of the term "reasonable assistance", the case and its findings will be discussed further in Chapter 3.

(c) Australia

2.61 The Commission notes that in Australia, there are certain situations in which a duty is imposed on a public authority to perform particular functions. The courts have based this duty on the general reliance which exists on the part of those at risk of injury or damage if certain statutory functions are negligently discharged.⁹⁹

(2) Consideration of a general duty to intervene

2.62 In the Consultation Paper, the Commission recommended that there should be no reform of the law to impose a duty on citizens in general, or any particular group of citizens, to intervene for the purpose of assisting an injured person or a person who is at risk of such an injury.¹⁰⁰

2.63 The Commission described a number of reasons why the law hesitates to impose such an obligation on individuals. The Commission then concluded that the arguments against the imposition of a positive duty to

⁹⁷ As regards states with a duty to aid see C.M. Ciociola "Misprision of Felony and Its Progeny" 41 *Brandeis L.J.* 697 at 735-36 (2003).

⁹⁸ 653 NW2d 794 (Minn Ct. App. 2002).

⁹⁹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424

¹⁰⁰ LRC CP 47-2007 at paragraph 2.52

intervene had a great deal of weight, in particular, as the Commission noted, because they are consistent with the general basis of the duty of care in negligence which the Commission argued had not been criticised in any significant respect.¹⁰¹ Furthermore, the Commission concluded that the arguments against imposing a duty to intervene outweigh any which would impose a general duty.¹⁰² In this section the Commission re-examines these arguments in detail. The Commission notes in this respect that, in *Stovin v Wise*¹⁰³ Lord Hoffmann stated that “[t]here are sound reasons why omissions require different treatment from positive conduct” and that these can be set out in political, moral or economic terms.¹⁰⁴ The Commission will now turn to deal with each of these arguments in turn as well as a number of additional arguments that have been put forward.

(a) Personal Liberty and Freedom of Choice

2.64 One of the main arguments put forward against the introduction of a positive duty to intervene is that it would constitute too great an infringement of personal liberty.¹⁰⁵ This argument stems from the limited choice offered by affirmative duties to potential defendants. In *Stovin v Wise* Lord Nicholls referred to this argument. He stated that:

“Liability for omissions gives rise to a problem not present with liability for careless acts. He who wishes to act must act carefully or not at all ... With liability for omissions, however, a person is not offered a choice. The law compels him to act when left to himself he might do nothing.”¹⁰⁶

2.65 Although it can be said that every duty which arises under law, both negative and positive, restricts our personal freedom, positive duties unlike negative ones are more restrictive because they deny us the option to avoid being subjected to them. Kortmann sets out a good example of this: if one believes they cannot act as a reasonable driver would, they can decide not to drive. However, one does not have the same option where they are required to act as a reasonable rescuer would upon witnessing an accident. However, Kortmann also notes that imposing positive duties does not in reality leave us

¹⁰¹ LRC CP 47-2007 at paragraph 2.50.

¹⁰² LRC CP 47-2007 at paragraph 2.51.

¹⁰³ [1996] 3 All ER 801 at 819.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 15-16.

¹⁰⁶ [1996] 3 All ER 801 at 809.

without an option to avoid being subjected to such positive duties but rather leaves a person with less of an option than is the case with negative duties.

(b) Distinction between Nonfeasance and Misfeasance

2.66 Another argument relates to the common law distinction between misfeasance and nonfeasance.¹⁰⁷ The Commission acknowledges that the question of what exactly constitutes “nonfeasance” is problematic. Certainly, it is clear that many words that are grammatically active connote inactive behaviour,¹⁰⁸ e.g. sleeping, starving, fasting etc. In many cases, therefore, it is quite difficult to draw a clear distinction between feausance and nonfeasance.¹⁰⁹

2.67 The Commission considers that the distinction between misfeasance and nonfeasance may also be stated in terms of acts and omissions and notes that the distinction between harming persons by active carelessness and a “simple” failure to help such persons is a jurisprudential distinction that has, for many years, been established as “fundamental” and “deeply rooted in the common law”.¹¹⁰ It is this classical distinction which holds that liability can result from an act of misfeasance but not from an act of nonfeasance.

2.68 To help clarify the distinction between misfeasance and nonfeasance, Weinrib has suggested focusing not on the moment the defendant failed to act to prevent harm to the plaintiff, but at the course of events prior to that moment.¹¹¹ If there is no significant interaction between the plaintiff and the defendant prior to that moment, the defendant's conduct can be considered to be nonfeasance.¹¹² Participation by the defendant in the creation

¹⁰⁷ Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 251-258.

¹⁰⁸ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 5.

¹⁰⁹ *Ibid*, at 5-8.

¹¹⁰ Bohlen “The Moral Duty to Aid Others as a Basis of Tort Liability” (1908) *Univ Penn Law Rev* 217 at 219.

¹¹¹ Weinrib “The Case for a Duty to Rescue” (1980) 90 *Yale LJ* 247 at 253

¹¹² Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 253-54. Professor Weinrib gives the example of two different scenarios: a car driver not pressing the brake and striking a pedestrian, and a pool patron not throwing a rope to a drowning person. *Id.* at 253. Looking only at the moment of injury, both situations pose instances of nonfeasance; the driver failed to press the brake, and the observer failed to throw a rope. *Id.* Looking to the events leading up to the injury, however, the driver created the conditions resulting in injury, while the pool patron did nothing to cause the drowning. *Id.* With this analysis, Professor Weinrib suggests that the car driver is guilty of misfeasance

of the risk is thus the crucial factor in distinguishing misfeasance from nonfeasance.¹¹³ As will be discussed below, this line of reasoning also forms the basis for the “causation” argument against the imposition of liability for acts of nonfeasance.

2.69 Feasance is often regarded as being more culpable than nonfeasance. Kortmann notes that a reason for this may be due to the fact that many acts imply an additional inaction. Honoré argued that omissions are less culpable than acts that bring about the same or similar outcome, other things being equal.¹¹⁴ He argued that hitting someone is worse than not preventing someone from being hit.¹¹⁵ Honoré did state, however, that omissions that violate a distinct duty that we owe others are usually as culpable as positive acts that violate those duties.¹¹⁶

(c) Individual Freedom

2.70 In the UK case *Stovin v Wise*,¹¹⁷ the argument in favour of individual freedom was also put forward. Lord Hoffmann argued that omissions require different treatment from positive conduct for the reason that it would constitute an interference with individual liberty:

“...it is less of an invasion of an individual’s freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect.”

2.71 While the Commission appreciates that it may be morally commendable to assist a person in need of rescue, it nonetheless considers that the imposition of a positive duty to intervene would constitute too great an infringement of an individual’s freedom, an important feature of the common law.

while the pool patron’s conduct is nonfeasance. *Id.*; see also *Newton v Ellis* 119 Eng. Rep. 424 (K.B. 1855) (holding that one who dug a hole near a road and failed to light it at night was guilty of misfeasance because the inaction (failure to light the hole) was preceded by an act (digging the hole)).

¹¹³ Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 256.

¹¹⁴ Honoré “Are Omissions Less Culpable?” in Cane and Stapleton (eds.) *Essays for Patrick Atiyah* (1991) at 31.

¹¹⁵ *Ibid* at 48.

¹¹⁶ *Ibid* at 33.

¹¹⁷ [1996] 3 All ER 801.

(d) Economic Arguments

2.72 In *Stovin v Wise*,¹¹⁸ Lord Hoffmann stated that a legal obligation to undertake a rescue could amount to the state appropriating the citizen's resources without compensation. In other areas of tort law, price deterrence has been established as a ground for the imposition of liability on a person who causes loss or damage to others.¹¹⁹ If a person is held liable for the damage and loss that they cause to others, this person will eventually refrain from carrying out the harmful activity.¹²⁰ As Lord Hoffmann pointed out in *Stovin v. Wise*, the efficient allocation of resources usually requires an activity should bear its own costs. He considered that if an activity were able to benefit from being able to impose some of its costs on other people, or 'externalities' as they are economically termed, the market would be distorted because the activity would appear cheaper than it really is. Thus, liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Lord Hoffmann noted that except in special cases (such as marine salvage) the common law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket. It would seem that Lord Hoffmann based his conclusions here on the fact that inaction does not *cause* harm. If this had not been the case then Lord Hoffmann's argument might easily be extended to justify the imposition of the cost of harm on the person whose failure to act had "caused" it.

(e) Altruism

2.73 Another argument involved relates to the principle of altruism. As Weinrib has noted, "the problem of rescue is a central issue in the controversy about the relationship between law and morality".¹²¹ The basic theory of altruism shows that persons are morally bound to assist one another. A Good Samaritan is generally, therefore, said to act out of the kindness in his or her heart. The Commission considers that a positive legal duty to intervene to assist another, therefore, would run counter to this principle, although it accepts that, in some instances the law can impose a duty to behave in an altruistic

¹¹⁸ [1996] 3 All ER 801 at 819.

¹¹⁹ See Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 18- 23.

¹²⁰ See Calabresi "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Yale LJ 499.

¹²¹ Weinrib, The Case for a Duty to Rescue, 90 Yale L.J. 247, 293 (1980).

manner, as when imposing duties on parents and guardians.¹²² As the Kansas Supreme Court stated in *Union Pacific Railway Co. v Cappier*.¹²³

"feelings of kindness and sympathy may move the Good Samaritan to minister to the sick and wounded at the roadside, but the law imposes no such obligation; and suffering humanity has no legal complaint against those who pass by on the other side."

In this respect, the Commission has concluded that while altruism plays an important part in the formation of legal principles, the concept of forced volunteerism appears to be a contradiction in terms.

(f) Causation

2.74 Weinrib notes that an absolutely necessary feature of the law of tort is the causation of harm. He points out that central to our conception of tort law are, firstly, 'the bipolar procedure that links plaintiff and defendant' and, secondly, the 'causation of harm'. He states that the causation of harm requires an act that results in suffering:

"[S]uffering by the plaintiff that is independent of the defendant's doing has no significance for tort law. Accordingly, no liability lies for failure to prevent or alleviate suffering."¹²⁴

2.75 As the Commission noted in the Consultation Paper,¹²⁵ if inaction is incapable of causing harm, then it cannot form the basis for a claim in negligence. If negligence were to concern itself with inaction, this would be akin to creating a conduct offence under negligence, which would go against the basis of negligence, which seeks to redress those situations in which damage has been caused. Kortmann points out the confusion, however, that has arisen between the issue of causation and that of duty on the other hand.¹²⁶ Our very understanding of the term "cause" implies a positive interference rather than a mere inaction. However, instances involving an affirmative duty to act do not appear to present any particular difficulty in our acceptance of the issue that inaction may, in fact, "cause" harm. It is Kortmann's contention, therefore, that inaction is just as likely to give rise to harm as positive action, however, it is only where there is a duty to act that legal liability will arise.

¹²² See the critique of the approach to this issues in the Consultation Paper in Byrne and Binchy, *Annual Review of Irish Law 2007* (Round Hall, 2008), pp.390-1.

¹²³ 72 P. 281 (1903).

¹²⁴ Weinrib *The Idea of Private Law* (Harvard University Press 1995), at 12-14.

¹²⁵ LRC CP 47-2007 at paragraph 2.43.

¹²⁶ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 24-27.

(g) Indeterminate Number of Claims

In *Donoghue v Stevenson*¹²⁷ Lord Atkin pointed out that to create a positive duty to intervene could create a situation in which innumerable claims could arise. He pointed out that the common law had, for this reason, developed rules which limit the range of complainants and their remedies. In addition, the Commission believes that, were moral wrongdoing to be a cause of action, there could well be numerous types of damage which might be difficult or even impossible to quantify. Certainly, what one person considers immoral or wrong, another person might not. In this regard, enforcing moral obligations could lead to much uncertainty in the law. In particular, it has been argued that the recognition of moral obligations as valid legal claims would destabilise written law by replacing it with the varied morals of those sitting on the bench.¹²⁸

(h) Several Tortfeasors / ‘Why Pick on Me?’ Argument

2.76 Lord Hoffmann in *Stovin v Wise* stated that:

“[a] duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than the other?”¹²⁹

2.77 The Commission considers this to be a compelling argument in cases involving nonfeasance or passive inaction. The Commission believes that the argument that each of the spectators is equally to blame where none of them acted is an important one. Furthermore, unlike the situation involving misfeasance, in cases of nonfeasance it will be difficult to identify who exactly is responsible for the harm which has occurred.¹³⁰ As noted in the Consultation Paper,¹³¹ cases of inaction do not afford the opportunity to analyse whose inaction is most responsible for the harm.

2.78 The Commission acknowledges, however, the argument that the difficulties posed by the “Why pick on me?” argument are no less surmountable than those posed by ordinary negligence cases involving many tortfeasors.¹³² In those cases, while the victim has the right to only one recovery, each

¹²⁷ [1932] AC 562.

¹²⁸ *Union Pacific Railway Co. v Cappier* 72 P. 281 at 283. (Kan. 1903).

¹²⁹ [1996] 3 All ER 801.

¹³⁰ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 16-17. Weinrib “The Case for a Duty to Rescue” (1980) 90 Yale LJ 247 at 262.

¹³¹ LRC CP 47-2007 at paragraph 2.45.

¹³² Weinrib “The Case for a Duty to Rescue” (1980) 90 Yale LJ 247 at 262

tortfeasor is liable to the victim and entitled to make a contribution with each of the other tortfeasors.

(3) Conclusions

2.79 The submissions received by the Commission after the publication of the Consultation Paper pointed out that a duty to intervene has never been a characteristic of Irish law and that, in the main, volunteers usually act for altruistic reasons and because they have a moral, rather than legal, duty to intervene. A number of submissions also note that a duty to intervene which may open individuals to civil liability might have the unintended consequence of making them unwilling or afraid to volunteer or to intervene in emergency situations which, the Commission considers, would be inimical to the policy objectives set out in Chapter 1.

2.80 Having considered these submissions and reflected again on the arguments that required consideration on this aspect of the Attorney General's request, the Commission remains of the view that there should be no reform of the law in this area so as to impose a duty on citizens in general, or any particular group of citizens, to intervene for the purposes of assisting an injured person or a person at risk of such injury.

2.81 The Commission also notes that, in addition to the arguments discussed above, it could also be said that the imposition of affirmative duties could lead to indeterminate or large numbers of claims thereby putting a strain on limited budgets, as well as provoking detrimentally defensive approaches. The imposition of a duty to intervene could also have other adverse effects on the provision of beneficial public services which the Commission considers would be in conflict with the policy objectives outlined in Chapter 1.

2.82 *The Commission recommends that there should be no reform of the law to impose a duty on citizens in general, or any particular group of citizens, to intervene for the purpose of assisting an injured person or a person who is at risk of such an injury.*

(4) "Easy rescue"

2.83 The Commission noted in the Consultation Paper that some commentators have taken a modified stance in advocating a so-called "easy rescue," in the sense of an intervention that poses little or no inconvenience to the intervenor, rather than a general positive duty to intervene.¹³³

2.84 The Commission argued that while it may be more reasonable to expect an individual to conduct an easy rescue, the Commission found that

¹³³ LRC CP 47-2007 at paragraphs 2.47-2.50. See also the discussion in Weinrib "The Case for a Duty to Rescue" (1980) 90 Yale LJ 247.

there is no greater legal basis for such an obligation than there is for a full blown duty to rescue. The Commission noted that it was particularly concerned about the uncertainty that the operation of such a duty might entail.¹³⁴

2.85 Weinrib defends a duty of easy rescue, which would require intervention provided that, firstly, the situation involved is an emergency and, secondly, the intervention would involve no risk and little other cost for the one who intervenes.¹³⁵ Other commentators assert that a duty should arise whenever one person is caught in a dangerous situation that another can alleviate at no significant cost to himself or herself. The Commission observes that it has also been argued that there has been a relaxation of the general principle that there is no duty to intervene. In this regard, it has been remarked that in recognising the merit of rescue and the desirability of encouraging it, the courts have increasingly afforded favourable treatment to rescuers in recognising claims for compensation by injured rescuers¹³⁶ and ruling unavailable defences such as voluntary assumption of risk and *novus actus interveniens*.¹³⁷

2.86 The Commission noted in the Consultation Paper that,¹³⁸ while Irish law may not have gone so far in this regard, it certainly seems to be the case that the courts are less likely to consider these defences unless it can be shown that the rescuer acted in some reckless or wanton way.¹³⁹ Furthermore, as outlined already, there are indications that the specific instances where the law imposes a duty to intervene are capable of some expansion. The Commission also notes that the experience of other jurisdictions is that a rescuer will rarely be found liable unless he or she has acted wantonly or recklessly in either assessing the situation or in reacting to the situation.¹⁴⁰

2.87 In arguing for a modified duty to intervene, Weinrib pointed out that the requirements of emergency and absence of prejudice distinguish the duty to carry out an easy rescue from those duties contemplated by the general no-duty to intervene rule. It has been argued that a duty to carry out an easy rescue will not, for instance, unduly inconvenience the bystander. The relative level of

¹³⁴ LRC CP 47-2007 at paragraph 2.50.

¹³⁵ Weinrib "The Case for a Duty to Rescue" (1980) 90 Yale LJ 247.

¹³⁶ *Ibid* at 248.

¹³⁷ *Ibid*.

¹³⁸ LRC CP 47-2007 at paragraph 2.47.

¹³⁹ *Phillips v Durgan* [1991] ILRM 321 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 581-584.

¹⁴⁰ Weinrib "The Case for a Duty to Rescue" (1980) 90 Yale LJ 247 at 248.

ease with which the bystander may intervene may be determined by referring to the nature of the activity undertaken, e.g. a phone call to the emergency services, or the level of skill of the particular bystander, e.g. a trained paramedic may be in a much stronger position to administer CPR than an untrained bystander.

2.88 The Commission notes, however, that a duty to intervene which is qualified by the level of inconvenience that may be encountered by the intervenor is of an uncertain nature. On the one hand, the duty may oblige the bystander to do only that which takes the least effort, as this is likely to cause the least inconvenience. However, such an intervention is unlikely to benefit the injured stranger to any great extent and, therefore, may be pointless. This lack of certainty is exacerbated by the fact that the action necessitated by the duty to intervene would vary from intervenor to intervenor depending on the particular skill set of the person involved. Furthermore, clarification of the circumstances surrounding the situation in which an easy rescue might be undertaken would pose a virtually impossible task. For these reasons and the argument outlined above as to the multitude of persons to whom liability might potentially attach, the Commission recommends that there should be no duty to carry out an “easy rescue.”

2.89 *The Commission recommends that there should not be reform of the law to impose a duty to carry out an “easy rescue.”*

2.90 The Commission notes that this provides an answer to one of the questions posed by the Attorney Generals’ request. The Commission next turns to address the situation where an individual “Good Samaritan” does intervene to help a person in need and causes injury or harm in the process and, likewise, where a person intervenes as a “volunteer” and causes injury to a person in his care or for whom he or she is responsible.

CHAPTER 3 DUTY OF CARE AND STANDARD OF CARE

A Introduction

3.01 In Chapter 1, the Commission considered the wider policy setting and background against which the Attorney General's request was received and noted the importance of promoting active citizenship in Ireland. In Chapter 2, the Commission recommended that there should be no general duty either to intervene as a Good Samaritan or to act as a volunteer.

3.02 In this Chapter, the Commission analyses the extent to which a voluntary intervention, by either a Good Samaritan or volunteer, can be subject to a duty of care under the law of negligence and also examines the standard of care to be applied in that event. In Part B, the Commission sets out the principles of negligence as they apply to Good Samaritans, voluntary rescuers and voluntary service providers. In Part C, the Commission examines the duty and standard of care of Good Samaritans. In Part D, the Commission analyses the duty and standard of care of voluntary rescuers. In Part E, the Commission discusses the duty and standard of care of other volunteers and voluntary service providers. In Part F, the Commission discusses why it considers that the duty and standard of care of Good Samaritans and volunteers should be set out in legislation.

B Law of Negligence

(1) Introduction

3.03 The law of negligence exists to compensate persons who are injured through the act or omission of another. The injured person, or the plaintiff, sues the wrongdoer or defendant for a "failure by the defendant to conform to the required standard of behaviour."¹ Therefore, the tort of negligence is concerned with a failure on the defendant's part to exercise the level of care which the law deems to be due to the plaintiff. The level of care expressed to be required is "reasonable care in the circumstances". Thus, in the wake of leading decisions

¹ McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at paragraph 7.01.

such as *Donoghue v Stevenson*,² a person must take reasonable care to avoid acts or omissions which would be likely to harm any person that they ought reasonably to foresee as being so harmed in the circumstances prevailing. The main problems in this regard include the determination of which circumstances are relevant in a given instance and the evaluation of what is “reasonable”.

3.04 The Commission notes that there are four elements of the tort of negligence, developed.³ These are:

- (1) *Duty of care*: the existence of a legally recognised obligation requiring the careless person to conform to a certain standard of behaviour for the protection of others against unreasonable risks.⁴
- (2) A failure to conform to or a breach of the required *standard of care*.
- (3) *Actual loss or damage* to recognised interests of the reasonably foreseeable person affected by the failure to conform to the standard
- (4) A sufficiently close *causal connection* between the conduct and resulting injury to the plaintiff.

3.05 The Commission notes that several elements of the tort of negligence will often be discussed together without any attempt to analyse them separately. The Commission proposes, however, to discuss each of these elements separately so as to set out the principal issues involved in an analysis of whether the Good Samaritan or volunteer comes under a duty to act with reasonable care.

(2) Duty of Care

3.06 It was noted in the English case *Le Lievre v Gould*⁵ that a person “is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them”. And so, the question arises as to what is meant by “duty”. McMahon and Binchy point out that the duty concept is “a control device

² [1932] AC 562, the decision of the UK House of Lords in which, as discussed in Chapter 2, the tort of negligence was developed by reference to the parable of the Good Samaritan.

³ McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at paragraph 7.01.

⁴ *Ibid.*

⁵ [1893] 1 QB 491 at 497 (CA), quoted with approval by Fitzgibbon LJ in *Petrie v Owners of SS “Rostrevor”* [1898] 2 IR 556 at 575 (CA).

whereby the courts may, as a matter of law, limit the range of liability within what they consider to be reasonable bounds”.⁶ In other words, an individual will only be liable for harm done to another where he or she owes a duty to that other. The Commission notes that discussion of the duty of care concept has focused mainly on how it relates to the range of persons to whom the defendant may be obligated.⁷ The Commission observes, however, that courts will also take into account the type of damage or injury when determining whether a duty of care is owed.⁸ For instance, it is more likely that a court will find a duty to exist in circumstances where the damage is physical rather than where it may be classified as “pure economic loss” or “nervous shock.”

3.07 In *Glencar Exploration plc. v Mayo County Council*,⁹ the Supreme Court stated that in order to establish a duty of care it must be shown that:

- there is *proximity* between the alleged duty holder and the injured person;
- the injury or damage caused was *reasonably foreseeable* by the alleged duty holder;
- it is *just and reasonable* to impose a duty of care.

3.08 Regarding “proximity”, McMahon and Binchy suggest that it is perhaps synonymous with “neighbourhood”, which implies a closeness between the parties that is not confined to considerations of space and time.¹⁰

3.09 The next step in establishing whether a duty exists necessitates an examination of whether it was reasonably foreseeable that the intervention would injure the stranger.¹¹ The use of the reasonable person indicates that the analysis should be objective rather than subjective. In other words, it should be based on the standards of the community and not the individual perspective of the defendant. In this regard, the analysis seeks to calibrate the knowledge possessed by the defendant against the knowledge possessed by the reasonable person in similar circumstances. Thus, the court will look to the

⁶ McMahon and Binchy, *Law of Torts* 3rd ed (Butterworths, 2000), at 115.

⁷ As in *Donoghue v Stevenson* [1932] AC 562.

⁸ In other words whether a claim is for personal injury, physical damage to property, pure economic loss or nervous shock.

⁹ [2002] 1 IR 84. See also *Fletcher v Commission for Public Works* [2003] 1 IR 465.

¹⁰ McMahon and Binchy *Law of Torts* (3rd ed. Butterworths 2000) at 119.

¹¹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388 (UK House of Lords).

knowledge that would be expected of a reasonable person in similar circumstances to the particular case at hand.¹²

3.10 The final step requires an investigation as to whether it would be “just and reasonable” to impose a duty of care. This third element is also sometimes referred to as the policy factor. Prior to *Glencar Exploration plc v Mayo County Council*,¹³ a two-stage test that accorded a lesser weight to public policy concerns had been used.¹⁴ In the *Glencar* decision, the Supreme Court restated the principles of the duty of care in negligence.¹⁵ Delivering one of the judgments in the Supreme Court, Keane C.J. considered it desirable to add a third requirement, the ‘just and reasonable’ test, favoured by the UK House of Lords in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*¹⁶ and later decisions of the House of Lords.¹⁷ Therefore, added weight is now given to the evaluation of whether it is just and reasonable to impose a duty of care in the circumstances.

3.11 Specifically, the just and reasonable test looks at broad considerations of social policy in deciding whether a duty of care is owed. There must be no issues of public policy which could negative, limit or reduce the scope of the duty of care, the class of persons to whom it is owed or the amount of damages that are recoverable. In this regard, McMahon and Binchy note that the court may decide that it is not in society’s best interests that a defendant, and others similarly acting, should compensate persons injured by the particular conduct as this might deter other persons from engaging in that

¹² The Commission points out that a greater knowledge may be expected of a person who is particularly skilled in the area of rescue, such as a voluntary rescuer or medically qualified person where an intervention of rescue is concerned.

¹³ [2002] 1 IR 84. See also *Fletcher v Commission for Public Works* [2003] 1 IR 465.

¹⁴ In the UK House of Lords decision *Anns v Merton London Borough Council* [1978] AC 728, Lord Wilberforce stated that once a duty of care had been found: “it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of, the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.” This was endorsed in Ireland by the Supreme Court in *Ward v McMaster* [1988] IR 337.

¹⁵ For a detailed analysis see Byrne and Binchy, *Annual Review of Irish Law 2001* (Thomson Round Hall 2002).

¹⁶ [1985] AC 210.

¹⁷ This test had also been preferred by Costello J. in his High Court decision in *Ward v McMaster* [1988] IR 337.

conduct in the future.¹⁸ In this way, the courts, in the majority of cases, set out the scope of the duty of care so as to accomplish various social goals. Given the policy considerations regarding Good Samaritans and volunteers, as outlined in Chapter 1, this evaluation is particularly important in the context of this Report.

(3) Standard of Care

3.12 Once a duty has been established the focus of the analysis moves to the standard of care issue. In this regard, McMahon and Binchy note that the courts tend to ask whether the defendant acted as “the reasonable person” would have done. This is an objective test. In *Kirby v Burke*, in which the general concept of a duty of care in negligence was first established in Irish law, Gavan Duffy J. stated:

“the foundation of liability at common law for tort is blameworthiness as determined by the existing average standards of the community; a man fails at his peril to conform to these standards. Therefore, while loss from accident generally lies where it falls, a defendant cannot plead accident if, treated as a man of ordinary intelligence and foresight, he ought to have foreseen the danger which caused injury to his plaintiff.”¹⁹

3.13 The defendant must, therefore, exercise such care as would be exercised by the reasonable person in similar circumstances. Seavey points out that regard must be had, however, to the characteristics of the group to which the defendant belongs,²⁰ including physical and mental characteristics, moral qualities and skill. This introduces a subjective element into the test to assess the appropriate standard of care. Thus, the standard of care to apply will vary depending on the level of skill of and knowledge possessed by the actor.

3.14 McMahon and Binchy have set out the factors to which the courts have regard in assessing the standard of care required:²¹

The *probability of an accident* caused by the defendant’s conduct: this is closely related to the issue of foreseeability. The greater the likelihood of harm to the plaintiff, the more probable it is that

¹⁸ McMahon and Binchy *Law of Torts* (3rd ed. Butterworths 2000) at 116-117

¹⁹ [1944] IR 207.

²⁰ Seavey “Negligence – Subjective or Objective?” (1927-1928) 41 Harv L Rev 1 cited in McMahon and Binchy *Irish Law of Torts* 3rd ed (Butterworths 2000) at 149.

²¹ McMahon and Binchy *Law of Torts* (3rd ed. Butterworths 2000) at 154-167 (footnotes omitted).

the court will consider it unreasonable for the defendant to engage in the conduct in question or to fail to take steps to avoid the threatened injury.

The *gravity of the threatened injury*: where the potential injury is great, the creation of even a slight risk may constitute negligence.

The *cost of eliminating the risk*: this concept is more suited to those carrying on activities in an organisational setting in that it refers to the cost of implementing safeguards around an activity.

The *social utility of the defendant's conduct*: where the defendant's conduct has a high social utility it will be regarded with more indulgence than where it has none.

3.15 McMahon and Binchy point out that "itemising these factors can give no indication of their weight in any particular case: determining this question involves a complex value-judgment, rather than merely some mathematical process."²²

3.16 In applying these principles to the type of scenario contemplated, the Commission understands that the common law standard of care to be expected of persons who intervene to assist someone in danger will vary according to their level of experience and the particular circumstances of the case. For instance, in the case of a doctor, the court would consider how a reasonable doctor with the same qualifications and background would have acted in a similar situation, for example, without equipment and hospital facilities. These circumstances must be taken into account as even where an individual has medical qualifications, it would not be fair to hold him or her to the same standard of care as would be expected in a hospital or practice setting when he or she just happens upon an accident. Therefore, in determining whether the rescuer has met the standard of care, the courts must consider what is reasonable in the circumstances prevailing.²³

(4) Definitions

(a) Good Samaritans

3.17 In the Consultation Paper, the Commission concluded that a "Good Samaritan" refers to:

²² McMahon and Binchy *Law of Torts* (3rd ed. Butterworths 2000) at 112.

²³ Eburn *Emergency Law* 2nd ed. (Sydney: Federation Press, 2005), pp.45-48, notes that courts acknowledge that the rescuer may be acting in situations outside their experience.

“Any person who intervenes voluntarily (without legal obligation or expectation of reward), to assist a person (using any reasonable means), who he or she reasonably believes (based on reasonable, objective criteria), to be ill, injured or at risk of illness, injury or death (where illness includes unconsciousness).”²⁴

3.18 The Commission noted that the Good Samaritan might be an unskilled passerby, an off-duty voluntary service provider or an off-duty professional. These distinctions may be relevant to identifying the appropriate standard of care. The traditional scenario is that he or she happens upon an accident or emergency unexpectedly, when he or she is unprepared to deal with it. An example of a situation involving a Good Samaritan would be where an individual, who, for example, is out for a stroll, comes across a stranger who has collapsed in the street, been involved in a car accident or got into difficulty in the water. In these scenarios the stranger has no means of helping himself or herself and so requires outside intervention to abate the risk that he or she faces. The individual out for a stroll happens upon the scene unexpectedly and is presented with the choice of intervening, with minimal resources to hand, to assist – thereby becoming a Good Samaritan - or walking on.

(b) Voluntary Rescuers

3.19 As discussed in the Consultation Paper, a “voluntary rescuer” can be said to be any person who is a member of a voluntary rescue organisation, providing a structured response, who is trained and equipped to deal with situations of accident and emergency and has some level of expectation that an accident or emergency will arise.²⁵ A voluntary rescuer may be any person who has received the requisite amount of training, whether he or she is a layperson or an off-duty professional. The voluntary rescuer spends time training and attaining a certain level of skill and expertise in certain rescue techniques and practices. Furthermore, voluntary rescuers often work in defined areas of coverage and take responsibility for responding to any accident or emergency that occurs in that area. Therefore, it could be said that the voluntary rescuer holds himself or herself out, more so than a Good Samaritan, as willing and able to intervene in the event of a crisis.²⁶

3.20 Examples of voluntary rescuers are given by the Pre-Hospital Emergency Care Council (PHECC), the State body with responsibility for

²⁴ LRC CP 47-2007 at paragraph 3.02.

²⁵ LRC CP 47-2007 at paragraph 3.57.

²⁶ See *Barnett v Chelsea and Kensington Management Committee* [1969] 1 QB 428.

standards in pre-hospital emergency medical services.²⁷ These include the Civil Defence, the Irish Coast Guard, the Irish Heart Foundation, Irish Mountain Rescue, Irish Red Cross, Irish Society for Immediate Care, Order of Malta Ambulance Corps and St. John's Ambulance Brigade.

(c) Voluntary Service Providers

3.21 In the Consultation Paper, the Commission concluded that the term “voluntary service provider” referred to those members of the Voluntary and Community sector that provide services, of their own free will and without payment, for the benefit of society.²⁸ The Commission observed that a voluntary service provider is just as likely to be an individual as an organisation. Where the voluntary service provider is an individual, a distinction can be drawn between those individuals defined as “informal volunteers”, who work independently, and those defined as “formal volunteers”, who work with an organisation.

3.22 The voluntary service provider may be involved in a very wide range of services and activities, particularly involving the provision of not-for-profit social services and social inclusion activities. The range of services provided by the voluntary service provider, therefore, may be much broader than that of the Good Samaritan or voluntary rescuer. Furthermore, the activities will not necessarily be of an inherently dangerous nature. Finally, the Commission noted that the voluntary service provider, unlike the Good Samaritan or the voluntary rescuer, may be responsible for creating the risk that has led to the individual's predicament.

C Duty and Standard of Care of Good Samaritans

(1) Duty of Care

3.23 In the Consultation Paper, following a detailed analysis of the principles of negligence, the Commission concluded that Good Samaritans may come under a duty to act with reasonable care.²⁹ The Commission considers broadly that liability for harm to another may be recognised when, having no prior duty to do so, the Good Samaritan takes charge of another who is helpless. The Good Samaritan in such a situation will be subject to liability for injury to that other where the Good Samaritan fails to exercise reasonable care in securing his or her safety or discontinues providing aid or protection and

²⁷ See www.phecc.ie

²⁸ LRC CP 47-2007 at paragraph 3.99.

²⁹ LRC CP 47-2007 at paragraphs 3.02 – 3.56.

leaves the victim in a worse position. In the Canadian case *Horsley v MacLaren*,³⁰ Schroeder JA stated:

“[E]ven if a person embarks upon a rescue and does not carry it through, he is not under any liability to the person to whose aid he had come so long as discontinuance of his efforts did not leave the other in a worse condition than when he took charge.”

3.24 The Commission notes that, particularly in the case of rescue situations entailing physical intervention, it is highly likely that the relationship between the Good Samaritan and the stranger will be recognised as one of sufficient proximity so as to give rise to a duty of care. In many cases, it may be held that a Good Samaritan had voluntarily assumed responsibility by intervening in the situation.³¹ In the UK case *Hedley, Byrne & Co Ltd v Heller & Partners Ltd*,³² it was held that liability can exist where one party relies on another’s special skill and trusts him to exercise due care and that other knows or ought to have known that the party was so relying on the special skill. As Lord Morris in the House of Lords stated:

“if someone possessed of a special skill *undertakes*... to apply that skill for the assistance of another person who *relies* upon that skill, a duty of care will arise.”³³

3.25 Thus, where a Good Samaritan voluntarily intervenes in favour of a stranger, provided the stranger relies on this voluntary intervention, and the Good Samaritan knows that the stranger is so relying on his or her intervention, a duty of care may arise. The case may be even stronger in situations where the Good Samaritan advertises that he or she is especially skilled in an area relevant to the rescue intervention, for example, if he or she were to state “trust me, I’m a doctor.” Such an announcement might induce in the imperilled person a confidence in the Good Samaritan’s skills such that he or she would be more inclined to rely on the Good Samaritan’s intervention.

3.26 The voluntary intervention or undertaking may be an express promise or one implied from the actions of the Good Samaritan. Regardless of whether it is express or implied, the Commission considers that a promise to rescue is, in effect, a promise to endeavour to rescue and not one to achieve a successful

³⁰ [1972] SCR 441.

³¹ See Kortmann, *Altruism in Private Law* (Oxford University Press 2005) at 58-68.

³² [1964] AC 465, cited with approval by the High Court in *Securities Trust Ltd. v Hugh Moore & Alexander Ltd.* [1964] IR 417.

³³ [1964] AC 465 at 502-503.

outcome upon intervention.³⁴ Given that the nature and content of a promise to endeavour is less specific than that of a promise to achieve a particular result, it lends itself less to being interpreted as an enforceable obligation. It is also important to point out that generally the law will refrain from enforcing a simple promise or statement of intention, unless made in contractual relations or unless it can be shown that there was reasonable reliance of which the voluntary service provider was aware.

3.27 There are a number of actions which a Good Samaritan could potentially undertake to assist a stranger. Situations may range from those in which the Good Samaritan alerts the stranger himself or herself to an imminent risk or alerts the emergency services to the situation involving the stranger to those involving a more direct and physical act of intervention, for example, in the provision of first aid assistance.³⁵ The more invasive or direct the intervention, the more likely it is that a duty of care will arise. Given the risk of injury to the stranger, foreseeability of harm is more readily established in such situations.

3.28 Looking at the issue of reliance, the Commission points out that a Good Samaritan, by his or her voluntary intervention, may cause the stranger to rely on him or her, which in turn will give rise to a relationship of proximity. The Commission considers that the term “reliance” implies that the stranger, in whose affairs the Good Samaritan has intervened, had the opportunity to choose between the course of conduct advised by the Good Samaritan and alternative courses. In a rescue this scenario will not always be the case. Where the stranger does have a choice, the Commission considers that reliance may mean that the stranger has changed his or her position on faith of the intervention by the Good Samaritan.

3.29 For the issue of reliance to have any legal implications, the Commission notes that the Good Samaritan must also be aware that the stranger is relying on his or her intervention. Such reliance must be objectively reasonable taking into account the circumstances of the rescue, including the availability of alternative courses of action, as well as other relevant factors such as the identity of the Good Samaritan. The Commission accepts that the law is reluctant to recognise non-detrimental reliance as a ground for holding the Good Samaritan liable for his or her intervention as such reliance implies that the stranger has not succumbed to actual injury or damage because of the reliance itself. In other words, this means that the stranger will be no worse off having changed his position on faith of the Good Samaritan’s intervention. However, the Commission observes that it is uncertain whether a Good

³⁴ LRC CP 47-2007 at paragraphs 3.10-3.12.

³⁵ LRC CP 47-2007 at paragraph 3.14.

Samaritan could be held liable for speeding up the arrival of the inevitable consequence, i.e. illness, injury or death, of a perilous situation. Detrimental reliance, on the other hand, suggests that the stranger has changed his or her position for the worse based on the intervention of the Good Samaritan. This is more likely to give rise to a duty of care, as the Good Samaritan's intervention has caused the stranger to be in a position of greater risk or to sacrifice a potentially more successful alternative option.

3.30 Thus, the Commission notes that where the voluntary intervention is constituted by a promise to the stranger, the element of reliance, if it exists, will be readily discernible. Where the voluntary intervention is a voluntary act, however, the issue of whether the element of reliance is present may depend on the nature of the act involved i.e. whether the Good Samaritan becomes directly involved or merely alerts a third party to the stranger's predicament. As already noted, it is more likely that the stranger will rely on the Good Samaritan where the Good Samaritan's involvement is direct and physical rather than where it is indirect, for example, when the Good Samaritan alerts a third party. It is in the former situation, then, that the conditions are more amenable to giving rise to a relationship of proximity.

3.31 The Commission acknowledges that the stranger will not always be in a position to decide whether or not to rely on the Good Samaritan's intervention, either because no alternative exists or because the stranger is incapable of making a choice, for instance, where he or she is unconscious. Such rescue situations may be more accurately described as relationships of control and dependence.³⁶ Kortmann points out that the law may be reluctant to recognise such relationships as giving rise to a duty of care but the Commission considers that there is nonetheless a possibility.³⁷

3.32 The Commission notes that control may relate to the respective powers of the parties involved, with the Good Samaritan obviously occupying the stronger position by being capable of taking control of the situation. Control might also suggest that the Good Samaritan intentionally takes charge of the situation, by express statement of intention or by implication of his or her conduct. Under this interpretation, there are a number of ways by which the Good Samaritan might take control such as alerting the stranger to the risk, alerting the emergency services to the risk or, at the higher end of the scale, taking complete control of the situation. This might occur where the Good Samaritan possesses special skills in relation to the situation. It is important to note that an assumption of control, in this sense, might lead to the exclusion of other possible sources of assistance. Where this condition prevails and where

³⁶ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 64.

³⁷ *Ibid.*

it is coupled with the dependence of the stranger, the Commission considers that a relationship of proximity sufficient to give rise to a duty of care could certainly be established - provided the other duty of care requirements were also established.

3.33 The Commission notes that, in many cases, the stranger may have no choice but to succumb to the will of the Good Samaritan either because there are no alternatives or, indeed, no real alternatives to the Good Samaritan's intervention, particularly in the case of imminent injury or death. As the Commission has already pointed out, there may also be situations in which the stranger is incapable of choosing. In such situations, it may be asserted that the Good Samaritan acts on behalf of the stranger when he or she assumes control. The Good Samaritan must, therefore, be aware that his or her decisions and actions may have a direct impact on the well-being and life of the stranger and that he or she may easily aggravate any existing condition or, indeed, create a new risk of harm. Bearing this in mind, the Commission considers that such a voluntary intervention may signify that the Good Samaritan appreciates the gravity of the situation, for which he or she accepts to take responsibility.

3.34 The next step is a determination of whether injury was a reasonably foreseeable result of the intervention. Where it can be shown that the Good Samaritan knew or ought to have known that his or her intervention would injure the stranger, it might be asserted that the Good Samaritan ought to have modified his or her conduct. The Commission notes that foreseeability may also depend on the circumstances of the case. For instance, where the stranger is in a particularly dangerous situation, it is clear that the risk of injury will be greater and, therefore, more foreseeable.³⁸

3.35 The extent to which the Good Samaritan is aware of what has given rise to the stranger's predicament will be an important consideration in the analysis of foreseeability. The type of intervention undertaken by the Good Samaritan will also be relevant. Injury may be more likely where the Good Samaritan undertakes an invasive intervention such as medical intervention, than a non-invasive intervention such as one which entails contacting the emergency services. Furthermore, it is important to consider the type and level of skill that might be attributed to the Good Samaritan. For instance, if a Good Samaritan undertakes an intervention for which he or she does not have the requisite level of skill the likelihood and, therefore, the foreseeability of further injury occurring is greater.

³⁸ The Commission notes that some damage may be actionable even where it is not readily foreseeable, as with the operation of the Egg-Shell Skull Rule. See *Burke v John Paul & Co Ltd* [1967] IR 227.

3.36 It must also be borne in mind that there may be situations in which injury is an inevitable consequence. The Commission notes that it is uncertain whether a Good Samaritan would be held liable for an injury that he or she foresaw where that injury was either necessary to or unavoidable in the overall rescue operation. In addition, the Commission notes that, further to the issue of proximity, the Good Samaritan may be in a better position to anticipate injury where the reliance is of a detrimental, as opposed to a non-detrimental, nature. The Commission accepts, however, that this argument is quite theoretical in nature and would be unlikely to apply to the actual Good Samaritan situation.

3.37 Having considered the extent to which these circumstances coincide, it may of course be the case that a duty of care cannot be imposed on the basis that it would not be “just and reasonable” to do. On the one hand, the Good Samaritan is said to be a person who is performing activities for the benefit of society and, therefore, should be encouraged. To impose liability on a Good Samaritan might have the effect of deterring Good Samaritans from intervening in future cases. A finding for the stranger would create a precedent for claims against Good Samaritans, a class of person that, typically, does not have the benefit of the protections such as advice, training and insurance policies, available to those involved in organisations. On the other hand, the law should not unduly prejudice the stranger who, by virtue of the predicament in which he or she found himself or herself, may be particularly vulnerable. Furthermore, it is asserted that a finding of liability may dissuade individuals, such as those who would otherwise be willing to intervene in a rescue situation, from undertaking dangerous activities. This would, thereby, create an environment in which imperilled individuals would have no choice but to fend for themselves. The Commission considers that each of these arguments merits attention.

3.38 On the basis of the foregoing analysis, the Commission concludes that there is nothing to prevent a Good Samaritan from being subject to a duty of care. In this regard, it has been shown that the general principles of negligence actually point towards the imposition of a duty of care in certain circumstances, in particular where the Good Samaritan is a person with a clear degree of medical skill. Of course, in reality the Commission accepts that the likelihood of such liability being imposed is remote, given that a Good Samaritan is often actually engaged in saving life, and that the social utility of the intervention will militate against liability because it would not be “just and reasonable” to do so.

(2) *Standard of Care*

3.39 The Commission therefore turns to consider the standard of care to be applied to a Good Samaritan, where it has been found that he or she owes the stranger a duty of care. The Commission notes that the standard of care will vary with the individual Good Samaritan, depending on the Good Samaritan’s

level or lack of skill. In analysing the standard of care, the courts will look firstly at the probability of harm and the gravity of the threatened injury. The Commission considers these to be difficult concepts to apply to the scenario involving the Good Samaritan. The Good Samaritan will normally intervene in a situation where the independent risk of harm occurring exists, even if this is, in reality, unusual.

3.40 The Commission considers that where the Good Samaritan undertakes a direct and physical intervention, the probability of harm occurring is clearly higher. So too is the risk of serious injury. On the other hand, where a higher level of skill is possessed by the Good Samaritan, it might be expected that he or she will be better able to assess the situation and decide on the most appropriate response. The Commission emphasises, however, that irrespective of skill the Good Samaritan will not always be privy to the circumstances which have given rise to the stranger's predicament or the nature and extent of the stranger's injury. It might not, therefore, be fair to hold the Good Samaritan liable for doing something which he or she might not have done had he or she been fully aware of the circumstances. Furthermore, in assessing the gravity of the threatened injury, the court will need to balance the risk posed by the Good Samaritan's intervention (more likely, as already noted, to result in a life saved through CPR or AEDs) against the risk posed by the independently created emergency situation (more likely to result in death without an intervention).

3.41 An examination of the cost of eliminating the risk does not fit very well in the Good Samaritan analysis given the spontaneous and one-off nature of such an intervention. The Commission considers that a Good Samaritan will rarely, if ever, be in a position to implement risk management measures in advance of an intervention. However, the Good Samaritan may be expected to consider the various interventions that are open to him or her upon coming across the stranger's predicament and to choose the option which is least risk-associated. The Commission notes that the Road Safety Authority's *Rules of the Road*³⁹ advise persons to refrain from rendering physical assistance where it is safer to alert the emergency services. However, this analysis could be problematic where direct, physical intervention is urgently required. The Commission notes that it is important to recall the other side of the cost argument which relates to the potential cost to society should Good Samaritans be deterred from intervening in emergency situations.

3.42 The most important concept in the analysis of the standard of care to be applied to the Good Samaritan is the social utility of his or her conduct in intervening to assist a stranger in need. In the context of social utility, the Commission notes that saving a life may justify taking risks which would not be

³⁹ Available at www.rsa.ie

permissible in the case of ordinary commercial enterprise. This is particularly relevant when one considers, as already noted, that the Good Samaritan's intervention in many cases may mean the difference between life and death. Furthermore, the Commission points to the enormous social benefit in encouraging those with specialist life-saving skills to intervene.

3.43 Based on this analysis, the Commission considers that numerous standards may be set for the Good Samaritan, based on the level of knowledge and skill of the particular individual, at the risk of not paying adequate regard to the social utility of the Good Samaritan's intervention. In the Commission's view, the key is to apply a standard that will appreciate the various skills that may be possessed by Good Samaritans while also acknowledging the social utility of the Good Samaritan's intervention. The Commission returns to the precise scope of this standard of care in Chapter 4.

D Voluntary Rescuers

(1) Duty of Care

3.44 Voluntary rescuers and their organisations play a lead role in terms of major emergency management.⁴⁰ In particular, voluntary rescuers support the work of statutory bodies, both by complementing existing services and by providing additional services. The Commission underlines the importance of considering this role and the extent to which it benefits society when making any recommendations.

3.45 Applying the general principles of negligence, the Commission notes that there is little to preclude voluntary rescuers from coming under a duty of care. First, similar to the Good Samaritan, a relationship of *proximity* is likely to be established once the voluntary rescuer intervenes. As with the Good Samaritan, the voluntary rescuer may make an undertaking upon which the recipient of the service may rely. The voluntary rescuer's undertaking, or intervention, may take the form of a promise or a voluntary act. For example, a promise to intervene may arise where the voluntary rescuer, like the Good Samaritan, agrees to respond to the predicament of a particular individual.⁴¹

3.46 A voluntary act of the voluntary rescuer may be an act in favour of the individual in need or, indeed, any act done on behalf of the voluntary

⁴⁰ *Report of the Inter-Agency Review Working Group on Major Emergency Management* (supported by the Department of Environment, Heritage and Local Government Review Project Team 12 September 2006).

⁴¹ In the English case *Kent v Griffiths* [2000] 2 All ER 474, a statutory ambulance service provider was held to owe a duty of care, once it agreed to respond to an emergency.

organisation. Like the Good Samaritan, the voluntary rescuer may intervene indirectly in the rescue by alerting the individual to a danger or advising him or her on how to remove themselves from the danger. Alternatively, the voluntary rescuer may become directly involved by physically intervening. The Commission also appreciates that there may be incidents to which the voluntary rescuer is unable to provide an adequate response. In such cases the voluntary rescuer may request outside assistance, for instance, from the emergency services or colleagues from the organisation who have different skills. The voluntary rescuer, however, may be expected to secure the scene temporarily or to assist the individual until the emergency services etc arrive. Again, the more invasive the intervention undertaken by the voluntary rescuer, the greater is the potential risk of injury.

3.47 Reasonable reliance may also be an element of the scenario involving the voluntary rescuer.⁴² In this regard the individual in need may change his or her position relying on the voluntary rescuer's intervention. In fact, the individual may be more likely to rely on the expertise of a voluntary rescuer than on that of an average Good Samaritan. While the Commission recalls that what might be considered objectively reasonable in a rescue situation may be a far cry from what is ordinarily termed objectively reasonable, it notes that reliance on the intervention of a skilled voluntary rescuer could rarely be considered unreasonable. As already noted, the voluntary rescuer commits a certain amount of time to attaining a particular level of skill and thus indicates that he or she is willing and able to respond to an accident or emergency should it arise.⁴³ The Commission appreciates, however, that voluntary rescuers neither have, nor hold themselves out as having, unlimited skills and, thus, only a certain level of reliance may be considered reasonable.

3.48 Once again, the more physical or invasive the action of the voluntary rescuer, the more likely it is that the individual will rely directly on him or her. Where a voluntary rescuer decides to give advice to the individual, the Commission believes that it is more likely that the individual will rely to some extent on his or her own counsel. Where the voluntary rescuer calls for outside assistance, it is likely that the individual will transfer his or her reliance from the voluntary rescuer to whoever takes over the rescue.

3.49 Furthermore, the individual may find that he or she has no choice but to rely on the voluntary rescuer's intervention. This may be the case in

⁴² *Hedley, Byrne & Co Ltd. v Heller & Partners Ltd.* [1964] AC 465 cited with approval by the High Court in *Securities Trust Ltd. v Hugh Moore & Alexander Ltd.* [1964] IR 417.

⁴³ See *Barnett v Chelsea & Kensington Management Committee* [1969] 1 QB 428 cited in McMahon and Binchy *Law of Torts* (3rd ed Butterworths 2000) at 62.

scenarios where there is a lack of comparable alternatives or the individual is, for some reason, incapable of choosing. Certainly, by virtue of his or her skill and the reputation of his or her organisation, the voluntary rescuer may be in a stronger position to assert control over a rescue situation than any other potential intervener who might qualify as a Good Samaritan. In many cases, the voluntary rescue organisation will have strategically placed itself at high risk locations, thereby representing that it is willing to intervene in any rescue situations which might arise in that particular location. Moreover, as voluntary rescue organisations often supplement the services of statutory bodies it may, in fact, be the only or most skilled rescue option available.

3.50 It should also be remembered that the individual may be in a particularly precarious situation, be ill, injured or unconscious. In such circumstances, he or she may be incapable of choosing between the voluntary rescuer's intervention and any alternatives. As a result, it might be more accurate to describe the individual as being in a state of "dependence" rather than "reliance". In tandem with this, it should also be noted that the voluntary rescuer's particular expertise means that he or she is exceptionally well-placed to assert control over the rescue situation. In this regard, the voluntary rescuer may either assert total control over the operation, conducting the rescue from start to finish, or, where responsibility for completing the rescue rests with an outside party, partial control to the extent that the voluntary rescuer temporarily secures the scene or abates the risk. Given the likelihood that power will be distributed in such a way, the Commission believes that the relationship arising in situations involving the voluntary rescuer is more likely to be one of dependence and control than reliance and undertaking.

3.51 Regarding the issue of foreseeability, the Commission considers that, as the voluntary rescuer's intervention is likely to be direct and physical, injury to the individual may be a foreseeable risk in most cases. However, given the training and experience of the voluntary rescuer, the Commission observes that a greater level of knowledge and skill might be expected of the voluntary rescuer. In particular, it may be noted that the ability of the voluntary rescuer to assess the situation and to tailor his or her conduct appropriately is more significant than in the case of the Good Samaritan. Thus, the reasonable voluntary rescuer may be in a better position to foresee the potential risks inherent in a situation or, indeed, in the particular intervention proposed. Furthermore, it may be expected that the expertise of the voluntary rescuer will encompass an ability to determine and employ the appropriate precautions to avoid such risks. As a result, it may be asserted that where a voluntary rescuer intervenes there is less chance that the situation will be inadvertently exacerbated or that any existing injury will be aggravated.

3.52 Foreseeability, the Commission notes, may also depend on the type of intervention undertaken and the level of skill possessed by the defendant with

regard to that type of intervention. The Commission appreciates that although a voluntary rescuer may be trained to undertake a variety of interventions, some interventions may go beyond his or her skill. Where the voluntary rescuer undertakes to do something for which he or she is not adequately qualified, it might be asserted that he or she should foresee that there is a greater chance of harm. However, like the Good Samaritan, the Commission accepts that there are particular situations where the voluntary rescuer may feel that he or she has no choice but to intervene, particularly where there is a threat to life.

3.53 The Commission notes that similar inferences, regarding foreseeability, may be made on the basis of the relationship arising in the situation involving the voluntary rescuer as were made on the basis of the relationship arising in the situation involving the Good Samaritan. Where the relationship is one of undertaking and reliance, for instance, harm may be a more foreseeable consequence where the reliance is detrimental. Where the relationship is one of control and dependence, on the other hand, a greater risk may exist that the situation or any existing injuries will be aggravated. Thus, in such circumstances, harm may be a more foreseeable result.

3.54 The Commission considers that it is only at the “just and reasonable” stage of the analysis that the question arises as to whether a duty of care *should* be imposed on the voluntary rescuer. Policy factors that could be taken into account include the fact that voluntary rescuers and their organisations undertake a multitude of activities for the benefit of society. In this regard, it should be noted that voluntary rescuers not only complement and supplement the services provided by statutory bodies they also undertake the hugely important task of saving lives. Furthermore, by providing a presence to guard against accidents and emergencies, voluntary rescuers and their organisations make possible the holding of large-scale events such as concerts and festivals, which are themselves for the benefit of society. In a more general, but no less significant, way voluntary rescue organisations benefit society by providing a forum for members of the public to interact and to develop skills. Given the various ways in which voluntary rescuers and their organisations benefit society, therefore, the Commission considers that the only just and reasonable conclusion to draw, in many situations, would be that a duty of care *should not* be imposed.

3.55 The Commission is also concerned that the imposition of a duty of care on voluntary rescuers may have a particularly harmful effect on their activities. A rescue, by definition, involves some element of danger and, therefore, a risk of liability. The voluntary rescuer who intervenes on a regular basis may, as a result, be more exposed to this risk of liability than the Good Samaritan who intervenes on a one-off basis. The imposition of a duty of care on the voluntary rescuer may, therefore, deter individuals from becoming involved in the activities of voluntary rescue organisations. Furthermore, the

Commission observes that a finding of liability may also create a precedent for future claims against voluntary rescuers who, by virtue of their activities, would be relatively easy targets. Although members of voluntary rescue organisations may have a number of protections available to them in the form of insurance cover, training and vicarious liability, the cost of litigation and loaded insurance premiums may place an inordinate financial burden on their organisations. This burden may prove to be of critical proportions for those organisations which depend, for their survival, on charitable donations. The potentially devastating effects that this would entail for voluntary rescues might include forcing the voluntary rescue organisation to reduce the number of members it engages or level of activities it undertakes or, at worst, withdraw completely from the field.

3.56 The Commission notes that while the activities of voluntary rescuers should be encouraged there is also the argument that because the service provided is rescue leniency in respect of the duty of care may not be appropriate. The Commission points out that, if this is the case, voluntary rescuers and their organisations will most likely be covered by insurance, which as already noted has become more readily available for voluntary bodies in Ireland in recent years.⁴⁴ Therefore, the Commission appreciates that, while there are very persuasive policy considerations against imposing a duty of care on voluntary rescuers, such persons do advertise their willingness and ability to assist in emergency situations. Thus, it may be argued that the voluntary rescuer, to some extent, assumes responsibility for rescuing and, therefore, assumes a duty of care.

(2) Standard of Care

3.57 As the Commission pointed out in the Consultation Paper,⁴⁵ there is some uncertainty regarding the standard of care to be applied to the voluntary rescuer. One argument is that the standard should be set according to the individual's status as a voluntary rescuer. This, however, does not recognise the particular skills of certain volunteers, such as those who may be professional rescuers or medical professionals. The standard could instead be set according to the particular voluntary rescuer's level of knowledge or skill. As pointed out in the case of the Good Samaritan, this may result in the creation of many different standards of care. Bearing in mind the level of training that the voluntary rescuer has undertaken, however, the Commission notes that a higher standard of care might be expected of the voluntary rescuer than the average Good Samaritan. Thus, the appropriate standard might relate to the standard applicable to the reasonable rescuer in the circumstances, taking into account the general and approved practice of the particular voluntary group.

⁴⁴ See paragraphs 1.10 and 1.29, above.

⁴⁵ LRC CP 47-2007 at paragraph 3.98.

However, where the particular voluntary rescuer has further professional qualifications or training, the question could arise as to whether the appropriate standard should refer to the practice of the voluntary group or that of the particular profession.⁴⁶ In either event, the Commission notes that the determination of the appropriate standard of care requires an examination of four elements: the probability of harm, the gravity of the threatened injury, the cost of eliminating the risk and the social benefit of the activity.

3.58 As to probability of harm, as with the Good Samaritan the voluntary rescuer will generally intervene in situations where there is an independently arising risk of harm or injury. The probability of harm occurring may, thus, be high as any intervention may easily exacerbate the prevailing conditions or aggravate any existing injuries. In determining the most appropriate course of action, the voluntary rescuer may be required to weigh up the risk independently arising against the risk posed by his or her proposed intervention. Voluntary rescuers may be more inclined to undertake more direct and physical interventions - either because they are trained to do so or because it is the best available course of action - to which a greater risk of harm, and sometimes serious harm, may be associated. The Commission observes, however, that the voluntary rescuer is likely to encounter some situations where injury is an inevitable consequence irrespective of the course of action undertaken or the precautions taken.

3.59 The Commission notes, however, that the voluntary rescuer who has benefitted from training may be in a particularly strong position to deal with a rescue situation. In this regard, the voluntary rescuer may be better able to assess the situation for existing and potential dangers and to determine the most appropriate method of intervening. Thus, the risk posed by his or her intervention is likely to be minimal. Furthermore, the voluntary rescuer will usually have the benefit of appropriate equipment and the support of his or her team. In any event, given that the voluntary rescuer anticipates, to some extent, that a rescue situation will arise, he or she will usually have had adequate time to consider and prepare his or her response in advance. As this response may have been tried and tested before, it is likely that it will be a more polished response than any that could be offered by the average Good Samaritan.

3.60 Regarding the gravity of the threatened injury, the Commission notes that where the potential injury is great engaging in conduct that entails even the slightest risk, or failing to take steps to avert the risk, may constitute negligence.

⁴⁶ For example, in the English case *Condon v Basi* [1985] 1 WLR 866 it was noted that there is a different standard of care applicable to the amateur sporting participant than to the professional.

In this regard, it is noted that the voluntary rescuer is not only likely to intervene in a situation where there is an independent risk of minor harm but also where there is an independent risk of serious harm. Any intervention could, therefore, result in the risk of such harm eventuating. As was noted above, the voluntary rescuer is more likely to engage in a direct and physical intervention, which carries more risk, than a more remote intervention. As against this, however, it must be noted that the voluntary rescuer has a greater capacity than the average Good Samaritan to improve the individual's predicament. Furthermore, while the voluntary rescuer might not be able to diagnose the exact nature or severity of any existing or potential injury, it is likely that he or she has been drilled to proceed cautiously where there is a real risk of serious harm. In this regard, the Commission observes that the voluntary rescuer's training and experience is likely to have prepared him or her to deal situations where it is necessary to either abate the risk or secure the scene until third party assistance arrives.

3.61 With reference to the cost of eliminating the risk, the Commission observes that courts have taken into account that it is impossible to make some work activities risk-free. In this regard, the Commission notes that voluntary rescue is an inherently dangerous and risk-laden activity. There are, however, certain steps which voluntary rescue organisations might be expected to take to reduce the risks. For example, voluntary rescue organisations may provide training and refresher courses to ensure that their members develop skills, which are then kept up to date. They may also implement procedures to ensure that appropriate candidates are selected for membership. Importantly, voluntary rescue organisations should ensure that voluntary rescuers have adequate equipment and support at their disposal. Insofar as the rescue situation itself is concerned, it has already been noted that some interventions will naturally involve more risk than others. While it is preferable that a course of conduct entailing the least amount of risk is undertaken, this may not be possible in all situations, especially where time is of the essence. Where the risk of litigation is at issue, the Commission notes that voluntary organisations may purchase insurance, and indeed this has been made increasingly available in Ireland.⁴⁷

3.62 The final element of the standard of care analysis relates to social utility. The Commission notes that the social utility of the voluntary rescuer's activities, particularly in the context of saving lives and preventing injury, must be taken into account when determining whether he or she has fallen below the reasonable standard. McMahon and Binchy note, however, that professional persons responding to emergency situations do not benefit from a blanket

⁴⁷ See paragraphs 1.19 and 1.30, above.

immunity.⁴⁸ Regarding fire fighters, they note that while it is well established that the court should take into account the social utility of rescue when assessing the question of negligence of emergency vehicles, it has been held that fire fighters must still exercise due care. In the English Court of Appeal decision *Daborn v Bath Tramways Motor Co Ltd*,⁴⁹ which concerned the standard of care to be exercised by ambulance drivers during World War II (1939-1945) in England, Asquith LJ stated:

“the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that... The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk... In considering whether reasonable care has been observed, one must balance the risk against the consequences of not assuming that risk.

3.63 The English Court of Appeal held in that case that the driver of a left-hand drive ambulance was not negligent when she did not give the signals that would otherwise have been required. The Court concluded that to impose such an obligation on the driver would have been to demand “too high and an unreasonable standard of care”, when the efficient use of all such vehicles was necessary during war time.

3.64 By contrast, in the English case *Watt v Hertfordshire County Council*⁵⁰ Denning LJ stated that:

“fire engines, ambulances and doctors’ cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger. It is always a question of balancing the risk against the end.”

3.65 The social utility of the voluntary rescuer’s activity goes beyond the specific rescue situation. The voluntary rescuer provides a service for the benefit of society, by complimenting and providing additional services to those offered by statutory bodies. Without the voluntary rescuer, then, there would either be an insufficient service or no service at all. Furthermore, the service is provided against the background of adequate instruction, training and experience. Thus, it may be asserted that there is less risk associated with an intervention by a voluntary rescuer. So, because of the voluntary activity of the

⁴⁸ McMahon and Binchy, *Law of Torts* (3rd edition Butterworths 2000) at paragraphs 15.53 and 26.36.

⁴⁹ [1946] 2 All ER 333.

⁵⁰ [1954] 2 All ER 368.

rescuer, a quality service is provided to the public at large. Furthermore, it is of consequence that the knowledge which voluntary rescuers gather may be passed on and used by other members of society, with the result that more people are capable of assisting in similar situations.

3.66 The Commission notes, therefore, that, as was the case with the Good Samaritan, numerous standards may be set depending on the various levels of skill and knowledge possessed by each voluntary rescuer. The Commission considers it preferable that there be one standard that will appreciate the various levels of skill and knowledge possessed by all voluntary rescuers while at the same time acknowledge that voluntary rescuers undertake activities which are for the benefit of society. The parameters of this are discussed in Chapter 4.

E Voluntary Service Provider

(1) Duty of Care

3.67 The Commission noted in the Consultation Paper⁵¹ that certain activities, whether undertaken by a voluntary service provider or otherwise, may be regulated by statute and that, therefore, statutory duties of care may arise in this context. For example, a voluntary service provider who organises an event may be subject to obligations under the *Fire Services Act 1981*, the *Occupiers' Liability Act 1995*, the *Planning and Development Act 2000* (licensing of outdoor events) or the *Licensing of Indoor Events Act 2003*.

3.68 In addition, the Commission is aware that while many voluntary service providers may appear, at first glance, to fall outside the scope of the *Safety, Health and Welfare at Work Act 2005* virtually all national voluntary service providers and charitable entities actually come within its terms because they have engaged at least one salaried employee, thus coming within the terms of the 2005 Act as employers.⁵²

3.69 In addition, in the case of voluntary service providers, the Commission notes that duties may also arise by virtue of the relationship which exists between the service provider and the recipient of the service. Thus, irrespective of whether the voluntary service provider is an individual or an organisation, the general principles of negligence regarding whether a duty of care exists are also relevant.

⁵¹ LRC CP 47-2007 at paragraph 3.102.

⁵² See paragraphs 2.50ff above.

(a) Proximity

3.70 The Commission notes that there may be a wide range of grounds for establishing a proximate relationship insofar as voluntary service providers are concerned. In respect of formal volunteers the Commission observes that proximity may be established on the basis of a direct relationship of proximity with the recipient of the service or an indirect relationship of proximity derived from the relationship between the formal volunteer and the voluntary organisation and the relationship between the voluntary organisation and the recipient of the service.

3.71 The Commission identifies the three most common types of scenario in which a relationship of proximity arises. First, a relationship of proximity might arise where there is a special relationship between the voluntary service provider and the recipient of the service,⁵³ for instance, where the service provider is, in some way, responsible for the well-being of the recipient. In addition, a special relationship might arise where the defendant exercises some element of control over the actions of a third party. For example, a youth group might be required to exercise some element of control over the actions of its members.

3.72 Second, the voluntary service provider may be connected in some way to the source of the damage. This may be the situation where the service provider has some element of control over the source of the danger⁵⁴ or where the voluntary service provider creates a risk which it fails to control, even where the voluntary service provider was legally entitled to create the risk. Proximity may also be established where the risk arises independently and the voluntary service provider either aggravates the risk or increases the likelihood of harm.⁵⁵

3.73 Third, the Commission observes that proximity may arise out of a situation where the voluntary service provider has voluntarily assumed responsibility. Again, an assertion of voluntary assumption of responsibility may be made on the basis of relationship of undertaking and reliance or a relationship of control and dependence.

⁵³ See the discussion of proximity in Chapter 2, above.

⁵⁴ For example, where a voluntary service provider organises a fundraiser, the voluntary service provider may at the least be subject to the duties in the *Occupiers' Liability Act 1995* or licensing obligations under legislation such as the *Planning and Development Act 2000* or the *Licensing of Indoor Events Act 2003*.

⁵⁵ An example might be where a voluntary service provider aggravates risks by failing to provide adequate equipment necessary for certain activities or where the voluntary service provider proceeds with an event despite warning such as adverse weather conditions.

3.74 Where the undertaking is a promise, the promise may be either an express promise to the recipient of the service or an implied promise inferred from the voluntary service provider's conduct. The Commission also observes that where the voluntary service provider is a formal volunteer a promise may be made directly to a voluntary organisation or be inferred from conduct in favour of the voluntary organisation. In this regard, the act of registering with the voluntary organisation might be considered an express promise to carry out the organisation's work while from this act it might also be that the formal volunteer intends to help those people whom the organisation itself undertakes to help.⁵⁶ Where the service provider is a voluntary organisation, the Commission notes that an express promise may be made to the community at large or be inferred from the organisation's general activities.⁵⁷

(b) *Distinction between Good Samaritans and Volunteers*

3.75 A distinction is to be made with the situation of the Good Samaritan. Given the vast range of activities undertaken by voluntary service providers, it is just as likely that the promise will be a promise to achieve a particular outcome as it is to be a promise to endeavour. While it is more difficult to identify the point at which the volunteer service provider has fulfilled its promise where the promise is one of endeavour rather than outcome, the Commission reiterates that simple promises are not generally enforceable. Were it otherwise, too onerous a burden would be placed on individual volunteers who have made promises to endeavour which are likely to be open-ended engagements that are not time-limited. In this regard, the Commission notes that there may be situations in which the personal commitments or the well-being of the individual may prevent him or her from continuing to provide the services. Given that the provision of services will rarely relate to life-or death situations, it would seem fair to assert that it should be possible for those personal commitments or issues related to well-being to trump the provision of services. The Commission notes that it might be easier for the voluntary service provider that is an organisation to provide a service on an indefinite basis as the voluntary organisation is less likely to be impeded by those obstacles encountered by the individual volunteers.

(c) *Voluntary Acts*

3.76 An undertaking may also consist of a voluntary act carried out by the voluntary service provider in favour of the recipient of the service. The

⁵⁶ This may be problematic in that it could be taken to be a positive duty to provide services, which the Commission did not recommend in Chapter 2.

⁵⁷ However, enforcement of such a promise may come close to a theory of general reliance on the part of the whole of society, which is unlikely to be imposed.

Commission considers that a “voluntary act” is an act done, freely and without payment, in favour of the recipient or an act done on behalf of the voluntary organisation. Thus, both formal volunteers at ground level, such as those providing the services, and formal volunteers at administrative level, such as those on the board of directors or senior management committee, may be included. In this regard, the Commission observes that certain voluntary acts necessarily entail a greater degree of risk than others. For instance, the more a service concerns the physical integrity of an individual, the more likely it is that harm will occur. In contrast, the less a service concerns the physical integrity of an individual, such as where a volunteer maintains the accounts of the voluntary organisation, the less likely it is that harm will occur. The identity of the group to whom the services are provided may also be relevant. It is more likely that harm will occur where the service is provided to a particularly vulnerable group than where it is provided to a more robust group.

3.77 Furthermore, the nature of the voluntary act may vary depending on the type of voluntary service provider that undertakes it. The Commission notes that where the informal volunteer provides a service, it is likely that he or she will personally undertake the act under his or her own direction. Where the formal volunteer undertakes to provide a service, it is more likely that he or she will personally undertake the service under the direction of the voluntary organisation. Where the voluntary organisation undertakes to provide a service, then, it will be its volunteers that physically provide the service, but it will be the organisation that controls and directs the provision.

(d) Reliance

3.78 As noted before, a voluntary act or intervention alone is not sufficient to form a relationship of proximity. In addition, there must be reasonable reliance of which the voluntary service provider is aware.⁵⁸ The Commission notes that where reliance is non-detrimental, this suggests that the recipient of the voluntary service has changed his or her position on faith of the volunteer’s voluntary provision of services, but is in no worse a position.⁵⁹ Reliance may, however, be of a detrimental nature. An example of detrimental reliance may be where an elderly person, on faith of a volunteer’s undertaking to provide evening meals for him or her, gets rid of his or her cooker. As a result, if the

⁵⁸ LRC CP 42-2007 at paragraph 3.119.

⁵⁹ For instance, the volunteer may prepare a hot meal for an elderly neighbour every evening, over a period of time. While the elderly neighbour may come to rely on the volunteer to do this, he or she may choose to keep his or her cooker in case the need should ever arise to prepare his or her own meal. In this way, the elderly neighbour is in no worse a position than he or she was before the volunteer intervened.

volunteer fails to turn up, it is very likely that the elderly person would find it difficult to make an alternative arrangement.

3.79 To establish a relationship of proximity it must be shown that the reliance is reasonable. In this regard, the Commission notes the argument that it might be asserted that reliance on a voluntary promise can never be considered reasonable.⁶⁰ In determining whether reliance is reasonable, it is the case that many recipients of voluntary services are particularly vulnerable and, therefore, more reliant on the voluntary provision of services. The nature of the volunteer's promise will also be important in this regard. It is more likely that reliance will be considered more reasonable where the promise is either inferred from or supported by conduct of the voluntary service provider, particularly where that conduct is on a regular and recurrent basis. Furthermore, given that a certain amount of training and support will be provided by a voluntary organisation, it is possible that a recipient of voluntary services will be more likely to rely on the undertaking of a formal volunteer than on that of an informal volunteer.⁶¹ It should also be noted that the recipient of a voluntary service may be more inclined to rely on the undertaking of a formal volunteer because of an implicit guarantee that should the individual volunteer fails the voluntary organisation will make alternative arrangements to ensure that the service continues to be provided. In such a case, it may be debatable as to whether reliance on the individual volunteer, rather than the overall organisation, would be reasonable.

(e) Control and Dependence

3.80 Proximity might also be established where the relationship between the voluntary service provider and the recipient of the service is one of control and dependence. In terms of control the voluntary service provider may be especially well placed to provide a particular service because of training or attachment to a voluntary organisation that specialises in the provision of that service. Alternatively, the voluntary service provider may assert control over a particular situation by taking charge of a particular task or by organising an event. The voluntary service provider would, in such a case, be expected to manage the operations in accordance with the relevant legislation or licensing obligations under legislation, such as the *Planning and Development Act 2000* (licensing of outdoor events) or the *Licensing of Indoor Events Act 2003*. The Commission considers that relationships of control and dependence are most likely to arise where the voluntary service provider is a voluntary organisation

⁶⁰ The promise is made without consideration, a prerequisite for a binding contract and enforcement would be highly onerous.

⁶¹ Based on the level of training, standards set by the voluntary organisation and access to equipment and resources.

based on the fact that it has the capacity, resources and authority to assert control. Where the voluntary service provider is a formal volunteer, he or she may have direct control over the particular task with which he or she is charged while ultimate control is likely to rest with the voluntary organisation.⁶² Relationships of control and dependence may also arise where the voluntary service provider is an informal volunteer.

3.81 Regarding dependence, the recipient of the voluntary service might be considered dependent where, for example, there are no comparable alternatives to the voluntary service provider's undertaking or where the recipient does not have the capacity to choose an alternative. As the Commission noted above, voluntary service providers tend to compliment supplement necessary services provided by statutory bodies. Thus, it may be the case that the voluntary organisation is the only entity providing the particular service. In addition, some voluntary service providers cater specifically for vulnerable people who may be more likely to depend on the assistance of others. The Commission also notes that partial dependence may develop into complete dependence over time. In this context, and as noted above, a voluntary organisation may be better able to provide a constant service than the average individual volunteer. The Commission notes that it may be asserted that the voluntary service provider should be aware of the recipient's dependence and, therefore, of the impact that the voluntary service provider's undertaking may have.

(f) Foreseeability of Harm

3.82 Where a relationship of proximity is established, it must be determined whether harm caused to the recipient by the voluntary service provider was reasonably foreseeable. In this regard, it may be relevant to consider the nature of the service being provided. Where the service affects the physical integrity of the recipient, there is a higher degree of inherent risk and injury, therefore, is a more foreseeable consequence of the service provider's actions.⁶³ The skill of the voluntary service provider will also be an issue. A higher level of skill might be expected of the formal volunteer than the informal volunteer as the formal volunteer benefits from specialised training from the voluntary organisation. Implicit in this would be the conclusion that harm is more foreseeable where the voluntary service provider is an informal volunteer. The Commission notes that such a conclusion would only be appropriate, however, where the formal volunteer and the informal volunteer were providing

⁶² The Commission notes that some volunteer organisations maintain an authoritative involvement while some limit involvement to provision of resources such as training.

⁶³ For example, by providing caring services or meals to elderly persons.

equivalent services. Furthermore, there may be situations in which the informal volunteer has benefited from a certain level of professional training that goes beyond the knowledge and skill possessed by the formal volunteer. The Commission concludes, therefore, that regardless of whether the voluntary service provider is an informal volunteer, a formal volunteer or a voluntary organisation, harm is more foreseeable where the provider departs from its area of competence.

3.83 The Commission also notes that where the voluntary service provider is an organisation it is foreseeable that some harm will arise. As the organisation depends on the services of many individuals to carry out its functions there is more room for human error and, consequently, harm of some kind. Such a situation might necessitate the assessment of the voluntary organisation's methods of selecting, training and directing its volunteers to see whether those methods were sufficient to reduce or eliminate the risk.

(g) Relationship between Service Provider and Recipient

3.84 The nature of the relationship between the voluntary service provider and the recipient of the voluntary service is also relevant to an analysis of foreseeability of harm. For instance, where the relationship is one of undertaking and non-detrimental reliance, there is clearly less risk of harm as the recipient still retains some control over his or her own well-being. Where the relationship is one of undertaking and detrimental reliance, however, the voluntary service provider might be expected to foresee a greater risk of harm, as the recipient is in a more vulnerable position because of the voluntary service provider's undertaking. Where the relationship is one of control and dependence, the voluntary service provider ought to be aware of the potential impact of its intervention on the recipient of the voluntary service. In this regard, the Commission notes that the voluntary service provider should consider the danger of aggravating an existing vulnerability and the fact that the recipient of the voluntary service is not in the position to either ensure his or her own safety or to seek assistance elsewhere.

3.85 The Commission considers that the argument of "inevitable harm" is less persuasive in the case of the voluntary service provider. While situations involving the Good Samaritan or the voluntary rescuer might be more conducive to the assertion that some harm was inevitable to ensure the success of the overall rescue, such circumstances are less likely to arise in situations involving the voluntary service provider. In this regard, the Commission underlines how difficult it would be to show that any harm could be justified by the overall benefits of the voluntary services provided. In the specific context of the voluntary organisation, this argument might be translated into the assertion that injury to one individual is justified by the success of the organisation's overall goal.

(h) Is it “Just and Reasonable” to impose Liability?

3.86 When it has been established that there is a sufficiently proximate relationship and that harm was foreseeable, the courts will also consider whether it is “just and reasonable” to impose a duty of care on a voluntary service provider. In this context, it might be argued that the voluntary provision of services is for the benefit of society, depending on the nature of the services being provided. Indeed, the Commission observes that by supplementing the statutory provision of services, voluntary service providers ensure that many more people may benefit from additional services. Furthermore, not only does involvement in voluntary activities provide a forum for volunteers to interact, develop skills and work towards a common purpose but also encourages individual volunteers to become more engaged members of society. In this regard, the Commission notes the argument then that it may not be just and reasonable to impose a duty of care to the extent that potential liability threatens such activities.

3.87 In the context of identifying a party to bear the cost of damages, the risk of harm must be weighed against the potential benefit to society. The Commission notes that where a duty of care is imposed, the voluntary organisation may be in a better position than the individual volunteer to bear the cost of damages. By virtue of its resources, structure and experience, it is likely that the organisation will have anticipated the risk of damage and, therefore, implemented precautions to guard against the risk and mechanisms to deal with the risk should it arise, for example, insurance cover. Therefore, the voluntary organisation may be better able to absorb the cost of damage without endangering its activities.

3.88 In respect of individual volunteers then, the formal volunteer may be in a stronger position to bear the cost of damages than the informal volunteer. This is so because the formal volunteer is likely to be protected by the voluntary organisation’s insurance cover or the principle of vicarious liability. By contrast, the informal volunteer may have no option but to resort to personal resources, which may not be sufficient, to meet the cost of damages. The Commission considers that, given the weight of such a burden, it might be asserted that it is not just and reasonable to impose a duty of care on the informal volunteer. As against this, however, the Commission notes that it may not be just and reasonable to completely deny the recipient of the voluntary service the right to seek redress.

3.89 The Commission notes, however, that the imposition of a duty of care may have a severe impact on the provision of voluntary services particularly those which entail a greater degree of inherent risk. As was the case with Good Samaritans and volunteers, the Commission considers that a finding of liability may not only deter individuals from volunteering but may also create a

precedent for future claims against voluntary service providers. The cost of litigation and insurance may impose too onerous a burden on voluntary service providers, whether organisations or formal volunteers, and lead to a withdrawal of services. Informal volunteers, who finance their activities themselves, can only fare worse in such circumstances.

(2) Standard of Care

3.90 In addition to establishing that the voluntary service provider owes the recipient of the service of care, it must also be shown that the voluntary service provider did not provide the service to the appropriate standard of care. There is some uncertainty, however, as to the appropriate standard of care to be applied to the voluntary service provider. In the Consultation Paper the Commission noted that the test has both objective and subjective elements.⁶⁴ From an objective perspective, the test considers how the reasonable voluntary service provider would act in similar circumstances. From a subjective perspective, it considers the actual skill of the particular voluntary service provider to determine the degree of care it was capable of exercising.⁶⁵ The Commission notes that it might be argued here that the formal volunteer, by virtue of his or her training, should be held to a higher standard of care than the informal volunteer and that the off-duty professional should be held to an even higher standard again. As with the voluntary rescuer, however, such an inference can only be drawn where the volunteers are providing equivalent services and where the skills referred to are relevant to the particular service being provided.

(a) Skill of Service Provider

3.91 The Commission considers that the voluntary service provider should, at the least, be expected to exercise such care as would be exercised by the reasonable person in similar circumstances. By undertaking to perform a particular function, the voluntary service provider represents that it has the requisite level of skill to do so. Therefore, where it has neither the skill nor reasonable belief that it possesses that skill, the voluntary service provider may be considered negligent. Thus, the voluntary service provider's conduct may be judged against that level of skill required to perform the particular function, regardless of whether or not the voluntary service provider is actually that skilled. The law, however, must be realistic. Therefore, where the voluntary service provider claims, legitimately or not, to be a specialist in a particular field,

⁶⁴ LRC CP 47-2007 at paragraph 3.141.

⁶⁵ See the English case *Condon v Basi* [1985] 1 WLR 866, contrasting the standard of care to be expected from an amateur sports player with that of a professional player.

the law will expect no more of the voluntary service provider than the ordinary level of skill possessed by those who specialise in that field. The voluntary service provider will not be expected to have a higher degree of skill or competence.

3.92 The Commission notes that regard may also be had to the “general and approved practice” of the particular field. This is so irrespective of whether the service is being provided by a lay volunteer or a professional volunteer.⁶⁶ The Commission notes, however, that what is general and approved in the voluntary sector may not necessarily align with what is general and approved in the professional sector.

(b) Probability of Harm

3.93 As was the case with Good Samaritans and voluntary rescuers, it is now necessary to consider four elements of the standard of care analysis, namely, the probability of harm, gravity of threatened injury, cost of preventing the risk and social utility. Regarding the probability of harm, voluntary service providers undertake to provide a wide variety of services, each carrying a different potential for injury. As noted above, harm will be more likely where the particular services touch upon the physical integrity of the recipient or are provided to particularly vulnerable individuals. This is so because it is in these types of situation that there is a certain element of inherent risk or sensitivity which the voluntary service provider might easily exacerbate or aggravate.

3.94 The skill of the voluntary service provider is another significant consideration in determining the probability of harm. The Commission considers that harm may be a more likely consequence where the voluntary service provider is insufficient skilled or departs from the guidance or instruction it has received. Voluntary organisations, for instance, may be guided by legislation, principles or best practice that have been developed in their field of expertise and passed on to their members, the formal volunteers.⁶⁷ Therefore, voluntary organisations and formal volunteers may be in a particularly strong position to assess the risks inherent in a service and to identify and put in place the most appropriate precautions. The Commission notes that such voluntary service providers may also have had the opportunity to make preparations and implement precautions in advance of the provision of the service

3.95 The informal volunteer’s capacity to assess the situation, on the other hand, will depend very much on the volunteer’s personal experience. This

⁶⁶ *O’Donovan v Cork County Council* [1967] IR 173; *Dunne v National Maternity Hospital* [1989] IR 91; *Roche v Peilow* [1986] ILRM 189.

⁶⁷ Volunteering Ireland provides helpful guidance in this regard: see the discussion in Chapter 1 and at its website, www.volunteering.ie.

would seem to imply that the standard of care to be applied to the informal volunteer is more akin to that applicable to the reasonable person. It must also be recognised, however, that any individual volunteer, formal or informal, may also have relevant professional skills that put him or her in a particularly strong position. The Commission observes that a question then arises as to whether this additional knowledge should be held against the volunteer, in that he or she, in particular should have known that there was a risk and the most appropriate precaution to put in place, whether or not this was covered in the training provided by the voluntary organisation.

3.96 The Commission notes that where the voluntary service provider is an organisation, there is, in general, a greater probability of some harm arising. This may occur because the organisation is managing a particular activity, directing a number of volunteers and overseeing a number of recipients.

(c) Gravity of Injury

3.97 Regarding the gravity of the injury, the Commission observes that the potential for serious harm may not be as high in situations involving the voluntary service provider as in situations involving the Good Samaritan or voluntary rescuer. While some interventions, depending on how dangerous the activity or vulnerable the recipient, may entail a high risk of serious harm, not all will be quite so precarious. The Commission notes that voluntary organisations and formal volunteers, by virtue of their skill and organisation, may be in a particularly strong position to assess the likelihood of serious harm and to identify the appropriate means to avoid such harm or treat it should it arise. The Commission reiterates, however, that this does not exclude the possibility that the individual volunteer, whether formal or informal, may have relevant professional skills to contribute. It is, therefore, difficult to make a clear distinction for all circumstances.

(d) Cost of Preventing Risk

3.98 In terms of the cost of preventing the risk, the Commission notes that a number of measures may be taken to eliminate, or at least reduce, the risks associated with the voluntary provision of services. First, voluntary organisations should ensure that those engaged as volunteers are appropriate candidates.⁶⁸ Second, voluntary organisations should ensure that their volunteers are adequately skilled to provide the particular service by providing training and courses in relevant areas. Formal volunteers do their part by committing to the courses provided by the voluntary organisation. Third,

⁶⁸ For example, through the Garda vetting process. See the Commission's *Report on Spent Convictions* (LRC 84-2007), Chapter 4. Youth Work Ireland carries out checks in this way on volunteer youth leaders.

voluntary organisations should ensure that their volunteers are adequately equipped and supported. Fourth, voluntary organisations may take out insurance cover or require their volunteers to take out individual policies. Finally, certain voluntary organisations require the recipients of their services to sign waiver forms to acknowledge that they assume the risk of anything adverse happening. The Commission notes that these measures place a financial burden on voluntary organisations and their members, which may put the continued provision of services at risk. Furthermore, the Commission notes that, in many cases, it may not be possible for informal volunteers to implement equivalent measures.

(e) Social Utility

3.99 The extent to which the service is of social utility is the final consideration. Where the voluntary service provider undertakes to provide services for the benefit of society, its activities may be regarded as having a high social utility. They may be of benefit to the recipients of those services as well as being of benefit to the individual provider of the services. The Commission notes that participation in voluntary organisations may also provide an opportunity for individual volunteers to exchange ideas and develop skills. The Commission considers, however, that while the social utility of an activity should be taken into account when determining liability, volunteers should not be protected to such an extent that the recipients of the service are placed in an even more vulnerable position by excluding all possibility of compensation.

3.100 As in the case of the Good Samaritan and the voluntary rescuer, the Commission identifies the ideal situation as being one in which there is a single standard that takes into account the various levels of skills and expertise associated with the provision of voluntary services, while appreciating the fact that voluntary service providers work for the public good. The Commission observes, however, that it may not be appropriate to treat individual volunteers, whether formal or informal, in the same way as voluntary organisations. The Commission will look more closely at these issues in the final chapter.

F Conclusions

3.101 The Commission concludes that the general principles of negligence, which apply to the determination of the duty of care and standard of care, do not preclude Good Samaritans, voluntary rescuers, individual voluntary service providers or voluntary service organisations from liability in negligence. A memorandum prepared in 2003 by experienced counsel for the Pre-Hospital Emergency Care Council (PHECC), the State body with responsibility for standards in pre-hospital emergency medical services,⁶⁹ expressed the view

⁶⁹ See paragraph 1.14, above.

that it was unlikely that liability would be imposed in practice. Indeed, the Commission is not aware of any litigation taken against a Good Samaritan or volunteer in this State, and it concurs with the general view expressed in that memorandum, in particular having regard to the social utility of the conduct involved, which would form an important element of the application of the “just and reasonable” element of the negligence principles currently applicable in Ireland.

3.102 The Commission underlines that, although there is a measurable risk of injury being caused, in practice, cases of botched attempts⁷⁰ are extremely rare. It is more likely that the outcome of an intervention by a Good Samaritan or rescuer is that a life is saved. In a real emergency, the Good Samaritan’s intervention, with the aid of, for example, an automated external defibrillator (AED) means that a person who is otherwise going to die is likely to live. The Commission has been made aware of a number of instances where the use of AEDs has clearly saved lives, including through the interventions of occupational first aid teams in large public facilities such as the State’s airports.

3.103 The Commission considers, for example, that where CPR or AEDs are used to resuscitate a victim of sudden cardiac arrest, the classic fear of liability arising from breaking the rescued person’s ribs is, in fact, unlikely. Indeed, this may be so unusual that it will be characterised as an unavoidable consequence of the attempt to save life and that it would, therefore, be unlikely that the Good Samaritan would be held liable. In any event, the rescued person is alive after the intervention – perhaps with broken ribs, but they are likely to heal after a short time – whereas the alternative is that the person is left to die because CPR or AEDs were not made available. While the interventions in Ireland of which the Commission has been made aware have, to date, universally led to profound thanks from those who have been resuscitated and who form an increasing list of “saves,” the Commission must also be conscious that the potential for at least a claim of liability in the event of adverse outcomes remains, even if this is remote.

3.104 Drawing from the submissions made to the Commission after the publication of the Consultation Paper, the Commission observes that, for many doctors and other health care professionals, stopping at accidents and emergencies provokes some uncertainty as to responsibility and legal liability. The Commission considers that it would be of clear benefit for such persons, as

⁷⁰ *Report of the Inter-Agency Review Working Group on Major Emergency Management* (supported by the Department of Environment, Heritage and Local Government Review Project Team 12 September 2006). The Commission discussed in the Consultation Paper at 3.157 other reasons why there might not a large amount of Good Samaritan claims.

well as general members of the public, to understand their legal position in this regard. The dilemma of whether to stop and render assistance in an emergency is a concern for many people, not alone health care professionals. Given the possibility of liability should the rescue go awry (even if this is, in reality, unlikely), the Commission accepts that a potential rescuer might very well reconsider his or her initial impulse to intervene.

3.105 Furthermore, taking into account the policy setting and background described in Chapter 1, it is important for persons involved in the provision of services and volunteering activities, whether they be rescuers or otherwise, to appreciate the standard of care that might be applicable to them as they go about their activities. It is clear from the submissions received by the Commission during the consultation period after the publication of the Consultation Paper that this is a significant area of concern for volunteer organisations and their members.

3.106 The Commission has, therefore, come to the conclusion that the enactment of legislation in this area would be beneficial in that it would establish clearly the nature and scope of the duty of care and the precautions a person must take to meet the standard of care required by the law as it stands. The Commission considers that people who come to the aid of others or who voluntarily give their time to assist community organisations should be able to do so with a clear knowledge of the precise scope of any legal liability. The Commission therefore recommends that the legal duty of care of Good Samaritans, voluntary rescuers and voluntary service providers, should be set out in legislation. The Commission also recommends that the legislation should take account of the high social utility of Good Samaritan acts and volunteering activities, particularly in light of the increased awareness of sudden cardiac death and the use of Automated External Defibrillators (AEDs).

3.107 *The Commission recommends that the legal duty of care of Good Samaritans, voluntary rescuers and voluntary service providers should be set out in legislation. The Commission also recommends that the legislation should take account of the high social utility of Good Samaritan acts and volunteering activities, particularly in light of the increased awareness of sudden cardiac death and the use of Automated External Defibrillators (AEDs).*

CHAPTER 4 THE CONTENTS OF THE GOOD SAMARITAN AND VOLUNTEERS LEGISLATION

A Introduction

4.01 In Chapter 3, the Commission recommended that legislation should be enacted to set out the duty of care and standard of care applicable to Good Samaritans, volunteers and voluntary organisations. In this Chapter, the Commission discusses the details of the proposed legislation.

4.02 In Part B, the Commission examines other protections which are already available to Good Samaritans and volunteers, notably insurance cover and incorporation. In Part C, the Commission examines the background to the development of Good Samaritan and volunteer legislation in other States as well as their detailed content, with a view to considering what form would be appropriate in Ireland. Based on this comparative analysis, in Part D, the Commission sets out the detailed elements of the legislation it recommends concerning the civil liability of Good Samaritans and volunteers.

B Forms of Protection Already Available

4.03 The Commission notes that some measures currently exist for the protection of Good Samaritans and volunteers. These include insurance cover and the protections which flow from incorporation.¹

(1) Insurance Cover

4.04 Section 56(1) of the *Road Traffic Act 1961* provides that third party insurance cover is mandatory. In Ireland, therefore, it is legally necessary to have at least third-party insurance which will cover any injury or loss suffered by persons other than the driver as a result of negligent driving of a vehicle. The Commission notes that there may be many situations in which driving forms the basis of a Good Samaritan intervention or voluntary activity. In this regard, the Good Samaritan or voluntary rescuer may cause an injury to a third party or a person in their care as a result of negligent driving in the context of conducting a rescue or providing assistance to an ill or injured person and similarly, volunteers may cause injury to recipients of services in the context of

¹ LRC CP 47-2007 at paragraphs 4.33-4.45.

volunteering activities. Thus, a Good Samaritan or volunteer may be covered in such situations by the 1961 Act.

4.05 Unlike motor insurance, there is no compulsory requirement in respect of the insurance of public liability risks. As Buckley notes,² individuals and commercial concerns may, therefore, decide whether or not to insure against liability to members of the public in respect of injury or damage to property caused by their negligence. Where they choose to do so, he notes that the general public liability policy insures against the risk of legal liability to pay compensation for accidental personal injury, or physical damage to material property.³ It should be noted, in this regard, that the indemnity provided by a general public liability policy relates only to legal liability arising from an accidental event or occurrence resulting in personal injury, illness, disease, loss of or damage to property of third parties.⁴

4.06 Buckley notes the difficulty encountered by the courts in defining the term “accidental.”⁵ While much will ultimately depend on the wording of the particular policy, Buckley asserts that the rationale for using the word is to ensure that only unexpected and unintended events, as opposed to deliberate acts or omissions, are covered by the policy. In the course of determining the intention of one particular public liability policy the Supreme Court, in *Rohan Construction Ltd v Insurance Corporation of Ireland Ltd*,⁶ accepted the statement of Lord Lindley in *Fenton v Thorley & Co Ltd*.⁷ that:

“The word ‘accident’ is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means an unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word ‘accident’ is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents is occasioned by carelessness; but for legal purposes it is

² Buckley, *Insurance Law*, 2nd ed (Thomson Roundhall 2006) at paragraph 10.01.

³ *Ibid* at paragraph 10.02.

⁴ *Ibid* at paragraph 10.02.

⁵ *Ibid* at paragraphs 10.02-10.08.

⁶ [1986] ILRM 373.

⁷ [1903] AC 443 at 448.

often important to distinguish carelessness from other unintended and unexpected events.”

The Commission notes, therefore, that while the term “accidental” may include negligent acts, it is not synonymous with the term “negligent”.

4.07 While the terms of various insurance policies may vary, Buckley notes that a general public liability insurance policy provides that the insurer will, subject to the terms, exceptions, limits and conditions of the policy, indemnify the insured against all sums which the insured becomes legally liable to pay as damages in respect of (a) accidental bodily injury to or illness of any person and (b) accidental loss or damage to property, occurring within the territorial limits during the period of insurance and happening in connection with the business.⁸

(a) Volunteer-Specific Insurance

4.08 The National Irish Community and Voluntary Fora (NICVF) has established in recent years the NICVF Group Insurance scheme for all members of Local Community and Voluntary Fora. The Commission notes that membership of a Local Forum is open to any community and voluntary group engaged in voluntary activity and that over 22,000 groups are now involved in the scheme. In its 2007 Report, the *Taskforce on Active Citizenship*⁹ welcomed the work done by the NICVF in developing a group insurance scheme and recommended that it be promoted widely amongst relevant groups and organisations. It also noted that experience of the insurance scheme to date shows insurance being obtained with minimum administration and considerably cheaper premium costs. In this regard, it may be noted that the premiums of community and voluntary groups are reduced based on power buying and bulk purchasing.

4.09 The Commission observes that the scheme provides cover in a number of areas including the two following:

- **Public Liability Insurance:** Public liability insurance covers the voluntary organisation against potential legal liability to pay compensation to members of the public who suffer injury or illness as a result of negligence and the legal costs involved in defending such a claim. The current policy allows for the various activities in which the organisation may be involved including fund-raising activities and social events. Areas automatically covered by the NICVF policy include the emergency first-aid administration of drugs and motor contingency to

⁸ Buckley, *Insurance Law*, 2nd ed (Thomson Roundhall 2006) at paragraph 10.02.

⁹ *Report of the Taskforce on Active Citizenship* (2007) at 18. On the work of the Taskforce and the implementation of the 2007 Report, see Chapter 1, above.

indemnify the organisation in the event of a failure of employees' or volunteers' motor policies to operate when they are using their vehicles in connection with the organisations' business.

- **Directors' and Officers' Liability Insurance:** The NICVF policy provides cover for claims brought against Directors and Officers, which allege a wrongful act in their capacity as a Director or Officer of the company, including legal representation costs at a formal investigation and compensation for court attendance.

(2) Incorporation

4.10 Another option which may be availed of by volunteers, whether they are classified as voluntary rescuers or voluntary service providers, but not Good Samaritans, is incorporation. The Commission notes that, as a corporation, or body corporate, a group of individuals coming together for a common purpose, in this case, the voluntary provision of assistance or services, is regarded in law as having a separate legal personality from its members and directors. In other words it is an artificial legal person. This process occurs by registration of the group with the Companies Registration Office ('CRO') by the Registrar of Companies,¹⁰ who issues a certificate of incorporation to the group under the *Companies Acts 1963 to 2006*.

4.11 The Commission notes that incorporation carries with it a number of significant consequences. In the case of volunteer organisations and charities, the most important of these relates to the separate legal personality of the company. Following incorporation, a corporation normally speaking has full legal capacity to sue or be sued in its own name:

"A corporation is a distinct legal person, separate from its members. This commonplace of corporation law runs as a vital thread through all the branches of the subject. A legal person is capable of being the subject of legal rights and the object of legal duties."¹¹

Since the company is a separate and distinct legal person, and is not as such the agent of its shareholders, only the company (and not its members) can be sued in respect of any duties or obligations that arise under law. Generally speaking, therefore, liability arising out of the acts or decisions of the company, which would ordinarily attach to the individuals who undertook those acts or

¹⁰ See generally Courtney *The Law of Private Companies 2nd ed* (Lexis Nexis Butterworths 2002).

¹¹ Ussher, *Company Law in Ireland* (1986), p.16.

made those decisions, transfers to the company itself. Consequently, the company is usually vicarious liability for the acts of its servants.¹²

4.12 The Commission notes that the measures outlined here do not cover all situations. While they may be relevant to volunteers who either attach themselves to a group or arrange themselves in a group, they are not applicable to Good Samaritans who, due to the ad hoc nature of their interventions, do not lend themselves to such organisation. The Commission reiterates that, in any case, there is no legislation specifically aimed at reducing the exposure of either Good Samaritans or volunteers to legal liability. For the most part, the Good Samaritan's or volunteer's position is that of an ordinary citizen. This is so even though the volunteer, usually where he or she is a formal volunteer, may on occasion benefit from insurance cover or the provisions of vicarious liability.

C Overview of Good Samaritan and Volunteer Legislation in other States

(1) Introduction

4.13 The original purpose of Good Samaritan statutes was to force people to intervene in the event of an accident or emergency and first appeared in civil law States where criminal law provisions regulated the conduct of individuals in such situations. Rudzinski notes that by the end of the 1950s, 13 European countries¹³ had provisions in their criminal codes stipulating a duty to rescue.¹⁴ The Commission notes that the purpose behind most Good Samaritan statutes has since changed. Instead of forcing individuals to intervene on pain of penal sanction, the tendency is now for Good Samaritan statutes to encourage intervention by granting immunity from civil liability.¹⁵ While some statutes focus on encouraging health care practitioners to intervene when not on duty,¹⁶ other

¹² See generally McMahon and Binchy, *Law of Torts* 3rd ed (Butterworths, 2000), chapter 43.

¹³ Portugal 1867; the Netherlands 1881; Italy 1889 and 1930; Norway 1902; Russia 1903-17, Turkey 1926; Denmark 1930; Poland 1932; Germany 1935, Romania 1938; France 1941 and 1945, Hungary 1948 and 1961, Czechoslovakia (as it then was) 1950. Belgium introduced such legislation in 1961.

¹⁴ Rudzinski "The Duty to Rescue: A Comparative Analysis" in Ratcliffe (ed) *The Good Samaritan and the Law* (Chicago: Anchor Books, 1966) at pp. 91-124.

¹⁵ Veilleux, Annotation, Construction and Application of "Good Samaritan" Statutes, 68 A.L.R. 4th 294, 299-300 (1989).

¹⁶ E.g., Fla. Stat. Ann. 768.13(2)(c)(3). See also Veilleux Annotation, Construction and Application of "Good Samaritan" Statutes, 68 A.L.R. 4th 294.

statutes go so far as to extend protection to the simple act of volunteering. The Commission observes that Good Samaritan statutes may be seen as an attempt to eliminate the perceived inadequacies of the common law rule under which a Good Samaritan or volunteer who acts voluntarily for the benefit of society, by assisting an injured person or providing services to another, can be held liable for failing to exercise reasonable care.

4.14 The Commission emphasises that any Good Samaritan legislation proposed by the Commission must be clear. It must also offer a coherent and comprehensive guide to Good Samaritans, voluntary rescuers and voluntary service providers as to their legal position.

4.15 In the subsequent sections, the Commission examines the legislation that applies to Good Samaritans and volunteers in other States. Drawing on their experience, the Commission identifies the type of legislation that is suited to Ireland. The Commission notes at this stage that, where full immunity is not involved, these statutes often state that a Good Samaritan or volunteer is not required to comply with the normal standard of negligence but is only to be held liable where gross negligence is established. The Commission considers whether this standard should be applied to Good Samaritans, volunteers and volunteer organisations in Ireland or whether the current standard of ordinary negligence is more appropriate. An underlying objective in this is to strike an acceptable balance between the need to afford protection to Good Samaritans and volunteers and an injured person's legitimate interest to seek redress for injury or harm.

(2) Good Samaritan Legislation in other Jurisdictions

(a) Introduction

4.16 In this section, the Commission examines the scope of Good Samaritan statutes in other comparable common law jurisdictions to determine their relevance to the proposed legislation in this State. The Commission observes that most common law jurisdictions have adopted either Good Samaritan or volunteer legislation, if not both. The Commission notes, however, that there is no generally accepted formula for the creation of such legislation and that legislation differs greatly from jurisdiction to jurisdiction.

(b) United States

4.17 Every State in the United States has enacted some form of Good Samaritan legislation.¹⁷ Much of this legislation protects from litigation to those who assist in emergencies. This protection is usually predicated on the

¹⁷ See Eric A. Brandt, Comment: Good Samaritan Laws – The Legal Placebo: A Current Analysis 17 Akron L. Rev. 303-303 (1983) for an overview.

condition that the Good Samaritan acts in good faith and without gross negligence. Furthermore, the Good Samaritan must not have received anything for his or her efforts or participated with the expectation of receiving any such benefit. It is beyond the scope of this Report to examine each of the relevant statutes so the Commission has singled out the more salient features.

4.18 In 1959, California was the first State in the United States to enact Good Samaritan legislation.¹⁸ One by one the other States and the District of Columbia enacted similar legislation. While many statutes are similar, others carry the distinctive scars of the particular case or incident which led to their enactment. Bearing this in mind, the Commission discusses the various protections on offer in the United States. In spite of differences regarding, for instance, the category of person to which the protection applies or the type of conduct which falls within its remit, the Commission discerns a common thread throughout: the goal of protecting those who provide emergency medical care and assistance, in good faith and without remuneration.

4.19 The Commission points first to the category or categories of person afforded protection by the statute. While some statutes protect narrow classes of person, others protect much broader classes.¹⁹ For instance, some States have chosen to protect only those individuals who are licensed or certified in the medical field. In this regard, the Massachusetts²⁰ *Massachusetts General Laws 2007* and Michigan²¹ statutes have a very narrow remit, affording protection to physicians, physicians' assistants and registered licensed nurses. The Oklahoma statute is also narrow to the extent that it protects licensed health care professionals alone.²² By contrast, the Commission notes that other States provide protection to larger classes of person. The Kansas statute, for instance, protects any person licensed to practice in any branch of the healing arts.²³ Broader again is the Missouri statute,²⁴ which protects licensed physicians and surgeons, registered or licensed nurses, and any person trained

¹⁸ 1959 Cal. Stat. ch. 1507. This is currently codified as Cal & Bus Prof Code § 2395.

¹⁹ For a discussion of the variations in this regard see Veilleux Annotation, Construction and Application of "Good Samaritan" Statutes, 68 A.L.R. 4th 294.

²⁰ Mass. Gen. Laws ch. 112, 12B.

²¹ Mich. Comp. Laws 691.1501.

²² 59 Okl St Ann § 518 (2006).

²³ Kan Stat Ann § 65-2891 (e).

²⁴ Mo. Rev. Stat. 537.037.

to provide first aid in a standard recognised training program. Maryland²⁵ seeks to protect health care professionals and various types of rescue group. Arkansas,²⁶ Delaware,²⁷ Minnesota²⁸ and Washington,²⁹ on the other hand, protect “any person” who is involved in a Good Samaritan situation. The Commission notes that in the case of Minnesota, the statute provides that “person” includes a public or private non-profit volunteer fire-fighter, volunteer police officer, volunteer ambulance attendant, volunteer first provider of emergency medical services, volunteer ski patroller, and any partnership, corporation, association, or other entity.

4.20 The Commission observes that while all States protect the Good Samaritan’s overall act of rendering assistance, there are variations in the type of conduct that is understood to be included. At one end of the spectrum, the Commission notes that the Oklahoma statute protects volunteer acts of artificial respiration, restoration of breathing, prevention of blood loss, or restoration of heart action or circulation of blood.³⁰ In Connecticut immunity from liability extends to persons rendering emergency medical assistance, first aid or medication by injection.³¹ At the other end of the spectrum, the Commission notes that the Maryland statute protects persons giving any type of assistance or medical care.³²

4.21 The Minnesota statute is explicit in the breadth of protection it affords in that it protects persons who render “emergency care, advice, or assistance”.³³ “Emergency care,” in this sense, includes providing emergency medical care by using or providing an automatic external defibrillator. Furthermore, in *McDowell v Gillie*, the North Dakota Supreme Court broadly

²⁵ Md. Code Ann., Cts. & Jud. Proc. 5-603 includes volunteer fire departments, ambulance and rescue squads.

²⁶ Ark. Code Ann. 17-95-101 (Michie 2002).

²⁷ Del. Code Ann. tit. 16, 6801.

²⁸ Minn. Stat. 604A.01, subd. 2(b). The Commission notes that the reason for this might be due to the fact that this state imposes a duty to assist a person in need. See chapter 1 in this regard,

²⁹ Wash. Rev. Code Ann. 4.24.300 (West 2003) (amended 2003).

³⁰ Okla. Stat. tit. 76, 5(a)(2).

³¹ Conn Gen Stat Ann § 52-557b.

³² Md. Code Ann., Cts. & Jud. Proc. 5-603(a).

³³ Minn. Stat. 604A.01, subd. 2(b).

defined “render” as “[t]o give or make available”.³⁴ By this logic, one might still be considered a Good Samaritan where one brings a rope to the scene of a person drowning, even where one does not use the rope to assist. However, in *Johnson v Thompson Motors of Wykoff*³⁵ the Minnesota Court of Appeal noted that the plaintiff’s claim was not for failure to render reasonable “assistance” but for failure to warn customers in advance. The court thereby limited the application of the Good Samaritan statute to present or existing emergencies, not future emergencies.³⁶ Thompson Motors had no statutory duty to render “assistance” before the plaintiff was shot.

4.22 Variations also appear in the statutes regarding the situations in which the assistance must be rendered in order to benefit from the protection. The Illinois³⁷ and Idaho³⁸ statutes stipulate that assistance must be rendered at the scene of the “accident”. The Commission observes that this is the case with most of the statutes. The Utah statute goes further, however, by extending protection to those rendering assistance at the scene of an “emergency.”³⁹ In his article, Nowlin argues that the term “emergency” is a broader than the term “accident.” He notes that while an emergency might involve an accident, not all accidents may be considered emergencies.⁴⁰ Furthermore, the Commission notes that a situation of emergency might extend beyond the confines of the time or place in which the accident occurs. In this regard, the Commission notes that Georgia has expanded the circumstances in which assistance may be given to allow for the scene of the “accident or emergency”.⁴¹ In a similar fashion, the Virginia statute allows for assistance to be given at the scene of an accident, fire or any life-threatening emergency.⁴² The Washington statute

³⁴ *McDowell v. Gillie* 626 NW2d 666 at 671.

³⁵ (No C1-99-666 2000 WL 136076) Minn Ct App 2 February 2000.

³⁶ See Nowlin, “Don’t Just Stand There, Help Me!: Broadening the Effects if Minnesota’s Good Samaritan Immunity Through *Swenson v. Waseca Mutual Insurance Co.*” (2003-2004) 30 Wm Mitchell L Rev 1001, at 1014.

³⁷ 745 Ill Comp Stat 49/1-75.

³⁸ Idaho Code 5-330.

³⁹ Utah Code Ann. 78-11-22.

⁴⁰ Nowlin, “Don’t Just Stand There, Help Me!: Broadening Minnesota’s Good Samaritan Immunity through *Swenson v Waseca Mutual Insurance Co.*” (2003-2004) 30 Wm Mitchell Law Rev 1001.

⁴¹ Ga Code Ann § 51-1-29. See also Ark. Code Ann § 17-95-101(a) and Wis Stat § 895.48(1).

⁴² Va. Code Ann. 8.01-225 (A)(1).

clearly states that protection is to be afforded to those who render “emergency care at the scene of an emergency or who participates in transporting.”⁴³ New Jersey has also extended protection to those who transport injured persons from the scene of the accident or emergency.⁴⁴

4.23 Similarly, Minnesota provides protection for those who render emergency care, advice or assistance “during transit”.⁴⁵ In *Swenson v Waseca Mutual Insurance Co.*,⁴⁶ the appellant contended that the Minnesota Good Samaritan law’s “during transit” provision did not apply to the mere act of driving an injured party from the scene of an accident to a hospital. Instead, the appellant argued, the “during transit” provision only protects those who provide some sort of emergency care while the person is being transported to a health-care facility.⁴⁷ The court identified the purpose of the statute as being to encourage laypersons to help others in need even when no legal duty to do so existed.⁴⁸ It reasoned, therefore, that the interpretation proffered by the appellant would be too narrow in that it offered little protection to laypersons.⁴⁹ The court observed that professional emergency technicians were not protected by the Good Samaritan law while on the job, due to their pre-existing duty to provide care. As a result, the logical conclusion of the appellant’s argument would be that the statute only protected laypersons providing emergency care in a vehicle in transit to a health care facility while a third person drove.⁵⁰ Since this could not have been the intention of the legislature, the court concluded that the “during transit” provision provided immunity to “laypersons whose only act of assistance is to drive a person from the scene of an emergency to a health-care facility.”⁵¹

⁴³ Wash. Rev. Code § 4.24.300.

⁴⁴ NJSA 2A:62A-1, 2A:62A-8, 2A:62A-9 (2007).

⁴⁵ Minn. Stat. 604A.01, subd. 2(b).

⁴⁶ 653 NW2d 764 (Minn Ct App 2002). See Nowlin, Don’t Just Stand There, Help Me!: Broadening the Effects if Minnesota’s Good Samaritan Immunity Through *Swenson v. Waseca Mutual Insurance Co.* (2003-2004) 30 Wm Mitchell L Rev 1001, at 1016-1017.

⁴⁷ *Ibid* at 797.

⁴⁸ *Ibid* at 797.

⁴⁹ *Ibid* at 799.

⁵⁰ *Ibid* at 798-799.

⁵¹ *Ibid* at 800. A different conclusion was reached in *Dahl v Turner* 459 P2d 816 (NM Ct App 1969). See Nowlin, Don’t Just Stand There, Help Me!: Broadening

4.24 The Commission notes that some states use neither the term “accident” nor “emergency,” referring instead to the characteristics of the imperilled person, thereby implying an emergency situation. Delaware,⁵² for instance, protects acts of assistance given “to a person who is unconscious, ill, injured or in need of rescue assistance, or any person in obvious physical distress or discomfort.” Minnesota provides immunity to the Good Samaritan where he or she renders assistance knowing “another person is exposed to or has suffered grave physical harm”.⁵³ In *Swenson v Waseca Mutual Ins. Co*⁵⁴ the Court found that the Good Samaritan statute did not require the injured person to be in “grave physical harm” before assistance could be rendered.⁵⁵

4.25 Other States have chosen to specify the locations where Good Samaritan immunity will not apply. In Florida, the Good Samaritan statute provides that the statutory immunity applies to assistance “at the scene of an emergency outside of a hospital, doctor’s office, or other place having proper medical equipment.”⁵⁶ Similarly, the legislators in Maine provided that the Good Samaritan immunity shall not apply if the first aid or emergency treatment or assistance is rendered on the premises of a hospital or clinic.⁵⁷

4.26 Nowlin notes that the legislatures in the United States have attempted to reduce ambiguity by defining the terms “emergency” and “accident.”⁵⁸ The Californian statute defines the scene of an emergency as including, “but not limited to, the emergency rooms of hospitals in the event of a medical disaster.”⁵⁹ The Minnesota legislature considers the scene of an emergency to be “an area outside the confines of a hospital or other institution that has hospital facilities or an office of a person licensed to practice one or

the Effects if Minnesota’s Good Samaritan Immunity Through *Swenson v. Waseca Mutual Insurance Co.* (2003-2004) 30 Wm Mitchell L Rev 1001, at 1025.

⁵² Del Code Ann tit. 16 § 6801 (a).

⁵³ Minn. Stat. 604A.01, subd. 2(b).

⁵⁴ 653 NW2d 764 (Minn Ct App 2002).

⁵⁵ *Ibid* at 796.

⁵⁶ Fla Stat Ann § 768.13(2)(a).

⁵⁷ Me Rev Stat Ann tit. 14, § 164.

⁵⁸ Nowlin, Don’t Just Stand There, Help Me!: Broadening the Effects if Minnesota’s Good Samaritan Immunity Through *Swenson v Waseca Mutual Insurance Co.* (2003-2004) 30 Wm Mitchell L Rev 1001.

⁵⁹ Cal. Bus. & Prof. Code 2395.

more of the healing arts.”⁶⁰ The Good Samaritan statute in Utah is broader and defines emergency as “an unexpected occurrence involving injury, threat of injury, or illness to a person or the public.”⁶¹

4.27 In *Buck v Greyhound Lines Inc*⁶² the Nevada Supreme Court denied the defendant’s claim to Good Samaritan immunity as the plaintiffs were uninjured at the time he offered assistance.⁶³ The Court read the statute as applying only to those who render emergency care to injured persons.⁶⁴ The defendant in *Buck* was driving his truck at night when he came upon a car which had broken down in the middle of the highway.⁶⁵ He offered to assist the women in the car by alerting other drivers to their presence with his headlights. The driver of an approaching bus did not realise the women’s car was in the middle of the road. The bus struck the car and injured the occupants. The court denied the defendant’s claim of Good Samaritan immunity because the women were uninjured at the time he offered assistance.⁶⁶

4.28 The Commission notes that this may be contrasted with cases such as *McDowell v Gillie*,⁶⁷ where immunity was granted to those who merely asked whether assistance was needed. In that case, the court considered the broad statutory definition of “aid or assistance”, finding that it meant “any actions which the aider reasonably believed were required to prevent [injury to the victim].”⁶⁸ In *Flynn v United States*⁶⁹ immunity was granted where a person who merely turned on safety lights at the scene of an emergency. However, in *Howell v City Towing Associates Inc.*⁷⁰, a call for help did not satisfy the

⁶⁰ Minn. Stat. 604A.01, subd. 2(b).

⁶¹ Utah Code Ann. 78-11-22(1).

⁶² (783 P2d 437) Nev 1989 at 441.

⁶³ See Nowlin, Don’t Just Stand There, Help Me!: Broadening the Effects of Minnesota’s Good Samaritan Immunity Through *Swenson v. Waseca Mutual Insurance Co.* (2003-2004) 30 Wm Mitchell L Rev 1001, at 1026.

⁶⁴ Nev. Rev. Stat. 41.500.

⁶⁵ *Buck v. Greyhound Lines Inc* (783 P2d 437) Nev 1989 at 441.

⁶⁶ *Ibid* at 441.

⁶⁷ 626 N.W.2d 666 (N.D. 2001).

⁶⁸ 626 N.W.2d 666 at 671 quoting the North Dakota Statutes, N.D. Cent Code § 32.03-1.01(1) (2001).

⁶⁹ 902 F.2d 1524 (10th Cir. 1990).

⁷⁰ 717 SW2d 729 (Tex Ct App 1986).

requirement of rendering emergency care.⁷¹ The defendant was giving the elderly plaintiff a lift home after the she had been involved in a car accident, when she went into cardiac arrest. It was held that the defendant, who had called his dispatcher who in turn contacted emergency personnel, was not entitled to Good Samaritan protection. Nowlin notes that the court may have decided differently had the driver contacted medical personnel directly.⁷²

4.29 Some statutes make it a precondition for immunity to apply that the assistance be rendered without a fee or expectation of such a fee. The Alabama statute, for instance, states that assistance must be rendered gratuitously and in good faith,⁷³ while the Colorado statute stipulates that the assistance must be rendered without compensation.⁷⁴ The statutes in Hawaii and Minnesota have gone a little further. In Hawaii services must be rendered without remuneration or expectation of remuneration⁷⁵ and in Minnesota services must be rendered without compensation or expectation of compensation.⁷⁶

4.30 When it comes to the standard of care, the Commission observes that the statutes generally define the standard of care that is expected of the Good Samaritan.⁷⁷ Some statutes grant a blanket-immunity to volunteers from liability for any acts or omissions when rendering assistance.⁷⁸ Others, such as those in Arkansas⁷⁹ and Florida,⁸⁰ do no more than codify the common law position as regards the standard of care, by requiring the individual to act as a reasonable and prudent person would. The Commission notes, however, that

⁷¹ 717 SW2d 729 at 732.

⁷² Nowlin Don't Just Stand There, Help Me!: Broadening the Effects if Minnesota's Good Samaritan Immunity Through *Swenson v. Waseca Mutual Insurance Co.* (2003-2004) 30 Wm Mitchell L Rev 1001, at 1026.

⁷³ Ala. Code 6-5-332.

⁷⁴ Colo. Rev. Stat. 13-21-108.

⁷⁵ Haw. Rev. Stat. 663-1.5.

⁷⁶ Minn. Stat. 604A.01, subd. 2(b).

⁷⁷ See Veilleux Annotation, Construction and Application of "Good Samaritan" Statutes, 68 A.L.R. 4th 294 for an analysis of the statutes in this regard.

⁷⁸ Ga Code Ann § 51-1-29; Mass Gen Laws Ann ch. 112 § 12B; W.Va Code Ann § 55-7-15 (2003).

⁷⁹ Ark Code Ann § 17-95-101.

⁸⁰ Fla Stat Ann § 768.13(2)(a).

most statutes grant immunity for acts of ordinary negligence⁸¹ while excluding acts of gross negligence or wilful or wanton misconduct.⁸²

4.31 The Rhode Island⁸³ case of *Boccasile et al v Cajun Music Ltd*⁸⁴ illustrates the effect of a Good Samaritan statute. The deceased was attending a music festival and suffered a severe allergic reaction. The defendants were a doctor, a nurse and a physician's assistant, who had volunteered as first aiders at the music festival. The doctor and other members of the first-aid crew attended Mr. Boccasile while the nurse remained at the first-aid tent. As Mr. Boccasile could not be moved, the doctor stayed with him while the crew returned to the first-aid tent to retrieve a single-dose adrenaline injector and to ring an ambulance. After the doctor administered the drug to him, Mr. Boccasile complained that he felt worse. As there was no other injector the doctor tried to administer a second dose, at which point Mr. Boccasile fell unconscious. The doctor began mouth-to-mouth resuscitation, while the physician's assistant administered chest compressions. An ambulance arrived and the physician's assistant accompanied Mr. Boccasile to the hospital. Mr. Boccasile never regained consciousness and the defendants were sued for his death. The plaintiff asserted that when the defendants responded to the emergency, they failed to bring along the necessary equipment and to administer the medication in a timely manner. In their defence, the defendants claimed that they were protected by the Rhode Island Good Samaritan legislation, which set a gross negligence test for liability. While the court appears to have agreed with the defendants, the Commission notes that the determinative factor of the case was the fact that the plaintiff had failed to submit sufficient evidence as to the appropriate standard of care.

(c) Australia

4.32 The Commission notes that recent Australian governments have undertaken major reforms in the area of tort and, in particular, the law of negligence. Most of the parliaments of the different States and territories have introduced provisions designed to modify the law of negligence as it applies to both Good Samaritans and volunteers. The Commission examines, in this section, the legislative provisions relating to Good Samaritans. As with the

⁸¹ Conn Gen Stat Ann § 52-557B (2007).

⁸² Del Code Ann tit. 16 § 6801(a); Ind Code Ann § 34-30-12-1 (b).

⁸³ R.I. Gen. Laws 9-1-27.1.

⁸⁴ 694 A2d 686, 1997 RI Lexis 153 (SC Rhode Island). The Commission notes that this case may be equally applied to voluntary rescuers and possibly voluntary service providers.

statutes in the United States, while there are similarities in the texts there are also important differences.

4.33 In New South Wales the *Civil Liability Act 2002* provides extensive protection for Good Samaritans. Any person who acts as a Good Samaritan will not incur personal civil liability for their acts or omissions provided that certain conditions are met.⁸⁵ Such conditions stipulate that there must be “an emergency;” the Good Samaritan must be assisting “a person who is apparently injured or at risk of being injured,”⁸⁶ and the Good Samaritan must be acting “in good faith” and “without expectation of payment or other reward”.⁸⁷ Therefore, it is clear that the Act does not limit protection to Good Samaritans who are, for example, medically trained, but neither does it limit the protection to medical interventions or interventions made at the scene of an accident. Although it is not explicitly stated, it is likely that protection would also be afforded to persons giving advice.

4.34 The protection afforded by the Act does not apply, however, if the Good Samaritan has caused the injury in the first place, either intentionally or negligently. For example, where the driver of a motor vehicle runs over a pedestrian, the driver cannot rely on the section for protection when they provide first aid to the person they have injured.⁸⁸ Furthermore, a Good Samaritan cannot rely on the section where he or she was intoxicated or where he or she fraudulently impersonated a professional rescuer.⁸⁹ Section 57(2) of the Act provides that the section does not affect the vicarious liability of any other person for the acts or omissions of the Good Samaritan.

4.35 The Queensland legislation applicable to Good Samaritans, which was originally enacted as the *Voluntary Aid in Emergency Act 1973* and subsequently as the *Law Reform (Miscellaneous Provisions) Act 1995* is one of the oldest pieces of legislation in this regard. Its operation is limited to doctors and nurses⁹⁰ rendering medical care, aid or assistance to an injured person in

⁸⁵ Section 57.

⁸⁶ Section 57.

⁸⁷ Section 56.

⁸⁸ Eburn, “Protecting Volunteers?” (2003) 18 *Australian Journal of Emergency Management* 7, at 8.

⁸⁹ Section 58 of the 2002 Act provides that impersonating a health care or emergency services worker or a police officer or falsely represent that they have skills or expertise in connection with the rendering of emergency assistance.

⁹⁰ Or such other persons as may be prescribed by regulation.

circumstances of emergency.⁹¹ It appears, therefore, to afford the most limited protection to Good Samaritans. For the protection to apply, a doctor or nurse must be rendering assistance at or near the scene of the incident or other occurrence constituting the emergency. Alternatively, he or she must be providing assistance to an injured person while that person is being transported from the scene of the emergency to a hospital or other “adequate medical care.” Persons availing of the protection must act in good faith and without gross negligence, without “fee or reward” or expectation of receiving such a “fee or reward.”⁹² In section 15 of the Act, the term “injured person” is defined as including a person suffering or apparently suffering from an illness. The Commission notes, however, that the *Civil Liability (Good Samaritan) Amendment Bill 2007* proposes to protect passers-by and witnesses to accidents, who offer assistance in good faith, without reward or expectation of reward.

4.36 In Western Australia, section 5AD of the *Civil Liability Act 2002* protects any person rendering emergency assistance to a person who appears to be in need of such assistance, at the scene of an emergency, in good faith and without recklessness or expectation of payment or other consideration. Section 5AB defines “emergency assistance” as emergency medical assistance or any other form of assistance to a person whose life or safety is endangered in a situation of emergency. In addition, the Act provides that a medically qualified person who gives advice, in good faith and without recklessness and without expectation of payment or other consideration, about the assistance being given is also protected under the Act. The protections provided for in the Act do not apply if the Good Samaritan was intoxicated. Similarly to New South Wales, the Act provides that the provisions in section 5AD do not affect the vicarious liability of any person for the acts or omissions or advice of the Good Samaritan, whether he or she is medically qualified.

4.37 In South Australia, the *Wrongs Act 1936*, now the *Civil Liability Act 1936*, protects any person who acts “in good faith and without recklessness” and without expectation of payment or other consideration, who comes to the aid of another who is in need or appears to be in need of emergency assistance.⁹³ Emergency assistance is defined as medical assistance or any other form of assistance to a person whose life or safety is endangered in a situation of emergency.⁹⁴ The Commission observes, therefore, that damage to

⁹¹ The word emergency is not defined in the Queensland Act.

⁹² Eburn *Protecting Volunteers?* The Australian Journal of Emergency Management, Vol 18 No 4 November 2003 7-11 at 7.

⁹³ Section 74.

⁹⁴ Section 74(1).

property is not included. To the extent that the word “emergency” appears in both subsections of the definition, the definition of “emergency assistance” is not entirely helpful.⁹⁵ Eburn attempts to clarify the situation by defining “emergency” as any “major accident or illness that is life threatening and requires urgent treatment.”⁹⁶ It is not clear, however, whether a less drastic situation could also be termed an “emergency.” Injury is not defined in the Act. Finally, the Commission notes that the Act replicates the New South Wales provisions regarding medically qualified persons who give advice.⁹⁷

4.38 The *Wrongs (Liability and Damages for Personal Injuries) Amendment Act 2002* aims to broaden the protection afforded to Good Samaritans and volunteers.⁹⁸ Section 38(1) of the Act defines “emergency assistance” as “emergency medical assistance; or any other form of assistance to a person whose life or safety is endangered in a situation of emergency.” Furthermore, a “Good Samaritan” is defined as any “person who, acting without expectation of payment or other consideration, comes to the aid of a person who is apparently in need of emergency assistance” or a “medically qualified person.”

4.39 In Victoria, amendments to the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* provide similar protections to doctors and nurses providing assistance in the event of an emergency. However, it goes further than the Queensland legislation by including any Good Samaritan who goes to the aid of another person in an emergency or accident, provided that they too have acted in good faith, and without reward. The *Wrongs Act 1958*, on the other hand, is similar to the legislation in South Australia. Some key differences include the provision which states that *any* person, not just a “medically qualified person”, may rely on the giving of “advice” to benefit from the immunity.⁹⁹ While the Act stipulates that the Good Samaritan must act in good faith, there is also no requirement that the action be “without recklessness.”¹⁰⁰ Unlike New South Wales, the Good Samaritan can rely on the legislation even if he or she is responsible for having created the emergency or

⁹⁵ Section 74(1)(a) and (b).

⁹⁶ Eburn, *Emergency Law 2nd* ed. (Sydney: Federation Press; 2005) pp.45-48.

⁹⁷ Section 74 protects any medically qualified person who gives advice, via telephone or other communication device, without expectation of reward.

⁹⁸ Received assent on 12 September 2002: includes the protection of both Good Samaritans and volunteers.

⁹⁹ Section 31B(2).

¹⁰⁰ Section 31B(2).

accident.¹⁰¹ The term “Good Samaritan” is defined as an individual who provides assistance, advice or care to another person in relation to an emergency or accident. The person to whom, or in relation to whom, the assistance, advice or care is provided must be at risk of death or injury, be injured, or be apparently at risk of death or injury, or be apparently injured.¹⁰² “Injury” is defined in the Act as personal or bodily injury and includes pre-natal injury, psychological or psychiatric injury, disease and aggravation, acceleration or recurrence of an injury or disease.

4.40 The most recently enacted legislation on Good Samaritans is in Tasmania. The *Civil Liability (Amendment) Act 2008*¹⁰³ amends the *Civil Liability Act 2002* by inserting a new Part 8A in relation to Good Samaritans. Protection is afforded against civil liability of any kind.¹⁰⁴ A “Good Samaritan” is defined as an individual who provides assistance, advice or care to another person in relation to an emergency or accident and acts in good faith and without recklessness.¹⁰⁵ Protection is provided where he or she provides assistance advice or care “in good faith and without recklessness”. Again the Good Samaritan cannot expect to receive any money or other financial reward¹⁰⁶ and the person whom the Good Samaritan is helping must be ill, at risk of death or injury, injured, apparently ill, apparently at risk of death or injury or apparently injured.¹⁰⁷ The 2008 Act also stipulates that the Good Samaritan must act “at the scene of the emergency or accident.” However, a Good Samaritan can also provide advice by telephone or other means of communication to a person at the scene of the emergency or accident. Like Victoria, the Good Samaritan can rely on the protection even if he or she is responsible for having caused the accident or emergency. The protection does not apply if the person was intoxicated and he or she must exercise reasonable care and skill. Protection is also excluded for anyone who was impersonating a health care or emergency services worker or a police officer or who otherwise falsely represents that he or she has skills or expertise in connection with the rendering of emergency assistance.

¹⁰¹ Section 31B(3).

¹⁰² Section 31B(1)(b).

¹⁰³ Act No. 39 of 2008.

¹⁰⁴ Section 35A(1) of the *Civil Liability Act 2002*, as inserted by the 2008 Act.

¹⁰⁵ Section 35B (1) of the 2002 Act, as inserted by the 2008 Act.

¹⁰⁶ Section 35B(1)(A).

¹⁰⁷ Section 35B(1)(b).

4.41 In the Australian Capital Territory, under the *Civil Law (Wrongs) Act 2002*, Good Samaritans – and volunteers - are protected from civil liability where they have rendered assistance or have given advice about the assistance honestly and without recklessness and without expectation of payment or other consideration to a person who is injured or at risk of being injured or to a person in need of emergency medical assistance. A person who is intoxicated cannot avail of the protection under the Act or where the liability falls within the ambit of a scheme of compulsory third-party motor vehicle insurance. Under the 2002 Act, only medically qualified persons can avail of the protection as regards giving advice about the treatment of the person.

4.42 One important point to note about the legislation of Western Australia and New South Wales is that, going further than the Queensland or Victoria legislation, they specifically remove personal protection for Good Samaritans with or without medical qualifications, should their ability to apply reasonable care and skill be significantly impaired by reason of alcohol or other substance that is not prescribed.

(d) Canada

4.43 Most of the Canadian provinces have enacted some form of Good Samaritan legislation. Prince Edward Island provides the broadest protection in Canada under the *Volunteers Liability Act 1988*.¹⁰⁸ The Commission observes that it seeks to protect both Good Samaritans and volunteers, including volunteer fire fighters. A “volunteer” is defined as “any individual, not in receipt of fees, wages or salary”, who renders services or assistance in respect of a person who is ill, injured or unconscious as a result of an accident or other emergency, or in respect of real or personal property in danger. The individual is protected regardless of whether he or she has special training to render the service or assistance and whether the service or assistance is rendered by the individual alone or in conjunction with others. Services or assistance can be rendered at any place. Protection is not afforded, however to those whose conduct constitutes gross negligence.

4.44 The provisions of the *Volunteer Services Act (Good Samaritan) 1989* in Nova Scotia are virtually identical to those of the Prince Edward Island Act.¹⁰⁹ A “volunteer” includes an individual, corporation or organisation that donates or distributes, for free, food or sundries to those in need. Section 4A of the Act provides that a volunteer is not generally liable for damages incurred as a result of injury, illness, disease or death resulting from the consumption of food or the use of sundries by a person in need. This is so unless the injury, illness,

¹⁰⁸ Available at <http://www.gov.pe.ca/law/statutes/pdf/v-05.pdf>

¹⁰⁹ Available at <http://www.gov.ns.ca/legislature/legc/statutes/volnteer.htm>

disease or death was caused by the gross negligence or the wilful misconduct of the volunteer or the volunteer knew that the food or sundries were contaminated or otherwise unfit for human consumption or use at the time of donation or distribution, respectively.

4.45 Saskatchewan provides for a more limited form of protection in the form of the *Emergency Medical Aid Act 1979*.¹¹⁰ It protects two categories of person. It protects physicians and registered nurses who render emergency medical services or first aid, voluntarily and without expectation of reward, outside a hospital or other place having adequate medical facilities and equipment. It also protects any person who voluntarily renders first aid assistance at the immediate scene of the accident or emergency. Services must be rendered in respect of a person who is ill, injured or unconscious as a result of an accident or other emergency. The threshold for liability is set at gross negligence. While protection is afforded to Good Samaritans, regardless of whether they have medical qualifications, protection is limited to interventions which are of a medical nature.

4.46 In Alberta the *Emergency Medical Aid Act 2000* extends protection to any “registered health discipline member” in addition to physicians and registered nurses.¹¹¹ The standard applied is again that of gross negligence and the provisions are similar to those in the Saskatchewan and Newfoundland Acts.

4.47 In British Columbia the *Good Samaritan Act 1996*¹¹² provides narrower protection than Prince Edward Island and Nova Scotia. The Act provides protection to any person rendering emergency medical services or aid to an ill, injured or unconscious person at the immediate scene of the accident or emergency, unless that person is employed expressly for that purpose or intervenes “with a view to gain”. The Commission notes that it is unclear whether the use of the term “aid” in this context refers to first aid in particular or assistance in general. The Commission notes that protection extends only so far as the conduct of the person in question does not constitute gross negligence.

4.48 In Manitoba the *Medical Act* provides some protection for Good Samaritans.¹¹³ While the Act restricts the practice of medicine to those who have medical qualifications, it permits any person to give “necessary medical or

¹¹⁰ Available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/E8.pdf>

¹¹¹ Available at <http://www.qp.gov.ab.ca/Documents/acts/E07.CFM>

¹¹² Available at http://www.qp.gov.bc.ca/statreg/stat/G/96172_01.htm

¹¹³ Available at <http://web2.gov.mb.ca/laws/statutes/ccsm/m090e.php>

surgical aid in case of urgent need if that aid is given without hire, gain or hope of reward.” The Commission notes that there is no provision in the Act, however, dealing with the consequences for negligent acts or omissions.

4.49 In Ontario the *Good Samaritan Act 2001* extends protection to “health care professionals” who provide emergency health care services or first aid assistance to a person who is ill, injured or unconscious as a result of an accident or other emergency. The Act stipulates that the health care professional must not provide the services or assistance at a hospital or other place having appropriate health care facilities and equipment for that purpose. The Act also protects any other person who provides emergency first aid assistance to a person who is ill, injured or unconscious as a result of an accident or other emergency, if the individual provides the assistance at the immediate scene of the accident or emergency. Furthermore, the Act provides for reasonable reimbursement of expenses reasonably incurred.

4.50 The duty to assist a stranger in need under the *Quebec Civil Code* and the *Quebec Charter of Human Rights and Freedoms 1975* has been discussed in Chapter 2. However, the Québec Civil Code also provides, under article 1471, protection for the Good Samaritan. Article 1471 states that:

“Where a person comes to the assistance of another person or, for an unselfish motive, disposes, free of charge, of property for the benefit of another person, he is exempt from all liability for injury that may result from it, unless the injury is due to his intentional or gross fault.”¹¹⁴

The Commission interprets this as meaning that the Good Samaritan who assists the injured person is immune from civil liability provided he or she is not guilty of intentional or gross fault.

D Detailed elements of the proposed legislation

4.51 Based on the comparative analysis in Part C, the Commission now turns to the detailed elements of the legislation it recommends concerning the civil liability of Good Samaritans and volunteers.

(1) Single piece of legislation for Good Samaritans and Volunteers

(a) Consultation Paper Recommendation

4.52 In the Consultation Paper the Commission provisionally recommended that a single piece of legislation be enacted to deal with Good Samaritans, voluntary rescuers and voluntary service providers, taking into

¹¹⁴ Québec Civil Code 1991, c. 64, a. 1471 (civil code of Quebec, S.Q., 1991, c.64, Book Five: Obligations: Title One: 1471).

account the general policy setting of encouraging active citizenship and volunteerism in Ireland.¹¹⁵ To the extent that the Private Member Bill, the *Good Samaritan Bill 2005*, which formed the backdrop to the Attorney General's request to the Commission, dealt only with Good Samaritans and volunteers who are engaged in certain types of activity, the Commission also expressed its preference for a legislative approach that was more inclusive.

(b) Discussion

4.53 The Commission acknowledges that, for the most part, the policy behind both Good Samaritan and volunteer statutes is to encourage those without a pre-existing duty to assist another.¹¹⁶ In this regard, the Commission refers to the policy background discussed in Chapter 1 which is concerned with promoting active citizenship and volunteering in Ireland and considers, therefore, the rationale for enacting such legislation to be in line with the experience of other jurisdictions. While some jurisdictions have enacted separate pieces of legislation to deal with Good Samaritans, on the one hand, and volunteers, on the other, the Commission notes that a Good Samaritan may be seen as a species of volunteer. In this regard, the Commission considers that the Good Samaritan "volunteers" to help in circumstances of emergency or accident. The Commission has, therefore, concluded that a single piece of legislation dealing with both Good Samaritans and volunteers would be appropriate. The Commission observes that this approach was supported by the majority of submissions received during the consultation process after the publication of the Consultation Paper. The Commission, therefore, recommends the enactment of a single piece of legislation that deals with the civil liability of both Good Samaritans and volunteers.

4.54 In the Consultation Paper, the Commission noted that the term "Good Samaritan legislation" is often used to describe legislation that relates to both Good Samaritans and volunteers. The submissions, however, indicate that a more descriptive title would ensure that volunteers understand that the proposed legislation is also relevant to the activities which they undertake. The Commission is of the view, therefore, that it would be more appropriate to refer to its proposed draft legislation as the *Civil Liability (Good Samaritans and Volunteers) Bill*.

4.55 *The Commission recommends the enactment of a single piece of legislation that deals with the civil liability of both Good Samaritans and volunteers.*

¹¹⁵ LRC CP 47-2007 at 4.47.

¹¹⁶ Veilleux, Annotation, Construction and Application of "Good Samaritan" Statutes, 68 A.L.R. 4th 294.

(2) General scope of legislation

4.56 In the Consultation Paper,¹¹⁷ the Commission concluded that it would be inappropriate for any legislation to set down strict circumstantial paradigms in which the intervention must be undertaken. The Commission provisionally recommended, in this regard, that the proposed legislation should accommodate the following: the range of individuals that may constitute Good Samaritans and volunteers; the various types of intervention that might be made; and the different situations in which those interventions might take place.¹¹⁸

4.57 Submissions received by the Commission in the consultation period after the publication of the Consultation Paper agreed with the Commission's provisional recommendation, noting the importance of protecting as wide a class of persons, situations and conduct as possible. The Commission observes that this is in line with the policy background which it has considered in Chapter 1 and, therefore, confirms the recommendation made in the Consultation Paper in this respect.

4.58 *The Commission recommends that the proposed legislation should accommodate: the range of individuals that may constitute Good Samaritans and volunteers; the various types of intervention that might be made; and the different situations in which those interventions might take place.*

(3) Protected Person

4.59 As the Commission pointed out in the Consultation Paper, any legislation must be broad enough to cover the wide range of individuals who may be classified as either a Good Samaritan or a volunteer.¹¹⁹

4.60 While many jurisdictions have limited the application of their Good Samaritan and volunteer protection statutes to narrow categories of person, the Commission is of the view that a more inclusive approach would be appropriate in this jurisdiction. Recalling the policy background discussed in Chapter 1, the Commission notes that a narrow definition of who or what might constitute a Good Samaritan or volunteer would be incompatible with the concept of "active citizenship." In this regard, the Commission recalls that the term "active citizen" may be used to describe both individuals and organisations. Furthermore, an individual active citizen may be further categorised as a formal or informal volunteer. Drawing from the examination of the protections available in other jurisdictions, the Commission notes that in most cases these apply to

¹¹⁷ LRC CP 47-2007 at paragraph 4.50-4.51.

¹¹⁸ LRC CP 47-2007 at paragraph 4.51

¹¹⁹ LRC CP 47-2007 at paragraph 4.47

individuals alone and not organisations. In addition, a distinction between formal and informal volunteers is rarely, if ever, made.

4.61 The Commission recommends, therefore, that while the legislation proposed should be broad enough to cover both individuals and organisations, it should draw a clear line between individuals and organisations, reflecting the very different circumstances encountered by each. In this regard, the Commission recalls the discussion in Chapter 3 which illustrated the varying degrees to which individual Good Samaritans and volunteers and voluntary organisations might come under a duty of care. The Commission observed that, taking into account the need to ensure that members of the public maintain a right to seek redress, it may be less just and reasonable to hold an individual accountable for ordinary negligence than a voluntary organisation. In support of this, the Commission points to the extent to which voluntary organisations not only create risk but also the extent to which they are in a position to absorb such risk. Given the organisational structure of a voluntary organisation and the duties that this of itself entails – which already includes statutory duties as employer such as those under the *Safety, Health and Welfare at Work Act 2005*, it is clear that an organisation is in a much stronger position to alleviate the risk not only to itself and its volunteers, but also to those it assists. If the public's right to seek redress is to be acknowledged, it is better that liability should apply to the voluntary organisation rather than the individual volunteer. The Commission therefore recommends that the legislation should distinguish between, on the one hand, the liability of individuals, and, on the other, the liability of organisations. The Commission notes that the definition of “undertaking” in the *Safety, Health and Welfare at Work Act 2005* includes both corporate and unincorporated entities, as well as for-profit and not-for-profit entities. The Commission considers that this definition, limited to not-for-profit entities, would be an appropriate legislative model to use to define the scope of the organisations to which its recommendations should apply.¹²⁰

4.62 *The Commission recommends that the proposed legislation should distinguish between, on the one hand, the liability of individuals, and, on the other, the liability of organisations, whether unincorporated or incorporated, which are not formed for profit.*

(4) Protected Conduct

4.63 The Commission notes that some jurisdictions limit the application of their Good Samaritan legislation to certain species of conduct, such as interventions of a medical nature or the provision of first aid assistance. For example, protection under the Oklahoma statute is available only for acts of artificial respiration, restoration of breathing, preventing blood loss, or restoring

¹²⁰ On the benefits of incorporation, see Part B, above.

heart action or circulation of blood.¹²¹ The Commission observes that limitations also exist in respect of the activities covered by volunteer protection legislation.

4.64 Since it is intended that the proposed legislation should cover the activities of Good Samaritans, volunteers and voluntary organisations, the Commission notes that it will be necessary to ensure that no voluntary activity that is for the benefit of society or the community in general is excluded from its remit. Again recalling the policy setting outlined in Chapter 1, the Commission notes that to take a more restrictive approach would be incompatible with the broad concept of “active citizenship” which encompasses a wide variety of socially benevolent activities. In addition, to place limits on the types of activity covered by the legislation might have the inadvertent effect of limiting the range of individuals who may avail of its protection.

4.65 The Commission considers the most wide-ranging legislative approach is to state that protection is available to those who render “any assistance, advice or care.” The Commission underlines in this respect the importance of ensuring that all activities are covered, whether they are the front-line activities undertaken by Good Samaritans or the more removed activities undertaken by those volunteering in the offices of a voluntary organisation. Given that the Commission has noted in Chapter 1 of the importance of providing first-aid and the associated use of automated external defibrillators (AEDs) in the context of cardiac sudden death, however, the Commission has concluded that it would be appropriate to include these activities in the definition of “assistance, advice or care.” Subject to these points, the Commission recommends that the proposed legislation should avoid making qualifications regarding the type of activity covered, other than to stipulate that it must be for the benefit of society or the community in general. In this respect, while the precise scope of this should not be defined, Commission considers that it would also be useful to indicate that the activities contemplated are comparable to those encompassed in the definition of charitable activities in section 3(11) of the *Charities Act 2009*.

4.66 In summary, therefore, the Commission recommends that the proposed legislation should apply to conduct that involves those who render any assistance, advice or care, including first-aid and the use of automated external defibrillators (AEDs). The Commission also recommends that the proposed legislation should apply to activities that are for the benefit of the community, including charitable activities within the meaning of section 3(11) of the *Charities Act 2009*.

4.67 *The Commission recommends that the proposed legislation should apply to conduct that involves those who render any assistance, advice or care,*

¹²¹ Okla. Stat. tit. 76, 5(a)(2).

including first-aid and the use of automated external defibrillators (AEDs). The Commission also recommends that the proposed legislation should apply to activities that are for the benefit of the community, including charitable activities within the meaning of section 3(11) of the Charities Act 2009.

(5) Protected Situations

4.68 Some States have defined the types of situation in which the Good Samaritan assistance or services must be provided for the statutory protection to operate. For instance, some statutes stipulate that the assistance must be rendered at the scene of an “accident.” The rationale for this would appear to be to ensure that only that assistance which is provided in the heat of battle is protected. Clearly, where the urgency of the situation demands immediate response, there is less time to prepare and resource oneself and there is more chance that a mistake will be made. The Commission notes, however, that setting strict conditions as to the circumstances in which the assistance or services must be rendered often necessitates the making of arbitrary distinctions between those interventions which merit immunity and those which do not on the basis of whether they fit a particular situational paradigm. As a result, a Good Samaritan who renders first aid (such as CPR) or uses an automated external defibrillator (AED) at the roadside might be protected while the Good Samaritan who drives the injured person to hospital may not.

4.69 Other statutes have taken a more expansive approach by stipulating that the assistance or services must be rendered at the scene of the accident or “emergency.” As discussed by the Commission in the Consultation Paper and noted by Nowlin,¹²² the term “emergency” appears to be broader than the term “accident.” In particular, the term emergency might be used to describe events which did not evolve from accidents but nonetheless require immediate intervention or situations which are detached from the immediate scene of the accident, such as where the injured person is being transported to a health care facility. The Commission notes, therefore, that including the term “emergency” in the proposed legislation would maintain a balance between ensuring that only those interventions made in the “heat of battle” are protected while taking care not to exclude unnecessarily other types of worthy intervention. The Commission emphasises, however, that this qualification only applies in respect of Good Samaritan interventions. The assistance and services of volunteers, either voluntary rescuers or voluntary service providers, and voluntary organisations, on the other hand, may be rendered in any type of situation. The Commission proposes to use the relevant terms used to described situations of

¹²² LRC CP 47-2007, paragraph 1.35 and Nowlin, “Don’t Just Stand There, Help Me!: Broadening Minnesota’s Good Samaritan Immunity through *Swenson v Waseca Mutual Insurance Co.*” 30 Wm Mitchell Law Rev 1001.

emergency contains in section 11 of the *Safety, Health and Welfare at Work Act 2005*, which concerns situations of emergency and serious and imminent danger.¹²³

4.70 In summary, therefore, the Commission recommends that the proposed legislation should apply where assistance, advice or care (including first aid and the use of defibrillators) is given by a Good Samaritan in the event of an accident or situation of emergency and serious and imminent danger. The Commission also recommends that the proposed legislation should apply where assistance, advice or care (including first aid and the use of defibrillators) is given by a volunteer in any setting.

4.71 The Commission recommends that the proposed legislation should apply where assistance, advice or care (including first aid and the use of defibrillators) is given by a Good Samaritan in the event of an accident or situation of emergency and serious and imminent danger. The Commission also recommends that the proposed legislation should apply where assistance, advice or care (including first aid and the use of defibrillators) is given by a volunteer in any setting.

(6) Good Faith

4.72 The Commission notes that many Good Samaritan statutes require that the volunteer act “in good faith” in order to be eligible for immunity.¹²⁴

4.73 Courts have encountered much difficulty in interpreting this term.¹²⁵ Henry has argued that what is meant by “good faith” in statutory immunities depends on the statutory provision under consideration and the circumstances of the case.¹²⁶ He asserts that 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. The

¹²³ Section 11 of the 2005 Act derives from the requirements of the EC “Framework” Directive on safety and health at work, 89/391/EEC.

¹²⁴ Ala Code s-6-5-332 states “gratuitously and in good faith”.

¹²⁵ *Central Estates (Belgravia) Ltd. v. Woolgar* [1971] 3 All ER 647 at 650.

¹²⁶ Henry, ‘Statutory immunities: when is good faith honest ineptitude?’ (2000) *Australian Journal of Emergency Management*, Spring, p.10. Loh “Legal risks of volunteer firefighters – how real are they?” (2008) *Australian Journal of Emergency Management*, May. See *Bankstown City Council v. Alamo Holdings Pty Limited* [2005] HCA 46.

Commission considers that the issue of good faith might come to bear when analysing the standard of care applicable to the individual.

4.74 Henry notes that numerous cases demonstrate a subjective approach to assessing good faith.¹²⁷ He argues that 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. Henry points out that this is consistent with the approach taken in California where it was said, in relation to the Good Samaritan statute in that state, 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.”¹²⁸ 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.”¹²⁹ It would appear, therefore, that a person who is providing emergency assistance acts in good faith whenever their honest intention is to assist the person concerned. More recently, the Federal Court of Australia has emphasised the notion of honesty, although this is said to require more than honest competence. In *Mid Density Developments Pty Ltd v Rockdale Municipal Council*,¹³⁰ the court considered that “good faith”

“... in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest; albeit careless... Abstinance from inquiry which amounts to a wilful shutting of the eyes may be a circumstance from which dishonesty may be inferred ... On the other hand, ‘good faith’ may require the exercise of caution and diligence to be expected of an honest person of ordinary prudence.”¹³¹

4.75 In the Commission’s view, this means that the court will consider what a person’s state of mind actually was, as well as how a reasonable person with the same level of experience and expertise would have conducted themselves in the same circumstances, in determining whether the act or omission was done in good faith. In this regard, Loh notes that, whatever the

¹²⁷ Henry, ‘Statutory immunities: when is good faith honest ineptitude?’ (2000) *Australian Journal of Emergency Management*, Spring, p.10, 11.

¹²⁸ *Lowry v Mayo Newhall Hospital* 64 ALR 4th 1191, 1196 (Cal 1986).

¹²⁹ *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105, 115.

¹³⁰ (1993) 116 ALR 460.

¹³¹ *Ibid* at 468.

precise definition of “good faith”, it is generally accepted that what is required of “good faith” is no different nor less than what is required in common law for liability, as outlined in Chapter 3, to behave as a reasonable person would.¹³² The Commission agrees with this view.

4.76 In these circumstances, the Commission considers that there is no need for the proposed legislation to set out that the assistance or other activities must be done in “good faith” as this is already dealt with by setting out the standard of care applicable to the Good Samaritan or volunteer.

(7) *Voluntarily and without reasonable Expectation of Compensation, Payment or Reward*

4.77 The Commission observes that terms such as “gratuitously”, “without compensation or expectation of compensation” and “without remuneration or expectation of remuneration” appear regularly in the statutes of other jurisdictions. The implication is that the individual seeking protection under the particular statute must not have received anything for his or her assistance or services. Furthermore he or she must not have engaged in the conduct with the expectation of receiving any benefit. Professionals such as professional rescuers, ambulance officers and medical teams who are acting in their professional capacity are, thereby, excluded from the ambit of the statute. Taking into account that the proposed legislation is to encourage persons who would not otherwise be bound to do so to intervene, and that a professional is reimbursed for any risk that he or she assumes, the Commission considers that this approach is also appropriate in Ireland.

4.78 The Commission notes that the term “voluntarily” is also evident in many of the statutes abroad. The term “voluntarily” would seem to exclude those acts performed in consequence of contractual obligations, statutory duties or perhaps even special relationships. As the purpose of the proposed legislation is to encourage people who are not otherwise obliged to act, the Commission considers that it need not and should not apply to persons who already have a legal obligation to act. A person who acts, when legally obliged to do so, is not acting voluntarily and, therefore, should not be protected by this sort of legislation.¹³³ In particular, the Commission notes that a person acting in the course of employment may not accurately be described as acting voluntarily. As opposed to acting freely, such a person acts because he or she is contract-bound to do so. Consequently, it is only fair that such a person should fall outside the remit of a statute intended to protect those who volunteer

¹³² Loh “Legal risks of volunteer firefighters – how real are they?” The Australian Journal of Emergency Management, Vol 23 2 May 2008.

¹³³ See *Velazquez v Jiminez*, 798 A.2d 51, 64 (NJ, 2000).

their services. To ensure that the definition includes important activities that are organised by State bodies, the Commission has also concluded that volunteer activity should also include those who are volunteer members of the civil defence, within the meaning of the *Civil Defence Act 2002*. The 2002 Act established the Civil Defence Board, and which plays a significant role in the organisation of the State's national emergency plans.¹³⁴ The Commission recommends, therefore, that the proposed legislation include the requirement that individuals act "voluntarily and without expectation of payment or other reward," including volunteer members of the civil defence, within the meaning of the *Civil Defence Act 2002*.

4.79 *The Commission recommends that the proposed legislation include the requirement that individuals act "voluntarily and without expectation of payment or other reward," including volunteer members of the civil defence, within the meaning of the Civil Defence Act 2002.*

(8) Standard of care for individuals: gross negligence

4.80 An important question addressed by Good Samaritan legislation in other States is whether it is appropriate to apply the ordinary standard of care in negligence to a person who, in the absence of a legal duty, decides to intervene to assist another. While some jurisdictions answer in the affirmative, the vast majority provide immunity from liability to such persons, except where there is evidence of gross negligence.

4.81 In respect of individual Good Samaritans and volunteers, the Commission considers that the imposition of a gross negligence test succeeds in striking a balance between the policy of encouraging altruistic behaviour with the public's right to seek redress. With regard to encouraging altruistic behaviour, the leniency of the gross negligence test may be understood as a reward for good behaviour. Furthermore, it militates against the deterrent effect that the fear of litigation may cause. The Commission is of the view that this is an appropriate approach regarding Good Samaritans and individual volunteers, whether formal or informal, taking into account the benefits that flow from their activities and the sacrifices that they have made, from their own pocket and time, in conferring them. The application of the ordinary negligence test, on the other hand, would be to impose too heavy a burden that would threaten the continuation of such benevolent activities.

¹³⁴ See the *Framework for Major Emergency Management* (2006), PRN A6/1509, September 2006. The Framework was developed jointly by three Government Departments: Environment, Heritage and Local Government; Health and Children; and Justice Equality and Law Reform. It is also available on the websites of the three Departments. See Byrne, *Safety, Health and Welfare at Work Law in Ireland* 2nd ed (Nifast, 2008), p.548.

4.82 In the Consultation Paper¹³⁵ the Commission provisionally recommended that the gross negligence test set out by the Court of Criminal Appeal in *The People (Attorney General) v Dunleavy*¹³⁶ was an appropriate template for the proposed legislation. In that case, it was decided that, in the context of gross negligence manslaughter, gross negligence is to be determined by the degree of departure from the expected standard and that the test is objective. The individual need not, therefore, be actually aware that he or she had taken an unjustifiable risk. The task of distinguishing whether the departure from the expected standard of care constitutes ordinary negligence or gross negligence is for the court. In the Commission's *Report on Homicide: Murder and Involuntary Manslaughter*¹³⁷ the key elements of the *Dunleavy* test of gross negligence, with a variation to take account of the capacity of the individual to advert to risk or to attain the expected standard, were set out:

- a) The individual was, by ordinary standards, negligent;
- b) The negligence caused the death of the victim;
- c) The negligence was of a very high degree;
- d) The negligence involved a high degree of risk or likelihood of substantial personal injury to others; and
- e) The accused was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence.

4.83 The Commission notes that the *Dunleavy* case involved the application of the criminal standard of gross negligence. As has been pointed out, however, it is suitable to apply that concept in the civil context of the tort of negligence where it is clear that it is being used to describe a high degree of careless conduct which, although not intended, was something which ought to have been foreseen.¹³⁸ Subject to the required changes to apply the test in the context of civil liability in negligence, therefore, the Commission confirms the thrust of the approach taken in the Consultation Paper.

4.84 The Commission therefore recommends that the proposed legislation should introduce a gross negligence threshold in respect of the activities undertaken by individual Good Samaritans and volunteers. The Commission also recommends that the test for gross negligence should be that:

¹³⁵ LRC CP 47-2007 at paragraph 4.58.

¹³⁶ [1948] IR 95, at 102.

¹³⁷ LRC 87-2008, at paragraph 5.69.

¹³⁸ See *Charlesworth & Percy on Negligence* 11th ed (Thomson Sweet & Maxwell, 2006), paragraphs 1.15-1.17.

- a) The individual was, by ordinary standards, negligent;
- b) The negligence caused the injury at issue;
- c) The negligence was of a very high degree;
- d) The negligence involved a high degree of risk or likelihood of substantial personal injury to others; and
- e) The individual was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence.

4.85 *The Commission recommends that the proposed legislation should introduce a gross negligence threshold in respect of the activities undertaken by individual Good Samaritans and volunteers. The Commission also recommends that the test for gross negligence should be that:*

- a) *The individual was, by ordinary standards, negligent;*
- b) *The negligence caused the injury at issue;*
- c) *The negligence was of a very high degree;*
- d) *The negligence involved a high degree of risk or likelihood of substantial personal injury to others; and*
- e) *The individual was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence.*

(9) Standard of care for organisations

4.86 As was noted in the Consultation Paper,¹³⁹ the Commission draws from the experience of comparable common law jurisdictions in reaching its conclusion that the gross negligence test should not be extended to voluntary organisations. Taking into account the structure of voluntary organisations, the control exercised, the responsibility assumed, the statutory duties to which they are subjected (in particular under legislation such as the *Safety, Health and Welfare at Work Act 2005*) and the various protections available to them, the Commission considers it appropriate that voluntary organisations should be held accountable for ordinary negligence, regardless of whether they are directly or vicariously responsible. The Commission also considers, however, that the proposed legislation must, in some way, acknowledge the significant contribution that voluntary organisations make to society. In this context, therefore, the Commission has also concluded that the proposed legislation should, in addition to requiring volunteer organisations or undertakings to conform to the ordinary standard of reasonable care in negligence, stipulate that account must be taken of the benefits which have accrued to society because of

¹³⁹ LRC CP 47-2007 at paragraph 4.60.

the organisation's work in determining whether it is just and reasonable to impose a duty of care.¹⁴⁰

4.87 *The Commission recommends that the proposed legislation should require volunteer organisations or undertakings to conform to the ordinary standard of reasonable care in negligence. The Commission also recommends that the proposed legislation should provide that account be taken of the benefits which have accrued to society because of the organisation's work in determining whether it is just and reasonable to impose a duty of care.*

(10) Effect on other duties

4.88 To avoid any doubt, the Commission considers that the proposed legislation should provide that the duties proposed should be in place of any common law (judge-made) duties that would otherwise apply to Good Samaritans, volunteers and volunteer organisations or undertakings. This is consistent with the approach taken in, for example, section 2 of the *Occupiers Liability Act 1995* which made clear that the statutory duties contained in the 1995 Act would not create a parallel set of statutory rules with which the pre-1995 common law rules might continue to compete.

4.89 At the same time, the Commission is conscious that the proposed legislation should not override statutory duties that have been put in place by the Oireachtas, including the *Occupiers Liability Act 1995* itself and other legislation, such as the *Safety, Health and Welfare at Work Act 2005* which has already been referred to in this Report.

4.90 On that basis, therefore, the Commission recommends that the proposed legislation should provide that the duties of Good Samaritans, volunteers and volunteer organisations or undertakings contained in it are in place of any common law duties that would otherwise apply, but that the legislation does not affect any civil liability that arises as a result of any other statutory duty or duties.

4.91 *The Commission recommends that the proposed legislation should provide that the duties of Good Samaritans, volunteers and volunteer organisations or undertakings contained in it are in place of any common law*

¹⁴⁰ In *O'Keeffe v Hickey and the Minister for Education and Science* [2008] IESC 72, Supreme Court, 19 December 2008, Hardiman J expressed some concern on the impact of the extension of the principles of vicarious liability to a volunteer organisation, in this case a school. The Commission notes the specific circumstances of that case (which involved child abuse) and considers that its recommendations in this Report, with the proviso that the social utility of the activities involved be taken into account, will avoid any unnecessary burden on volunteer organisations.

duties that would otherwise apply, but that the legislation does not affect any civil liability that arises as a result of any other statutory duty or duties.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

The recommendations contained in this Report may be summarised as follows:

5.01 The Commission recommends that there should be no reform of the law to impose a duty on citizens in general, or any particular group of citizens, to intervene for the purpose of assisting an injured person or a person who is at risk of such an injury. [Paragraph 2.82]

5.02 The Commission recommends that there should not be reform of the law to impose a duty to carry out an “easy rescue.” [Paragraph 2.89]

5.03 The Commission recommends that the legal duty of care of Good Samaritans, voluntary rescuers and voluntary service providers should be set out in legislation. The Commission also recommends that the legislation should take account of the high social utility of Good Samaritan acts and volunteering activities, particularly in light of the increased awareness of sudden cardiac death and the use of Automated External Defibrillators (AEDs). [Paragraph 3.107]

5.04 The Commission recommends the enactment of a single piece of legislation that deals with the civil liability of both Good Samaritans and volunteers. [Paragraph 4.56]

5.05 The Commission recommends that the proposed legislation should accommodate: the range of individuals that may constitute Good Samaritans and volunteers; the various types of intervention that might be made; and the different situations in which those interventions might take place. [Paragraph 4.58]

5.06 The Commission recommends that the proposed legislation should distinguish between, on the one hand, the liability of individuals, and, on the other, the liability of organisations, whether unincorporated or incorporated, which are not formed for profit. [Paragraph 4.62]

5.07 The Commission recommends that the proposed legislation should apply to conduct that involves those who render any assistance, advice or care, including first-aid and the use of automated external defibrillators (AEDs). The Commission also recommends that the proposed legislation should apply to activities that are for the benefit of the community, including charitable activities within the meaning of section 3(11) of the *Charities Act 2009*. [Paragraph 4.67]

5.08 The Commission recommends that the proposed legislation should apply where assistance, advice or care (including first aid and the use of

defibrillators) is given by a Good Samaritan in the event of an accident or situation of emergency and serious and imminent danger. The Commission also recommends that the proposed legislation should apply where assistance, advice or care (including first aid and the use of defibrillators) is given by a volunteer in any setting. [Paragraph 4.71]

5.09 The Commission recommends that the proposed legislation include the requirement that individuals act “voluntarily and without expectation of payment or other reward,” including volunteer members of the civil defence, within the meaning of the *Civil Defence Act 2002*. [Paragraph 4.79]

5.10 The Commission recommends that the proposed legislation should introduce a gross negligence threshold in respect of the activities undertaken by individual Good Samaritans and volunteers. The Commission also recommends that the test for gross negligence should be that:

- a) The individual was, by ordinary standards, negligent;
- b) The negligence caused the injury at issue;
- c) The negligence was of a very high degree;
- d) The negligence involved a high degree of risk or likelihood of substantial personal injury to others; and
- e) The individual was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence. [Paragraph 4.85]

5.11 The Commission recommends that the proposed legislation should require volunteer organisations or undertakings to conform to the ordinary standard of reasonable care in negligence. The Commission also recommends that the proposed legislation should provide that account be taken of the benefits which have accrued to society because of the organisation’s work in determining whether it is just and reasonable to impose a duty of care. [Paragraph 4.87]

5.12 The Commission recommends that the proposed legislation should provide that the duties of Good Samaritans, volunteers and volunteer organisations or undertakings contained in it are in place of any common law duties that would otherwise apply, but that the legislation does not affect any civil liability that arises as a result of any other statutory duty or duties. [Paragraph 4.91]

**APPENDIX DRAFT CIVIL LIABILITY (GOOD SAMARITANS AND
VOLUNTEERS) BILL 2009**

ACTS REFERRED TO

Charities Act 2009
Civil Defence Act 2002

2009, No.6
2002, No.16

DRAFT CIVIL LIABILITY (GOOD SAMARITANS AND VOLUNTEERS) BILL 2009

ARRANGEMENT OF SECTIONS

1. Short title and commencement
2. Definitions
3. Civil liability of good samaritans
4. Civil liability of volunteers
5. Civil liability of volunteer undertakings
6. Effect on common law and statutory duties

DRAFT CIVIL LIABILITY (GOOD SAMARITANS AND VOLUNTEERS) BILL 2009

BILL

Entitled

AN ACT TO PROVIDE FOR THE EXTENT OF THE CIVIL LIABILITY OF GOOD SAMARITANS, VOLUNTEERS AND VOLUNTEER UNDERTAKINGS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.—(1) This Act may be cited as the Civil Liability (Good Samaritans and Volunteers) Act 2009.

(2) This Act comes into operation on such day or days as the Minister for Justice, Equality and Law Reform may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Definitions

2.—In this Act, unless the context otherwise requires—

“assistance, advice or care” includes administering first-aid and, or alternatively, using an automated external defibrillator,

“damage” includes death of or personal injury to any person;

“gross negligence” means—

- (a) The individual was, by ordinary standards, negligent,
- (b) The negligence caused the injury at issue,
- (c) The negligence was of a very high degree,
- (d) The negligence involved a high degree of risk or likelihood of substantial personal injury to others, and

- (e) The individual was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence;

“personal injury” includes any injury or illness;

“purpose that is of benefit to the community” includes the instances referred to in section 3(11) of the Charities Act 2009;

“volunteer undertaking” means an unincorporated or incorporated body formed for the purpose of giving assistance, advice or care to individuals and that is of benefit to the community and is not formed for profit.

Explanatory note

This section implements the recommendations in paragraphs 4.62 (definition of “volunteer undertaking”), 4.67 (definitions of “assistance, advice or care” and “purpose that is of benefit to the community”) and 4.85 (definition of “gross negligence”).

Civil liability of good samaritans

3.—(1) A good samaritan shall not be held liable in any civil proceedings for damage caused to another person in the circumstances referred to in *subsection (2)*, unless the damage is caused by the gross negligence of the good samaritan.

(2) The circumstances are that the good samaritan provides assistance, advice or care to another person who has been injured in an accident or in an emergency or other circumstance of serious and imminent danger.

(3) In this section and Act a “good samaritan” is an individual who provides assistance, advice or care in the circumstances referred to in *subsection (2)* without any expectation of payment or other financial reward.

Explanatory note

This section implements the recommendations in paragraphs 4.71 (scope of application to Good Samaritans), 4.79 (no expectation of payment) and 4.85 (“gross negligence” test).

Civil liability of volunteers

4.—(1) A volunteer shall not be held liable in any civil proceedings for damage caused to another person in the circumstances referred to in *subsection (2)*, unless the damage is caused by the gross negligence of the volunteer.

- (2) The circumstances are that the volunteer—
- (a) agrees to provide his or her services with a view to giving assistance, advice or care to another person, and
 - (b) does so for a purpose that is of benefit to the community.

(3) In this section and Act a “volunteer” is an individual who, without any expectation of payment or other financial reward, agrees to provide assistance, advice or care in the circumstances referred to in *subsection (2)*, and includes an individual who does so under the auspices of a volunteer undertaking (including as a volunteer member of the civil defence within the meaning of the Civil Defence Act 2002).

Explanatory note

This section implements the recommendations in paragraphs 4.71 (scope of application to volunteers), 4.79 (no expectation of payment, and inclusion of civil defence volunteer) and 4.85 (“gross negligence” test).

Civil liability of volunteer undertakings

5.—(1) Subject to *subsection (4)*, a volunteer undertaking is liable in civil proceedings for damage caused to a natural person in the circumstances referred to in *subsection (2)* where the damage is caused by the failure of the volunteer undertaking to take such care as is reasonable to expect.

- (2) The circumstances are that the volunteer undertaking—
- (a) is engaged in activities that involve giving assistance, advice or care to individuals, and
 - (b) is for a purpose that is of benefit to the community.

(3) Notwithstanding *section 4*, a volunteer undertaking is liable for the negligence of a volunteer.

(4) A volunteer undertaking shall not be held liable in civil proceedings under this section where, having regard to the benefit to the community of its activities, it would not be just and reasonable to impose liability.

Explanatory note

This section implements the recommendations in paragraph 4.87 (scope of liability of volunteer undertaking).

Effect on common law and statutory duties

6.—(1) Subject to *subsection (3)*, any duty or liability provided for by this Act is in place of any common law duty or liability that applied to a good samaritan, a volunteer or a volunteer undertaking prior to the coming into force of this Act.

(2) This Act does not apply to a cause of action which accrued before the commencement of this Act.

(3) Nothing in this Act shall be construed as affecting any civil liability that arises as a result of any statutory duty or duties (other than the duties in this Act).

Explanatory note

This section implements the recommendations in paragraph 4.91 (application to other duties).



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide of legislative changes.

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