



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Consultation Paper

**CIVIL LIABILITY OF GOOD SAMARITANS
AND VOLUNTEERS**

(LRC CP 47 - 2007)

IRELAND

**The Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 84 Reports containing proposals for reform of the law; eleven Working Papers; 46 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie.

The *Statute Law Restatement Act 2002* provides for the administrative consolidation of legislation, certified by the Attorney General. At the Attorney's request, and following a Government decision in May 2006, the Commission agreed to take over responsibility for this function from the Office of the Attorney General.

Subsequently, in December 2006 the Commission agreed to the Attorney General's additional request for the Commission to assume responsibility in 2007 for the maintenance of the Chronological Tables of the Statutes.

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

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Ward v McMaster	[1988] IR 337	IRL
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INTRODUCTION

A Request by the Attorney General

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

- 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.
- 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.

B The Good Samaritan Bill 2005

2. The request arises against the immediate background of a Private Members Bill, the *Good Samaritan Bill 2005*, which was debated in Dáil Éireann on 6th and 7th December 2005. Section 2 of the 2005 Bill proposed to 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 damages were caused by the gross negligence of the person.

3. The 2005 Bill appears to be modelled on similar Good Samaritan Statutes enacted, for example, in the US and Canada, 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. While the 2005 Bill did not progress past Second Stage in Dáil Éireann, the Commission discusses the content of the Bill here for the purposes of comparison and contrast with the Attorney General's request.

C Outline of this Consultation Paper

4. Chapter 1 sets out the general policy setting in which the Attorney General's request was received and the *Good Samaritan Bill 2005* was drafted. The chapter discusses how the Attorney General's request and the *Good Samaritan Bill 2005* may be compared and contrasted. The chapter examines in detail the categories of person referred to in the Attorney General's request – Good Samaritans, voluntary rescuers, voluntary service providers, citizens and members of an Garda Síochána or the Defence Forces (when not engaged in duties in the course of their employment). The chapter also examines the concept of “benefit to society” and the extent to which it may already be recognised at common law.

5. Chapter 2 discusses the concept of a positive duty to intervene. The chapter examines the extent to which the common law and the civil law recognise a positive duty to intervene. In this regard, the chapter refers to a number of duties which are imposed by statute in Ireland. The chapter discusses whether it would be appropriate to amend the law in Ireland to provide for a positive duty to intervene in the context of rescue or voluntarism in general.

6. Chapter 3 examines the current common law duty of care as applied to Good Samaritans and volunteers. The chapter explores the application of the current law to different scenarios, and in particular examines whether a duty of care is more likely to arise where the intervention of the Good Samaritan or volunteer is more invasive or at a high level of professionalism or training. This chapter also examines the issues raised in relation to the standard of care to be applied to Good Samaritans and volunteers.

7. Chapter 4 examines the extent to which it may be appropriate to apply a gross negligence test to Good Samaritans and volunteers. The chapter refers to the approach taken by other common law jurisdictions and by comparison, civil law jurisdictions.

8. Chapter 5 contains a summary of the Commission's provisional recommendations for reform.

9. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations made are provisional in nature. Following further consideration of the issues and consultation with interested parties, the Commission will make its final recommendations. Submissions on the provisional recommendations contained in this Consultation Paper are most welcome. In order that the Commission's final Report may be made available as soon as possible, those who wish to do so are requested to send their submissions in writing by post to the Commission or by email to info@lawreform.ie by 31 March 2008.

CHAPTER 1 BACKGROUND

A Introduction

1.01 The request from the Attorney General requires the Commission to examine the legal duty of care of Good Samaritans and volunteers against the general background of its policy setting. This is clear from the immediate context from which the request emerged, namely, the debate in Dáil Éireann of the *Good Samaritan Bill 2005*. That debate posed the question of whether the legal duty of care needed to be changed in order to underpin the clearly desirable goal that Good Samaritans should not be discouraged from helping strangers who are in danger and that volunteers should, likewise, not be discouraged from taking part in activities of benefit to the community. The *2007 Report of the Taskforce on Active Citizenship* indicates that there are many initiatives which are required to encourage active participation in community and society activities, and the Attorney General's request deals with a narrow aspect of this wider debate.¹ Nonetheless, that wider setting forms an important part of the analysis of the legal duty of care.

1.02 In this Chapter, the Commission examines this policy setting. In Part B, the Commission investigates the policy considerations at both the national and international level. In Part C, the Commission discusses the extent to which the Attorney General's request may be compared with the *Good Samaritan Bill 2005*. In Part D, the Commission examines the categories of person specified by the Attorney General's request. In Part E, the Commission explores the meaning of the concept of "benefit to society".

B Background

(1) National Setting

1.03 The Commission notes that the *Good Samaritan Bill 2005* and the Attorney General's request arose against immediate concerns about the phenomenon of sudden cardiac death syndrome. In 2004, the Department of Health announced the appointment of a National Task Force on Sudden

¹ *2007 Report of the Taskforce on Active Citizenship*. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%Report%20to%Government%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%Report%20to%Government%20(Mar%2007).pdf).

Cardiac Death Syndrome. The report of the Task Force, entitled *Reducing the Risk: A Strategic Approach*, was published in 2006.²

1.04 The Report emphasises the importance of timely responses in order to improve the survival rate of those succumbing to cardiac arrest. The Report recommends the roll out of a training programme for healthcare professionals, occupational first-aiders and members of the public, in cardiopulmonary resuscitation (CPR), basic life support (BLS) and operation of automated external defibrillators (AEDs).³ Crucially, the Report highlights the need to clarify the legal position of those responding to emergency situations:

“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,⁴ the Task Force recommends that the legal situation should be reviewed to protect rescuers from any possible litigation.”⁵

The Report can be seen against the background of other Reports which have examined the legal and policy framework concerning the activities of volunteers.

1.05 In 2000, the Government published a *White Paper on Supporting Voluntary Activity*. It is noted in the White Paper 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.”⁶

² Department of Health, Report of the Taskforce on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006.

Available at http://www.dohc.ie/publications/sudden_cardiac_death.html.

³ Department of Health, Report of the Taskforce on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006 at 92-96. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

⁴ Craven “Civil Liability and Pre-hospital Emergency Care” (February 2004) *PHECC Voice*.

⁵ Department of Health, Report of the Taskforce on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006 at 104-105. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

⁶ Department for Social, Community and Family Affairs *White Paper on a Framework for Supporting Voluntary Activity and for Developing the Relationship between the*

1.06 In 2002, the National Committee on Volunteering (NCV) published *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland*. While the Report commends the work of individual organisations in developing policies and procedures, it notes 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.⁷

1.07 In 2005, the European Volunteering Centre (EVC) published a *Country Report on the Legal Status of Volunteers in Ireland*, in conjunction with the Association of Voluntary Service Organisations (AVSO). The EVC observes that while there are policies to support the development of volunteerism, there is no legislation specific to volunteers in Ireland. In particular, the Country Report remarks upon the absence of legislative norms relating to the reimbursement of out-of-pocket expenses and the insurance of volunteers while “on the job”. In this regard, the Country Report refers to the recommendation of Volunteering Ireland that organisations should draft volunteer policies stating, amongst other things, that volunteers are insured against risks of illness, accident and third party liability.⁸

(2) International Setting

1.08 The Commission notes that “volunteering” is not just a question of domestic proportions. As an item on the international agenda, there is increasing recognition of the role volunteering has to play in the fulfilment of international obligations.

1.09 In particular, the Commission notes the importance that the UN General Assembly has attributed to volunteerism,⁹ recognising the responsibility of governments to develop strategies and programmes to

State and the Community and Voluntary Sector 2000 at 13. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁷ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁸ Association of Voluntary Service Organisations & Centre Européen du Volontariat *Country Report on the Legal Status of Volunteers in Ireland* 2005 at 5. Available at www.cev.be/Legal%20Status%20Ireland%202005.pdf.

⁹ UN General Assembly *Resolution 52/17* proclaimed 2001 the International Year of Volunteers. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N98/760/39/PDF/N9876039.pdf?OpenElement>.

support volunteering at a national level.¹⁰ Furthermore, the General Assembly underlines the value of volunteerism in many different fields such as those covered by the Millennium Development Goals.¹¹

(3) Summary

1.10 Drawing from these sources, the Commission notes the importance of volunteerism, nationally and internationally. The Commission also acknowledges the suggestion made by various bodies, including the Task Force on Active Citizenship, that relevant legislation may be of some value in this respect.

1.11 In Part C the Commission examines the scope of the proposed *Good Samaritan Bill 2005* and analyses the extent to which its provisions coincide with those of the Attorney General's request.

C Comparison between the *Good Samaritan Bill 2005* and the Attorney General's Request

(1) Civil Liability in Tort

1.12 The language used in both the *Good Samaritan Bill 2005* and the Attorney General's request is the language of civil liability in tort. While the *Good Samaritan Bill 2005* deals solely with the question of whether a Good Samaritan may be found liable for his or her negligence,¹² the Attorney's request looks at this and whether a duty may be imposed on all persons to act as a Good Samaritan.

(2) Who is Covered?

1.13 The Commission notes that the *Good Samaritan Bill 2005* was intended to protect any person other than a health care professional acting in the course of his or her employment, so long as that person has provided first aid assistance at the immediate scene of the accident or emergency, voluntarily and without expectation of compensation or reward.¹³ Assuming that the term "person" is not intended to include legal persons, such as

¹⁰ UN General Assembly outcome 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. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/601/84/PDF/N0060184.pdf?OpenElement>.

¹¹ UN General Assembly *Resolution 52/17* at 3. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N98/760/39/PDF/N9876039.pdf?OpenElement>.

¹² Dáil Debates, Official Report – Unrevised, Vol 611, No 4, Tuesday 6th December 2005, Second Stage, Mr Timmins, page 1139.

¹³ See Section 2(1)(a)-(c).

companies or other incorporated entities (such as State bodies), the 2005 Bill would have limited its protection to individual Good Samaritans.¹⁴

1.14 The Commission observes that the purpose behind the Attorney General's request is different. First, the request asks the Commission to examine the duty of care and the standard of care of: (a) Good Samaritans, (b) voluntary rescuers and (c) voluntary service providers. Second, the request asks the Commission to examine whether a positive duty to rescue may be imposed on all citizens, members of the caring professions, the Garda Síochána and the Defence Forces (when not engaged in duties in the course of their employment).

1.15 On this basis, the Attorney's request may apply to both individuals and organisations. While the "Good Samaritan" tends to be an individual providing a spontaneous response, the "voluntary rescuer" will normally be a member of a rescue organisation providing a structured response. The Commission also notes that a "voluntary service provider" is just as likely to be an organisation as it is to be an individual. This may be contrasted with the final paragraph of the request, which refers to "citizens" and "members", which clearly relates to individuals rather than organisations.

(3) *What Activity is Covered?*

1.16 The *Good Samaritan Bill 2005* intended to provide protection to those providing "emergency first aid assistance"¹⁵ and thus appears to anticipate activities of a medical nature alone.¹⁶ In addition, the use of the term "emergency" in the 2005 Bill may exclude medical intervention of a less than urgent nature. Since first aid assistance is, by its very nature, reactive rather than pre-emptive, any actions undertaken to prevent an illness, injury or lapse into unconsciousness might have been excluded from the intended protection in the 2005 Bill.

1.17 By contrast with the 2005 Bill, the Attorney General's request is not limited to any particular type of activity. In respect of Good Samaritans, for instance, the request refers to "assistance" and "help" rendered to an "injured person". While this does not necessarily mean the assistance or help must be of a medical nature, it does seem to preclude any pre-emptive action that would prevent injury. In respect of voluntary rescuers, the activities most commonly undertaken would probably fall within the range of what might be described as a "rescue operation". These may include, but

¹⁴ See Section 2(1).

¹⁵ See Section 2(1)(a).

¹⁶ Dáil Debates, Official Report – Unrevised, Vol 611, No 4, Tuesday 6th December 2005, Second Stage, Mr McDowell, at 1158.

are not limited to, “emergency first aid assistance”. Furthermore, such activities may be either pre-emptive or reactive in nature, although it is debatable as to whether pre-emptive action may accurately be described as “rescue”. In relation to voluntary service providers, “voluntary services” may encompass an infinite range of activities, so long as such activities are for the “benefit of society”. The final paragraph of the Attorney’s request refers to “assisting an injured person or a person who is at risk of such an injury”. The term “assist” may refer to a wide range of activities. Furthermore, since the recipient of the assistance may be injured or simply at risk of such an injury, the assistance may be either reactive or pre-emptive.

1.18 In jurisdictions where Good Samaritan statutes are already in use, there has been much discussion as to which activities are actually protected. Invariably, the courts have directed their scrutiny to the terminology used by the legislators in the given statute. In this regard, the courts have frequently been required to interpret the meaning of the term “assistance” or “render assistance”.

1.19 For instance, in *Johnson v Thompson Motors of Wykoff Inc*¹⁷ 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.¹⁸ In *Buck v Greyhound Lines Inc*,¹⁹ the Nevada Supreme Court denied the defendant’s claim to Good Samaritan immunity as the plaintiffs were uninjured at the time he offered assistance.²⁰

1.20 In *Howell v City Towing Associates Inc*,²¹ a call for help did not satisfy the requirement of rendering emergency care. However, it was noted that the outcome might have been different had the call been made directly to medical personnel rather than via the dispatcher.²²

¹⁷ (No C1-99-666 2000 WL 136076) Minn Ct App 2 Feb 2000.

¹⁸ Nowlin “Don’t Just Stand There, Help Me!: Broadening the Effect of Minnesota’s Good Samaritan Immunity Through *Swenson v Waseca Mutual Insurance Co.*” (2003-2004) 30 Wm Mitchell L Rev 1001, at 1014.

¹⁹ (783 P2d 437) Nev 1989.

²⁰ Nowlin “Don’t Just Stand There, Help Me!: Broadening the Effect of Minnesota’s Good Samaritan Immunity through *Swenson v Waseca Mutual Insurance Co.*” (2003-2004) 30 Wm Mitchell Law Rev 1001, at 1026.

²¹ 717 SW2d 729 (Tex Ct App 1986).

²² Nowlin “Don’t Just Stand There, Help Me!: Broadening the Effect of Minnesota’s Good Samaritan Immunity through *Swenson v Waseca Mutual Insurance Co.*” (2003-2004) 30 Wm Mitchell Law Rev 1001, at 1026.

1.21 In *McDowell v Gillie*²³ the court had to determine whether the act of stopping and inquiring if assistance was required could constitute rendering aid or assistance under the Good Samaritan Act.²⁴ The court consulted 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].” Consequently, the court concluded that the act of stopping and inquiring could constitute the rendering of aid and assistance”.²⁵

(4) The Recipient of the Service

1.22 The *Good Samaritan Bill 2005* envisaged the recipient of the voluntary service as “a person who is ill, injured or unconscious.”²⁶

1.23 The scope of the Attorney General’s request appears to be broader in this respect. For the most part, the request refers to “third parties” as the recipients of the voluntary service. The use of such a neutral term prevents the situation from being further qualified by reference to the person to whom the service is being rendered. Furthermore, the term “third party” may also imply that there is no prior relationship, contractual or otherwise, between the service provider and the recipient.

1.24 In respect of Good Samaritans, however, the term “third party” is used in conjunction with in the request with the term “injured person”. Consequently, an individual may not be considered a Good Samaritan unless he or she is assisting an injured person, as opposed to a person who is merely in need of assistance.

1.25 The recipient of the voluntary service contemplated by the final paragraph of the Attorney’s request is not a third party but “an injured person or a person who is at risk of such an injury.” As such, the recipient may equally be a person who is injured or a person who is in danger of becoming injured in the case of intervention by members of the caring professions and members of an Garda Síochána or the Defence Forces.

(5) Injury

1.26 As was mentioned above, the *Good Samaritan Bill 2005* referred to those who are “ill, injured or unconscious.”²⁷ While it may be readily

²³ 626 NW2d 666.

²⁴ Nowlin “Don’t Just Stand There, Help Me!: Broadening the Effect of Minnesota’s Good Samaritan Immunity through *Swenson v Waseca*” (2003-2004) 30 Wm Mitchell Law Rev 1001, at 1023.

²⁵ The same conclusion was reached in *Flynn v United States* 902 F2d 1524 (10th Cir 1990).

²⁶ See section 2(1)(a).

²⁷ See section 2(1)(a).

apparent that a person is unconscious, it may not be so easy to determine whether a person is ill or injured. Furthermore, while it might be presumed that an unconscious person requires emergency first aid assistance, the same might not be presumed in relation to a person who is “ill” or “injured.”

1.27 For instance, the term “illness” may be used to describe a condition affecting an individual’s physical or mental health. Its symptoms, if any, may be visible for all to see or apparent only to a select few. The “illness” may be a pre-existing condition, over which control is being exercised or over which control has been lost. Likewise, the “illness” may be a singular occurrence or an incident marking the beginning of a persistent condition.

1.28 The term “injury” is equally unrestricted. In legal terms, an “injury” may be of a physical (injury to a person or property), mental or economic nature. As only injuries of a physical nature could require emergency first aid assistance, it may be presumed that these were the type of injuries contemplated by the 2005 Bill.

1.29 The *Good Samaritan Bill 2005* did not set a gravity threshold in respect of the “illness” or “injury”. To do otherwise would require laypersons to determine the severity of a victim’s injury or illness before offering assistance. In any case, it is possible that a less serious injury or illness, left untreated, may become more serious.²⁸ The absence of a gravity threshold would appear to be a fairly common characteristic of Good Samaritan Statutes.²⁹

1.30 In respect of the Attorney General’s request, the paragraph dealing with Good Samaritans refers specifically to an “injured person”. This is in contrast to the *Good Samaritan Bill 2005*, which appeared to limit the type of injury to those types requiring emergency first aid assistance. Consequently, it is possible that “injury”, in the context of the Attorney’s request, may refer to physical, mental or economic injury to a person or property.

1.31 In respect of voluntary rescuers and voluntary service providers, the Attorney’s request does not limit the examination of liability to instances

²⁸ 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, at 1017-1018.

²⁹ For instance, in *Swenson v Waseca Mutual Ins Co* 653 NW2d 794 (Minn Ct App 2002) the Court found that the Good Samaritan statute did not require the injured person to be in “grave physical harm”. 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, at 1015-1016.

in which the individual is “ill, injured or unconscious”. In this respect, a general examination is required.

1.32 As was noted above, the final paragraph of the Attorney’s request refers to an “injured person or a person who is at risk of such an injury”. This may, therefore, involve actual or potential injury. Where the injury can be described as potential, it is not clear whether the volunteer must consider the likelihood of injury actually eventuating before rendering assistance.

1.33 It must be noted that the legal treatment of any situation may need to take into account whether an illness, injury or lapse into unconsciousness is self-induced or the result of some outside force, such as a third party or natural circumstances.

(6) Circumstances: Accident or Emergency

1.34 The *Good Samaritan Bill 2005* contemplated situations of “accident or other emergency”. Phrased in this way, it would seem that an “accident” is to be interpreted as a type of “emergency”. To understand why this might be so, it is useful to compare how the terms are defined in a general sense and how they are defined in a legal sense.

1.35 According to the *New Oxford English Dictionary*, an accident is “an unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury.”³⁰ In contrast, an emergency is “a serious, unexpected and often dangerous situation requiring immediate action.”³¹ Common to both definitions is the element of surprise or unexpectedness. However, an “emergency” is not limited to “unintentional” incidents. Furthermore, an “emergency” is of a serious nature and requires immediate intervention.

1.36 In those jurisdictions where Good Samaritan statutes already apply, the Commission notes that the need to define such terms has arisen. In *Swenson v Waseca Mutual Ins Co*,³² for instance, the court acknowledged that the term “emergency” had not been defined by statute or case law in the context of the Good Samaritan statute. However, case law broadly defined an “emergency” as “any event or occasional combination of circumstances which calls for immediate action or remedy.”³³

³⁰ *New Oxford English Dictionary*, at 10.

³¹ *New Oxford English Dictionary*, at 603.

³² *Swenson v Waseca Mutual Ins Co* 653 NW2d 794 (Minn Ct App 2002). 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, at 1017-1018.

³³ 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*

1.37 The Attorney General’s request makes no reference to accident or emergency. Therefore, it does not limit the question to situations involving an accident or emergency. Thus, an extremely wide range of situations may fall within its ambit. However, in the context of Good Samaritans, voluntary rescuers, voluntary service providers and intervention to assist an injured person or person at risk of injury, the presence of an accident or emergency might be presumed.

(7) On-site Assistance

1.38 The *Good Samaritan Bill 2005* proposed that the emergency first aid assistance must be provided “at the immediate scene of the accident or emergency”.³⁴ Most often, emergency first aid assistance will be administered at the site of the accident or emergency. However, there may be situations in which it is necessary to render assistance away from the site. Thus, had the term “emergency” been used without the qualification of “immediate scene”, the scenario contemplated might have extended beyond the precise location of the incident. This might be the case where it is necessary to transport the ill, injured or unconscious person to a health care facility. In *Swenson v Waseca Mutual Ins Co*,³⁵ the question arose as to whether transportation was protected under the Good Samaritan Statute. While the court in that case concluded that transportation was protected, a different conclusion was reached in *Dahl v Turner*.³⁶

1.39 The Commission notes that the Attorney General’s request is not site-specific. As a result, it would allow first aid assistance and other assistance to be rendered away from the scene of the incident.

(8) Voluntary

1.40 The *Good Samaritan Bill 2005* refers to those who have “acted voluntarily and without reasonable expectation of compensation or reward.”³⁷ According to the Oxford English Dictionary, the term

Rev 1001, at 1019 – The term “emergency” was analysed in the context of common usage, legal usage and case law.

³⁴ See Section 2(1)(b)

³⁵ 653 NW2d 794 (Minn Ct App 2002). 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 at 1016-1017.

³⁶ 458 P2d 816 (NM Ct App 1969). 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, at 1025.

³⁷ See Section 2(1)(c).

“voluntary” is defined as “done, given or acting of one’s own free will” and “working, done or maintained without payment”.³⁸

1.41 A voluntary act, therefore, is an act performed without compulsion. A person undertakes the activity not because he or she is duty-bound to do so, but simply because he or she wishes to do so. This would seem to exclude those acts performed in consequence of contractual obligations, statutory duties or perhaps even special relationships. In addition, a voluntary act may be an act done gratuitously. Thus, where an individual performs an act without compulsion or reward he or she may be described as voluntarily assuming responsibility. The Commission notes that this may give rise to certain legal obligations.³⁹

1.42 By contrast, the Attorney General’s request refers to those who are engaged in “voluntary” activities in general, such as voluntary rescuers and voluntary service providers. More specifically the request refers to situations involving Good Samaritans and members of particular professions when not compelled by their contracts of employment, for example, the caring professions, the Garda Síochána and the Defence Forces.

(9) Exclusion

1.43 The *Good Samaritan Bill 2005* excluded “health care professionals” acting in the course of their employment from its protection.⁴⁰ The 2005 Bill defined “in the course of employment” as being where the health care professionals were “providing emergency health care services or first aid assistance... having been summoned or called to provide services or assistance for payment or reward.”⁴¹ This echoed another provision of the 2005 Bill, in which “a person other than a health care professional acting in the course of employment” must have “acted voluntarily and without reasonable expectation of compensation or reward.”⁴²

1.44 The Commission observes here 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. In addition, he or she is reimbursed for any risk he or she

³⁸ *New Oxford English Dictionary*, at 2071.

³⁹ *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428, cited in McMahon and Binchy, *Irish Law of Torts* 3rd ed (Butterworths, 2000), at 62. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not. See Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 59.

⁴⁰ See Section 2(1).

⁴¹ See Section 2(2).

⁴² See Section 2(1)(c).

assumes. Consequently, it is only fair that such a person should fall outside the remit of a statute intended to protect those who volunteer their services.

1.45 Where a person acts in the “course of employment”, other routes to redress may be available to the injured party. Aside from the personal liability of the employee, liability may attach to the employer either personally or vicariously. Therefore, the extent to which a volunteer may also be an employee will have significant implications concerning employer’s liability.⁴³ Furthermore, there may be arrangements in place to protect a professional person, such as personal insurance policies, or indemnity schemes such as the Clinical Indemnity Scheme in respect of health care providers.

1.46 During the Dáil Debates on the 2005 Bill, criticism was levelled at the exclusion of health care professionals acting in the course of employment.⁴⁴ It was argued that the 2005 Bill introduced a distinction between professionals on the ambiguous basis of whether they had been “summoned or called to provide services or assistance for payment or reward.” Consequently, a higher standard of care might be expected of a doctor on duty than a doctor off duty, of a doctor treating his or her patient than a doctor treating a stranger, of a paramedic on duty than a doctor off duty, or of a doctor in the public health service than a private consultant. The Commission notes that complications may also arise in situations where off-duty professionals respond in accordance with obligations imposed by a profession, such as the doctor’s Hippocratic Oath to strive to save life, professional ethical guidelines, or Employer Supported Volunteering (ESV) schemes.

1.47 An alternative approach, the Commission notes, would be to omit the phrase relating to actions taken in the course of employment and to provide a stronger definition of the term “Good Samaritan” instead.

1.48 The Attorney General’s request makes use of a similar phrase, referring to members of the caring professions, the Garda Síochána and the Defence Forces who are “not engaged in duties in the course of their employment”.

⁴³ In *Health Board v BC and the Labour Court*, High Court, unreported, 19 January 1994, Costello P noted at page 10 of his judgment that: “... an employer is vicariously liable where the act is committed by his employee within the scope of his employment”, cited in McMahon and Binchy *Irish Law of Torts* 3rd ed (Butterworths 2000) at 1097.

⁴⁴ Dáil Debates, Official Report – Unrevised, Vol 611, No 4, Tuesday 6th December 2005, Second Stage, Mr McDowell, at 1152.

(10) Summary

1.49 In respect of the various elements of the *Good Samaritan Bill 2005* and the Attorney General’s request highlighted above, the Commission notes that the Attorney General’s request contemplates a more wide-ranging scope of application. Without prejudice to the provisional recommendations which the Commission makes in the following chapters of this Consultation Paper, the Commission notes here the value of having legislation that is sufficiently wide-ranging in scope to encompass all organisations and individuals who provide an equally beneficial service. In terms of specific issues, the Commission is inclined to the view that the phrase “engaged in duties in the course of their employment” might be made redundant if a comprehensive definition of the terms “Good Samaritan”, “voluntary rescuer” and “voluntary service provider” were to be included in such a statute.

1.50 In Section D, the Commission now proceeds to discuss in detail the categories of person referred to in the Attorney General’s request.

D Categories of Person specified in the Attorney General’s Request

(1) Good Samaritans

1.51 The phrase “Good Samaritan” is derived from the moral and religious parable of the same name.⁴⁵ The parable, in effect, places a moral demand on all persons to help those who are less well off - it advises us to volunteer to help a person in need. In Chapter 2, the Commission notes this moral rule has no legal standing in most common law states, such as Ireland. Indeed, the leading case on civil liability for negligence, *Donoghue v Stevenson*,⁴⁶ is specifically premised on the view that a person has no legal duty to act to rescue another person in need: there is no legal obligation to be a Good Samaritan. The question addressed, however, in Good Samaritan statutes is as follows: if a person who has no legal duty to help another person does so, should they be under the ordinary legal standard of negligence, or should they be excluded unless, for example, they act grossly negligently?

1.52 Much of the literature dealing with the topic of the “Good Samaritan” uses the term to refer to any person who responds to an emergency or rescue-type situation, especially where that person is not acting in the course of his or her employment. This was echoed in the *Good Samaritan Bill 2005*.

⁴⁵ Gospel of Luke 10.30-37.

⁴⁶ [1932] AC 562.

1.53 The Commission observes that many definitions of the term “Good Samaritan” have been constructed over the years.⁴⁷ Not all of these definitions confine the Good Samaritan to the emergency or rescue-type scenario, using the term “Good Samaritan” to describe a person who renders any type of charitable assistance.⁴⁸ More often than not, however, the definitions emphasise the moral motivation behind the Good Samaritan’s intervention. The Commission notes that the Attorney General’s request provides its own definition, defining the “Good Samaritan” as one who intervenes to assist and help an injured person.

1.54 The Attorney General’s request clearly sets the Good Samaritan apart from voluntary rescuers, voluntary service providers and, possibly, members of certain professions (acting outside the course of employment). In the context of voluntary rescuers and voluntary service providers, this may indicate that a person ordinarily engaged in such activities may never be classified as a “Good Samaritan”. Alternatively, it may simply indicate that a person whose intervention is pursuant to his or her occupation as a voluntary rescuer or voluntary service provider may not be classified as a “Good Samaritan”. Thus, a person ordinarily engaged in voluntary rescue or voluntary service provision may indeed be classified as a “Good Samaritan” where he or she is off-duty. A similar logic may be applied to professionals (acting outside the course of employment).

1.55 If this is so, it is most likely that these distinctions are based on the relative levels of skill and preparation attributed to each category of person - voluntary rescuers, voluntary service providers and members of particular professions. However, there may be situations in which even these individuals may be called upon to act, when they are not prepared or equipped to do so. Thus, the term “Good Samaritan” may be used to describe any person who happens upon an accident or emergency unexpectedly, who is most likely unprepared to deal with the accident or emergency and who may or may not be endowed with an element of specialist skill. The level of skill may be pertinent to the analysis of the appropriate standard of care.

⁴⁷ 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, at 1019. Nowlin describes the Good Samaritan as “...an individual who, out of kindness in his heart, assists others who are downtrodden or injured.”

⁴⁸ *Good Samaritan Bill 2005*, Dáil Debates, Second Stage (Resumed), Wednesday 7th December 2005, Mr Brian Lenihan, page 1476 stated that “The good samaritan or rescuer ...is a person not under a legal duty to do as they do but views himself or herself as being under a moral duty to so behave.”

(2) Voluntary Rescuers

1.56 The Attorney General’s request distinguishes voluntary rescuers from Good Samaritans, voluntary service providers and members of certain professions (acting outside the course of employment).

1.57 By denoting this group as “rescuers”, the Attorney General’s request may be suggesting that there is an element of specialty involved in the activity. Although referring to first responder programmes, the Commission notes the relevance of the characteristics listed in the *2006 Report of the Task Force on Sudden Cardiac Death*.⁴⁹ These characteristics are:

- Trained and equipped first responders;
- Structured response systems based on the planned availability of first responders;
- Effective alerting systems; and
- Defined areas of coverage.

In the context of “rescuers”, the implication is that rescuers operate in a specialised unit, in anticipation of an accident or emergency and are quite prepared to deal with such an event should it arise.

1.58 While there may be some overlap between rescuers and first responders, the definition in the *Report of the Task Force on Sudden Cardiac Death* highlights that these two categories are more different than alike. According to this definition a first responder is:

“A person trained as a minimum in BLS (Basic Life Support) and the use of an AED (Automated External Defibrillator), who attends a potentially life threatening emergency. This response may be by the statutory ambulance service or complementary to it. If complementary, first responders can be linked with the statutory emergency services or they can be independent and stand alone. In any single event the first responder may be an individual who happens to be present or part of a first responder programme. Trained first responders may or may not participate in a first responder programme.”⁵⁰

⁴⁹ Department of Health, Report of the Task Force on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006, at 97. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

⁵⁰ Department of Health, Report of the Task Force on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006, at 97. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

This definition applies only to those people who are trained in some form of first aid and, most likely, to situations requiring first aid assistance. In addition, it contemplates an emergency situation that is “potentially life threatening”. In contrast, not all incidents to which a voluntary rescuer responds will be of such a serious nature. Furthermore, the definition allows for responses made by a statutory ambulance, in other words by people acting in the course of employment. The Commission considers that it is unlikely that the Attorney General’s request intended to include those acting in the course of employment in the definition of “voluntary rescuers”.

1.59 The *Report of the Task Force on Sudden Cardiac Death* identifies seven models of first responder programmes.⁵¹ These are: Emergency Medical Services (EMS) First Responders, General Practitioner (GP) First Responders, Uniformed First Responders (on-duty and off-duty), Community First Responders, Site Specific First Responders, Public Access Defibrillation and Individual/Home First Responders. For the purposes of the Attorney General’s request, these categories appear to be over-inclusive. They cover every person who has attained a certain level of training, whether they are professionals or non-professionals, on-duty or off-duty, members of a specialised response team or non-members. Furthermore, in relation to off-duty first responders, the Task Force Report includes those who are off-duty members of certain professions and those who are members of voluntary rescue organisations.

1.60 The Commission notes the importance which the Task Force Report attached to voluntary organisations. The Task Force recommends that more consideration should be given to the role of voluntary organisations and highlights the importance of developing a closer relationship between the statutory and voluntary sectors.⁵² By way of illustration, the Pre-Hospital Emergency Care Council (PHECC)⁵³ Commission lists, among others, the following groups as “voluntary rescuers”:

- Air Corps

⁵¹ Department of Health, Report of the Task Force on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006, at 98-99. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

⁵² Department of Health, Report of the Task Force on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach* 2006 at 95. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

⁵³ The Pre-Hospital Emergency Care Council (PHECC) is the independent statutory agency with responsibility for establishing standards, education and training for pre-hospital emergency care practitioners. It was established by the *Pre-Hospital Emergency Care Council (Establishment) Order 2000* (SI No.109 of 2000). The material in the text is available at the Council’s website, www.phecc.ie.

- Civil Defence⁵⁴
- Irish Coast Guard
- The Irish Heart Foundation
- Irish Mountain Rescue
- Irish Red Cross
- Irish Society for Immediate Care
- Order of Malta Ambulance Corps
- St John Ambulance Brigade

1.61 A voluntary rescuer will usually be a member of a voluntary rescue organisation, will be trained and equipped to deal with emergencies and rescue-type situations and will have some level of expectation that an emergency or rescue-type situation will arise. Thus, a voluntary rescuer who intervenes while off-duty from the voluntary organisation may very well be classified as a “Good Samaritan.” Furthermore, it is possible that there may be situations in which a voluntary rescuer may also constitute a voluntary service provider. Finally, there is nothing to suggest that members of those professions mentioned in the Attorney General’s request may not participate in the activities of a voluntary rescue organisation while not engaged in the course of employment. In summary, therefore, each of these categories and organisations are useful indications of the scope of the term “voluntary rescuers”, but they indicate that there is considerable overlap between them.

(3) Voluntary Service Providers

(a) Voluntary Services

1.62 It is equally difficult to define with precision the term “voluntary services”. The term may refer to the Voluntary and Community Sectors, sometimes called the Third Sector. The Voluntary and Community Sector is helpfully discussed in the Government’s 2000 *White Paper on Supporting a Framework for Voluntary Activity*:

“The roots of the voluntary Sector can be traced back to the charitable and philanthropical organisations – many church-based – of the eighteenth century. The voluntary Sector is the larger of the two [that is, the voluntary and community Sectors], with a focus often on service delivery and a greater reliance on charitable

⁵⁴ The Civil Defence Board, established by the *Civil Defence Act 2002*, has statutory responsibility, through local authorities, for civil defence arrangements at national level. Much civil defence activity nonetheless incorporates the activities of voluntary groups, albeit under the direction of the Civil Defence Board.

donations and fund raising. Many voluntary Sector organisations are major service providers, particularly in the fields of health, disability and services for the elderly. Community Sector groups tend, on the other hand, to be smaller in scale and focus on responses to issues within a given community (geographical or interest based) and often with a social inclusion ethos.”⁵⁵

1.63 Thus, the voluntary sector may be separate and distinct from the community sector. While the voluntary sector may be described as entailing the provision of not-for-profit social services, the community sector is usually associated with mutual aid, self-help “active citizenship” groups and focuses on issues of social inclusion and participatory democracy.⁵⁶

1.64 The White Paper also notes that the term Voluntary Sector has also been used to refer to the wider “non-profit Sector”.⁵⁷ The non-profit Sector may be defined as the sector that is non-market and non-state. It spans a range of specialised organisations and institutions, such as voluntary public hospitals, major sporting organisations (such as the GAA or the Special Olympics), church-based institutions, credit unions, political parties, employer organisations, trade unions, major organisations supporting those with limited intellectual capacity and educational institutions.

1.65 More recently, the Taskforce on Active Citizenship has defined the voluntary sector as:

“...often traditionally equated loosely with charities or with professionally-led non-profit organisations operating in the personal social services, but recently equal emphasis has begun to

⁵⁵ Department for 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* at 73. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁵⁶ For explanation of the term “active citizenship”, see Taskforce on Active Citizenship *Report 2007* at 2. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%Report%20to%20Government%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%Report%20to%20Government%20(Mar%2007).pdf). See also the Task Force *Background Paper on the Concept of Active Citizenship 2007*. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Concept%20of%20Active%20Citizenship%20paper%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Concept%20of%20Active%20Citizenship%20paper%20(Mar%2007).pdf).

⁵⁷ Department for 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* at 79. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

be placed on community organisations. The more usual phrase now is the ‘voluntary and community sector’.⁵⁸

It may be noted that this definition refrains from drawing a line between the voluntary sector, on the one hand, and the community sector, on the other.

1.66 In any event, the Commission notes that there are a number of activities generally undertaken by the Community and Voluntary sector:⁵⁹

- Delivery of essential services
- Advocacy and provision of information
- Contributing to policy-making
- National and local partnership arenas
- Undertaking research
- Creation of opportunities for members and participants to access education, training, income and employment opportunities

Some, but clearly not all, of these are relevant to the question of liability of Good Samaritans and, more particularly, the type of voluntary activity contemplated by the Attorney General’s request.

(b) Voluntary Service Providers

1.67 Voluntary services may be provided by individual volunteers or voluntary organisations.⁶⁰ Thus, it is useful to consider each type of provider separately.

(i) Individuals

1.68 The overarching theme of the Attorney General’s request relates to the duty of care and standard of care of volunteers, whether such volunteers are Good Samaritans, voluntary rescuers, voluntary service providers or certain professionals (not acting in the course of employment).

⁵⁸ Task Force on Active Citizenship Background Working Paper Together, We’re Better at 19 citing Community Development Foundation, www.cdf.org.uk/html/whatis.html. Available at www.activecitizenship.ie/getFile.asp?FC_ID=9&docID=49-.

⁵⁹ 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* at 17-18. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁶⁰ Association of Voluntary Service Organisations & Centre Européen du Volontariat *Country Report on the Legal Status of Volunteers in Ireland 2005* at 3: volunteerism is “a vehicle for individuals and associations to address human, social or environmental needs and concerns. Available at www.cev.be/Legal%20Status%20Ireland%202005.pdf.

Schematically, it is convenient to discuss the generalities of volunteers and volunteerism in this section dealing with voluntary service providers.

1.69 The 2002 Report of the National Committee on Volunteering *Tipping the Balance* examines the issue of volunteering in detail.⁶¹ The Report observes that while different definitions of the term “volunteering” apply in different countries, a number of common elements may be discerned. It states that “volunteering” is usually unpaid and without obligation and for the benefit of others and society. It emphasises that while voluntary activity will usually involve a degree of sacrifice, a volunteer may derive a number of personal benefits. According to the Report, international comparative research has found that consideration of the net cost of volunteering to an individual is central to the public perception of who is acting, to a greater or lesser degree, as a volunteer.

1.70 In the Irish context, the most popular definition of “volunteering” appears to that contained in the Government’s 2000 *White Paper on Supporting Voluntary Activity*, which defines volunteering as:

“...the commitment of time and energy, for the benefit of society, local communities, individuals outside the immediate family, the environment or other causes. Voluntary activities are undertaken of a person’s own free will, without payment (except for reimbursement of out-of-pocket expenses).”⁶²

This definition was proposed by the Carmichael Centre for Voluntary Groups and has recently been adopted by the Task Force on Active Citizenship. The exclusion of services provided to one’s “immediate family” from the ambit of “volunteering” is worth noting.⁶³

⁶¹ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁶² 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* at 37. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁶³ This exclusive definition may be contrasted with the inclusive definition provided by the Association of Voluntary Service Organisations. National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002 at 6. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

1.71 The 2002 Report *Tipping the Balance* distinguishes between two forms of volunteering, informal and formal. The Report explains that informal volunteering refers to:

“...voluntary work done by the individual at her or his own behest and not through an organisational setting, but not for a relative and unpaid.”⁶⁴

In contrast, the Report explains that formal volunteering refers to:

“...voluntary work done with or through an organisation. Formal settings include not only voluntary organisations, but workplace settings, the public sector, school or other educational establishments or, in more recent times, virtual networks established over the Internet. Such organisations are referred to as volunteer-involving organisations.”⁶⁵

1.72 The Report observes that while there are many settings for formal volunteering, the majority of this occurs in voluntary and community organisations, which in turn make up the voluntary sector.⁶⁶ The individual may volunteer his or her services at the top end of the voluntary organisation, for instance, as a director or trustee, or at ground level, for instance, as a service provider. Furthermore, a volunteer may work part-time or full-time, in Ireland or abroad.

1.73 There are a number of areas in which Irish volunteers are particularly active, both informally and formally:⁶⁷

⁶⁴ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002 at 6. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁶⁵ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002 at 6. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁶⁶ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002 at 6. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁶⁷ Ruddle & Mulvihill “Reaching Out: Charitable Giving and Volunteering in the Republic of Ireland, The 1997/98 Survey” (Policy Research Centre, Dublin, 19993). Cited in 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* at 185. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

- Collecting items to raise money for/give to those in need
- Visiting the elderly
- Helping at a club or with a club activity
- Visiting the sick
- Visiting the lonely
- Serving as a ‘church helper’
- Serving on a committee for a charity
- Voluntary community work
- Giving Blood
- Conservation of the environment
- Involvement in sports

It is clear that a large number of these activities are relevant to the Attorney General’s request.

(ii) Organisations

1.74 The Community and Voluntary Sector operates via a network of, predominantly, voluntary organisations. Voluntary organisations are formal, non-profit-distributing and independent of government.⁶⁸ In addition, they contribute to the public good and contain some element of voluntary participation. Similarly, the Johns Hopkins structural/operational definition of non-profit organisations states that voluntary participation is a key defining characteristic and one of five central criteria:⁶⁹

- “Organised: they have an institutional presence and structure;
- Private or non-governmental: they are institutionally separate from the state;
- Non-profit distributing: they do not return profits to their managers or to a set of ‘owners’;

⁶⁸ 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* at 78. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁶⁹ 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* at 79-80. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

- Self-governing: they are fundamentally in control of their own affairs;
- Voluntary: membership is not legally required and such organisations attract some level of voluntary contribution of time or money.”

Therefore, without volunteering the organisation cannot be described as “voluntary”. However, it must be stressed that voluntary organisations may have paid employees and that both of these definitions allow for different scales of voluntary activity within the organisation.⁷⁰

1.75 In line with this, the Government’s 2000 *White Paper on Supporting Voluntary Activity* lists a number of characteristics that voluntary organisations may have in common. Typically, voluntary organisations may be:⁷¹

- Distinguished from informal or *ad hoc*, purely social, or familial groupings by having some degree, however vestigial, of formal or institutional existence.
- Non-profit distributing
- Independent, in particular of Government and other public authorities

They must also be:

- Managed in what is sometimes called a “disinterested” manner - in the Irish context this particularly relates to containing some element of voluntary, unpaid participation
- Active to some degree in the public arena and their activity must be aimed, at least in part, at contributing to the public good.

1.76 Voluntary organisations may be distinguished on the basis of their primary activity. The most common activities undertaken by voluntary organisations are:⁷²

⁷⁰ It should be noted that voluntary organisations that engage paid employees are subject to relevant employment legislation, including the *Safety, Health and Welfare at Work Act 2005*, which imposes considerable statutory duties that are of relevance here.

⁷¹ 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* at 78. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf. Cf *Promoting the Role of Voluntary Organisations and Foundations in Europe – Communication from the Commission* (European Commission, Brussels, 6 June 1997).

⁷² Department of Social, Community and Family Affairs *White Paper on a Framework for Supporting Voluntary Activity and for Developing the Relationship between the*

- Service delivery or provision of services
- Advocacy
- Self-help or mutual aid
- Resource and co-ordination

In the context of this Consultation Paper, the Commission's focus is on those organisations involved in service delivery or the provision of services. However, it must be remembered that such organisations may undertake a range of activities, which span the other three categories listed.

1.77 There are three main structures which may give legal status to a group in the Community and Voluntary Sector.⁷³

- Trust, especially Church-based organisations
- Limited Company, usually limited by guarantee
- Industrial and Provident Society.

1.78 There are a number of advantages to having a specific legal structure. Firstly, the individual members of the group are not generally legally responsible for the group's activities, including any debts which may arise. The group can own property, enter into contracts and employ people in its own name. The group can bring and defend court proceedings in its own name and the group can apply for charitable recognition (although this also applies to some unincorporated groups).

1.79 An organisation in the Voluntary and Community sector may also be recognised as a charity.⁷⁴ Under existing law, a charity is a body which is established for charitable purposes only. Charitable purposes in this respect involve:

- The advancement of education
- The advancement of religion
- The relief of poverty, or

State and the Community and Voluntary Sector 2000 at 78. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf. Cf Faughnan "Voluntary Organisations in the Social Services Field" Paper delivered at Seminar, Partners in Progress, Department of Social Welfare, 1990.

⁷³ See the Commission's *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006).

⁷⁴ *Ibid.*

- Other works of a charitable nature beneficial to the community.⁷⁵

Looking at the fourth charitable purpose, there is a clear similarity between the phrase “beneficial to the community” and the phrase “of benefit to society” used in the Attorney General’s request. In this respect, those organisations contemplated by the Attorney General include charitable organisations.

⁷⁵ The *Charities Bill 2007* proposes a new statutory definition of charitable purposes which will replace the ‘Pensel’ purposes (derived from *Commissioners for Special Purposes of Income Tax v Pensel* [1891] AC 531) listed in the text.

(iii) Relationship with the State

1.80 With reference to the provision of services, “the [voluntary] sector not only complements and supplements State provision, but is the dominant provider in particular areas.”⁷⁶

This point may be illustrated by reference to the activities undertaken by the Irish Mountain Rescue Association, a voluntary group which is not replicated in the public sector field, but which is funded in part by the State.

1.81 The relationship between volunteering and government is increasing in importance.⁷⁷ In its Universal Declaration on Volunteering, the International Association for Volunteer Effort (IAVE) called on governments:

“...[T]o ensure the rights of all people to volunteer, to remove any legal barriers to participation, to engage volunteers in its work, and to provide resources to NGOs to promote and support the effective mobilisation and management of volunteers.”⁷⁸

1.82 It is clear that different organisations maintain different relationships with the State.⁷⁹ While many form close partnership relationships with the State, often depending on statutory funding for survival, others challenge the State through vigorous social movements that some see as a “people’s opposition.” For their future survival, one commentator has advocated the Irish Social Partnership model, describing it as “imaginative in its strategy”.⁸⁰ The Social Partnership model envisages a symbiotic relationship between the third sector and the State, with an “enabling State” based on a social market economy positioned in the overall framework of the European Union.

⁷⁶ 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* at 16. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁷⁷ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁷⁸ Available at www.volunteernow.org.nz/article/3.

⁷⁹ Powell, Paper on the Third Sector in Ireland (Presented to the Faculty of Sociology at the University of Rome “La Sapienza” March 2002). Available at www.ceis.it/euroset/products/pdf/Third_Sector_in_Ireland.PDF.

⁸⁰ *Ibid.*

1.83 In its 2000 *White Paper on Supporting Voluntary Activity*, the Government stated that it regards statutory support of the Community and Voluntary sector as having an importance to the wellbeing of society that goes beyond the utilitarian “purchase” of services. Accordingly, the Government envisages a society which encourages its members to provide for their own needs, independently of the State and, where this is not possible, in partnership with statutory agencies.

(4) *The Fourth Paragraph of the Attorney General’s Request*

1.84 The fourth and final paragraph of the Attorney General’s request requires the Commission is to examine whether a general duty to intervene should be imposed on “citizens” and “off-duty members” of the caring professions, an Garda Síochána or the Defence Forces. It is useful to deal with each category of person separately.

(a) *The concept of “citizen” and “citizenship”*

1.85 The first group mentioned in the final paragraph of the Attorney General’s request is “citizens”. While the term “citizen” is, from a legal perspective, commonly used in the context of citizens of a particular state, the Commission considers that, for the purposes of this request, it was not the intention of the Attorney General to limit this group to individuals with an Irish passport. In this context, the term “citizens” is an allusion to the idea of “active citizenship.”⁸¹ The term “active citizen” was discussed by the Taskforce on Active Citizenship:

“Broader than just a narrow definition of citizenship, such as appears on a passport, being an active citizen implies that we are aware and responsible members of a community. We can belong to a community in which there are many communities – sometimes with divergent values and identities – but all sharing some common sense of responsibility and shared civic space. Indeed, developments such as the Good Friday Agreement and increased migration have extended traditional notions of Irishness.”⁸²

This definition emphasises that, for this purpose, “citizenship” goes beyond ownership of an Irish passport. While citizenship relates to being part of a

⁸¹ See the *2007 Report of the Taskforce on Active Citizenship*. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20(Mar%2007).pdf).

⁸² *2007 Report of the Taskforce on Active Citizenship 2007* at 1-2. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20(Mar%2007).pdf).

community, it requires the citizen to be an active participant in that community. Thus, citizenship entails both rights and responsibilities.⁸³

1.86 A similar definition is contained in the Government's 2000 *White Paper on Supporting Voluntary Activity*:

“Active citizenship refers to the active role of people, communities and voluntary organisations in decision-making which directly affects them. This extends the concept of formal citizenship and democratic society from one of basic civil, political and social and economic rights to one of direct democratic participation and responsibility.”⁸⁴

This highlights that it is not just individuals who have a role to play, but also communities and voluntary organisations.

1.87 The Commission stresses, however, that “active citizenship” is not limited to communities and voluntary organisations. The role of business is also increasing in importance. There is:

“...a growing consensus that the role of business in society is more complex than maximising the return to shareholders. Business must take account of the interests of other stakeholders – not just the obvious ones like staff or customers – but the needs of the wider community in which they operate. The long term economic success of a business requires maintaining the legitimacy and public confidence that comes from compliance with fair regulation, and from ethical behaviour and engagement with communities in which they do business.”⁸⁵

To illustrate this, the Commission notes the growing importance of employer supported volunteering (ESV)⁸⁶ and corporate social responsibility.⁸⁷

⁸³ 2007 *Report of the Taskforce on Active Citizenship 2007* at 2. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20(Mar%2007).pdf).

⁸⁴ 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* at 14. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁸⁵ The Wheel Discussion Document 2005 *Building a Vibrant Civil Culture through Citizen Engagement* at 11. Available at www.wheel.ie/user/content/view/full/2921.

⁸⁶ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland 2002* at 44. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

1.88 The three activities most commonly associated with “active citizenship” are:⁸⁸

- Civic Participation: for example voting in elections, contacting a local councillor or TD about an issue of public interest or attending a public meeting;
- Formal volunteering/community involvement: unpaid help through a group or organisation;
- Informal volunteering: unpaid help to an individual or others who are either family members or otherwise.

Thus, an active citizen may be any person who participates in his or her community, whether by performing civic duties or undertaking voluntary activity.⁸⁹ In other words, the active citizen participates in civil society, which is the domain of secondary associations that are distinct from primary domains, such as family, Market and State.⁹⁰ The active citizen will generally be one who pursues the common good.⁹¹ Therefore, the term “active citizen” is broad enough to encapsulate the categories of Good Samaritan, voluntary rescuer, voluntary service provider and member of a profession (when not acting in the course of employment) to which the Attorney General’s request refers.

⁸⁷ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002 at 44. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

⁸⁸ Taskforce on Active Citizenship, Public Consultation Paper 2006 “*Together We’re Better*” at 2. Available at www.activecitizen.ie/index.asp?locID=121&docID=-1.

⁸⁹ For more information on the relationship between active citizenship and volunteering National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland* 2002 at 8 (available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf) and Powell Paper on the Third Sector in Ireland (Presented to the Faculty of Sociology at the University of Rome “La Sapienza” March 2002) at 12 (available at www.ceis.it/euroset/products/pdf/Third_Sector_in_Ireland.PDF).

⁹⁰ Task Force on Active Citizenship Background Working Paper Together, We’re Better at 18. Available at www.activecitizenship.ie/getFile.asp?FC_ID=9&docID=49-.

⁹¹ The Wheel Discussion Document 2005 *Building a Vibrant Civil Culture through Citizen Engagement* at 5. Available at www.wheel.ie/user/content/view/full/2921.

(b) Off-duty members of the Caring Professions, An Garda Síochána and the Defence Forces

1.89 The Attorney General’s request refers, separately, to citizens and off-duty members of the caring professions, an Garda Síochána and the Defence Forces. The rationale for this may be to distinguish “citizens” from “off-duty members” of the particular professions. However, as was noted in the previous section, the term “citizen”, where it means “active citizen,” is broad enough to incorporate off-duty members of those professions mentioned.

1.90 Before examining this any further, the Commission notes that each one of these professions is defined and regulated by statute. For instance, the “caring professions”, which is probably shorthand for “health and social care professions”, are regulated by, for example, the *Dentists Act 1985*, the *Nurses Act 1985*, the *Health and Social Care Professionals Act 2005*, the *Medical Practitioners Act 2007* and the *Pharmacy Act 2007*. An Garda Síochána is regulated by the *Garda Síochána Act 2005*, while the Defence Forces are regulated by the *Defence Act 1954*.

1.91 By grouping the caring professions, an Garda Síochána and the Defence Forces together, the Attorney General may be acknowledging that members of these professions assume professional obligations relating to public health and safety. The Commission notes that members of these professions have undertaken a certain amount of training and have, therefore, attained a certain level of skill. As a result, it might easily be concluded that members of these professions are in a particularly strong position to respond to emergency and rescue-type situations whenever and wherever they occur. However, such a conclusion would not acknowledge that within these professions there are vastly different specialisations, skills and standards. For instance, it may not be reasonable to expect an off-duty podiatrist (that is, a foot specialist) to give the type of assistance that might be given by an off-duty accident and emergency doctor, even though both are qualified “doctors”. This may be even more pronounced within the ranks of an Garda Síochána and the Defence Forces, where skills may differ depending on whether the individual is a civilian, non-civilian or medical member of staff.

1.92 The final paragraph of the Attorney General’s request applies to professionals “when not engaged in duties in the course of their employment”. The Commission interprets this as referring to activities undertaken by a professional person who is off-duty. This interpretation may, however, raise concerns in respect of employees who are engaged in employer-supported volunteering (ESV). The phrase may equally refer to a role or duties, assumed by the professional, ancillary to that or those designated by his or her contract of employment. This might accommodate

employer-supported volunteering schemes. The Commission also acknowledges that the phrase may cover situations in which the professional is engaged in a professional activity and unexpectedly deviates to render assistance.

1.93 The 2006 *Report of the Task Force on Sudden Cardiac Death* has defined “on-duty” and “off-duty” in the context of uniformed first responders.⁹² On-duty first responders include an Garda Síochána, the fire brigade and other emergency personnel acting as first responders in the course of their work. Off-duty first responders, on the other hand, include off-duty health professionals, including emergency medical technicians and “members of voluntary and auxiliary organisations who are used to responding to emergencies.” While the two groups are defined separately, the Task Force does not appear to distinguish between them in terms of skill or liability. While the Task Force appears to prefer uniformed first responder schemes to lay first responder schemes,⁹³ this preference is based on the assertion that uniformed first responder schemes are likely to have greater success than lay schemes.

1.94 Professionals acting outside the course of their employment may not benefit from mechanisms applicable to professionals acting within the course of their employment. For instance, professional insurance policies may only cover those activities which are undertaken pursuant to a contract of employment. Insurance policies applying to doctors will, however, usually cover Good Samaritan interventions. Furthermore, the extent to which a professional person acts outside the course of his or her employment may have repercussions on the amount of control that may be attributed to his or her employer, which in turn may determine whether the employer is vicariously liable for the off-duty act of his or her employee.

1.95 Finally, the extent to which a professional acts outside the course of his or her employment may affect the standard of care to be applied. While it may be argued that members of the caring profession, an Garda Síochána or the Defence Forces have voluntarily joined the profession to undertake activities for the benefit of society, they are reimbursed and insured for their altruism. Members acting outside the course of their employment, however, may not benefit from such safeguards. The Commission acknowledges that moderating the standard of care in respect of such individuals may level the playing field.

⁹² Department of Health, Report of the Taskforce on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach 2006* at 98-99. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

⁹³ Department of Health, Report of the Taskforce on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach 2006* at 97. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

(5) Summary

1.96 Drawing from this analysis of the general literature, the Commission notes that a volunteer generally refers to a person who provides a service without obligation and free of charge. The Commission has also noted that there is a good deal of overlap between the various categories of volunteers identified in the literature. In the specific setting of the Attorney General's request, the main premises to distinguish between the categories of person specified would appear to be preparation, skill, activity and, to a lesser degree, payment. In this regard, the Commission considers that it may be unnecessary to distinguish between volunteers in general and off-duty members of certain professions in particular. As to the specific issue of skill, the Commission considers that this is more relevant in the context of the standard of care question, discussed in Chapter 3.

1.97 In Section E, the Commission turns to examine the meaning to be given to the reference to voluntary activities being for the "benefit of society".

E Benefit of Society

(1) Definition

1.98 The Attorney General's request refers to those providing voluntary services "for the benefit of society." The term is closely related to other terms, such as "public good", "common good", "social utility" and "desirable activity."

1.99 The Government's 2000 *White Paper on Supporting Voluntary Activity* suggests that "voluntary" organisations have a number of characteristics in common, including that it "must be active to some degree in the public arena and their activity must be aimed, at least in part, at contributing to the *public good*."⁹⁴ From this, it might be inferred that the notion of "benefit of society" is a crucial feature in defining the term "volunteering. In other words, even if an activity is undertaken free from obligation and without expectation of reward, it will not be considered a voluntary act unless it is also for the benefit of society. This view appears to be supported by other commentators. For instance, the Government defines volunteering as "the commitment of time and energy for the benefit of

⁹⁴ 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* at 78. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf. Cf *Communication on Promoting the Role of Voluntary Organisations and Foundations in Europe* (European Commission, Brussels, 6 June 1997).

society,”⁹⁵ while the Association of Voluntary Service Organisations (AVSO) notes that volunteering, “...benefits the volunteer, communities and society as a whole.”⁹⁶ However, this might be too narrow an approach.

1.100 An alternative approach is that the simple act of volunteering is inherently for the benefit of society, as it contributes to “social capital”:

“Volunteering is one way in which social capital and solidarity is strengthened (Putnam 2000). The involvement of the individual in volunteering, whether for idealistic, altruistic or functional reasons, leads to a relational engagement and thereby to the building of social units, social cohesion and societal sustainability (Donoghue 2001). Volunteering makes an input to social capital, thereby, which as Healy and Cote note ‘places social relations, values and norms at the centre of the debate about economic and social development’ (Healy and Cote, 2001).”⁹⁷

On this view, therefore, irrespective of the motivation, volunteering inherently contributes to social capital by creating social units. The Commission observes, however, that this idea fails to consider the particular types of activity undertaken by these voluntary social units and their potentially detrimental effects. For instance, a voluntary paramilitary group is as much a voluntary social unit as is a Tidy Towns Committee.

1.101 The Commission concludes, therefore, that it must have been the intention of the Attorney General to limit the application of the request to those entities engaged in voluntary activities which are for the benefit of society and therefore may be equated with active citizenship.

(2) Recognition at Common Law

1.102 The Commission notes here that the concept that an activity is for the benefit of society may be taken into account by a court in deciding whether a duty of care exists under the principles of negligence, in the sense

⁹⁵ 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* at 37. Available at www.welfare.ie/publications/naps/socincl/supporting_whitepaper.pdf.

⁹⁶ Association of Voluntary Service Organisations & Centre Européen du Volontariat *Country Report on the Legal Status of Volunteers in Ireland 2005* at 3. Available at www.cev.be/Legal%20Status%20Ireland%202005.pdf.

⁹⁷ National Committee on Volunteering *Tipping the Balance: Report and Recommendations to Governments on Supporting and Developing Volunteering in Ireland 2002* at 8. The Report notes that the term “social capital” is generally used to describe the effects that norms and social networks have on social solidarity, democracy and economic effectiveness. Available at www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2002/02_10_01IRL_tipping_the_balance.pdf.

that there may be public policy reasons to protect the particular activity from the threat of litigation.⁹⁸

1.103 Secondly, where a particular duty is found to exist, the court may qualify this by holding that it is owed to society at large rather than to a private individual.⁹⁹ Consequently, an injured individual will find it difficult to succeed in his or her private claim. The Commission notes, however, that the European Court of Human rights has ruled that a blanket immunity for those performing socially useful functions, such as members of an Garda Síochána, is inconsistent with the right to a fair trial in Article 6 of the European Convention on Human Rights.¹⁰⁰

1.104 Thirdly, the concept that an activity is for the “benefit of society” may be relevant to the court’s decision on the appropriate standard of care to be applied. The court may look on the activity with more indulgence where the object of the defendant’s conduct has a high social utility:¹⁰¹

“It is, of course, well established that the perceived social utility of a risk-creating activity is one component of the negligence calculus helping to decide what precautions the reasonable person would have adopted to avoid the harm. Thus, we are all entitled to take abnormal risks in an emergency to avoid life-threatening outcomes...”¹⁰²

1.105 Fourthly, the concept of an activity being for the “benefit of society” may affect the court’s consideration of the social cost of a finding of liability. In other words, litigation and findings of liability may deter individuals from pursuing socially beneficial activities. In *Tomlinson v Congleton Borough Council*,¹⁰³ which concerned a young man who was injured after diving into a pond in a public park, it was noted that:

“...it is not... the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and

⁹⁸ See in particular the discussion in Chapter 2 of the Supreme Court decision in *Glencar Exploration plc v Mayo County Council* [2002] 1 I.R. 84. See also McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 593.

⁹⁹ *East Suffolk Catchment Board v Kent* [1940] 4 All ER 527.

¹⁰⁰ *Osman v United Kingdom* (1998) 27 EHRR 212.

¹⁰¹ *Whooley v Dublin Corporation* [1961] IR 60, *Tomlinson v Congleton Borough Council* [2003] 3 All ER 1122.

¹⁰² Williams “Legislating in an Echo Chamber?” (2005) 155 NLJ 1938 at 1939.

¹⁰³ [2003] 3 All ER 1122 paragraph 81 (Lord Hobhouse). The decision was cited with approval by the Supreme Court in *Weirs-Rodgers v The SF Trust Ltd* [2005] IESC 2; [2005] 1 IR 47.

amenities to which they are rightly entitled... In truth, the arguments for Mr Tomlinson have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen”.

(3) *Deterrent Effect*

1.106 The issue of social cost is closely related to the concern that volunteers may, in the absence of legislative protection,¹⁰⁴ be discouraged from volunteering because of a perceived risk of being sued. The Task Force on Active Citizenship noted that the “fear of litigation has become a growing barrier for many community and voluntary groups”,¹⁰⁵ although it would appear it has not been a particularly significant deterrent.¹⁰⁶ While it seems that the current law does not appear to be a particularly strong barrier to volunteerism, the Commission is aware that many small organisations feel they must take out expensive public liability insurance, even though it may be that liability would be unlikely to be imposed in the absence of gross negligence. In this respect, a Good Samaritan law such as the proposed *Good Samaritan Bill 2005* is more likely to be declarative of existing law though it may have the indirect effect that some aspects of insurance cover currently taken out might no longer be required.

1.107 The concern relating to the deterrent effect of potential liability was behind the enactment of section 1 of the UK *Compensation Act 2006*, which states that:

“A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might-

¹⁰⁴ Dáil Debates, Official Report – Unrevised, Vol 611, No 4, Tuesday 6th December 2005, Second Stage, Mr Timmins, at 1144.

¹⁰⁵ *2007 Report of the Taskforce on Active Citizenship* at 17. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Governmtn%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Governmtn%20(Mar%2007).pdf).

¹⁰⁶ *2007 Report of the Taskforce on Active Citizenship* at 6-8. The Taskforce notes that while Active Citizenship is changing, it is not necessarily declining. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Governmtn%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Governmtn%20(Mar%2007).pdf).

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity”.

1.108 The *Compensation Act 2006* was enacted as a response to the concern that the UK was succumbing to a “compensation culture.”¹⁰⁷ Although this concern was criticised as unfounded, it was acknowledged that the mere perception was having disastrous effects. The Commission notes that the 2006 Act has been criticised for confusing the situation, by doing no more than restating the current common law approach in the UK,¹⁰⁸ and by introducing the ambiguous term “desirable activity.”¹⁰⁹

1.109 Some of the concerns which led to the UK *Compensation Act 2006* may also have influenced the decision to introduce the *Good Samaritan Bill 2005* although, as already discussed, there is also a more specific local context concerning the desire to prevent sudden cardiac death through the promotion of defibrillators at public venues and workplaces.¹¹⁰

1.110 The UK *Compensation Act 2006* could also be described as largely declarative of existing law in Ireland, especially in light of the decisions of the Supreme Court in *Glencar Exploration plc v Mayo County Council*¹¹¹ and *Fletcher v Commissioners for Public Works*.¹¹² In that respect Irish courts already acknowledge the special circumstances of those who undertake voluntary activities which have a public benefit or public policy component.

1.111 The available data on the number of people volunteering their services is insufficient to draw any definitive conclusions as to whether the threat of legal liability has deterred others from doing so. The Task Force on Active Citizenship notes that there has been no drop in the numbers of people participating in voluntary activities.¹¹³ But there is anecdotal

¹⁰⁷ The Taskforce on Better Regulation, *Report on Better Routes to Redress 2004* at 3. Available at www.brc.gov.uk/publications/liticompensation.asp.

¹⁰⁸ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

¹⁰⁹ Williams “Legislating in an Echo Chamber?” (2005) 155 NLJ 1938 at 1939.

¹¹⁰ Department of Health, Report of the Taskforce on Sudden Cardiac Death *Reducing the Risk: A Strategic Approach 2006*. Available at www.dohc.ie/publications/sudden_cardiac_death.html.

¹¹¹ [2002]1 IR 84.

¹¹² [2003] 1 IR 465.

¹¹³ *2007 Report of the Taskforce on Active Citizenship* at 6-8. The Taskforce notes that while Active Citizenship has recently changed in nature - in the sense that the engagement involved may be time-constrained arising from other commitments - it does not appear to have declined in terms of the actual numbers of people who engage

evidence to suggest that the concern about liability has been raised in the context of specific voluntary groups, in particular before insurance schemes were introduced to allay such fears.¹¹⁴

(4) Summary

1.112 The Commission notes that the term “benefit of society” may be used to describe those activities voluntarily performed for the social good and, as a result, constituting acts of active citizenship. The Commission also notes that existing law may already, at a number of levels, take account of the extent to which an activity may be for the benefit of society.

1.113 The question arises then as to whether the current approach of the law is sufficient to protect those activities from the risk of litigation. The Commission turns in Chapter 2 to examine in detail to what extent existing law in Ireland actually poses a real risk of litigation for those engaged in the various forms of activity encompassed by the Attorney General’s request to the Commission.

in active citizenship. Available at
[www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20\(Mar%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20Report%20to%20Government%20(Mar%2007).pdf).

¹¹⁴ In discussions with the Commission, a number of voluntary groups have indicated that some volunteers were concerned about the risk of liability before an insurance scheme was introduced.

CHAPTER 2 DUTY TO INTERVENE

A Introduction

2.01 In Chapter 1, the Commission examined the policy setting against which the Attorney General's request and the *Good Samaritan Bill 2005* arose. In this chapter, the Commission responds to two questions posed by the Attorney's request, namely, whether the common law recognises a positive duty to intervene and, if not, whether the common law should be amended to recognise such a positive duty to intervene. The Commission answers these questions in light of the policy setting outlined in Chapter 1. In Part B, the Commission examines the extent to which a positive duty to intervene is recognised in common law and civil law jurisdictions. In Part C, the Commission reflects upon a number of situations in which a positive duty to intervene has been imposed by statute. In Part D, the Commission considers the various strands of the debate surrounding the imposition of a positive duty to intervene. In Part E, the Commission expresses its conclusions.

B Common Law Duty to Intervene

(1) Common Law

2.02 Even before the 20th century development of a general legal duty not to injure another person arising from negligence, the law opposed the imposition of a positive duty to intervene.¹ This common law position was particularly strong, extending to situations in which the injured person's life depended upon an intervention, and which would not expose the intervenor to any risk or even any inconvenience. While most may agree that it is morally commendable to assist a person in need of rescue, the view that there was no duty to intervene was justified on the ground that the common law was founded upon the principle of individual liberty and not the principle of altruism.² As such, it was argued that to impose a positive duty

¹ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 169.

² See Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 9-16, referring to *Stovin v Wise* [1996] AC 923; Calnan "Reasonableness, Justice and the No-Duty-To-Rescue Rule of Torts" (1 November 2007). Available at <http://ssrn.com/abstract=993118>.

to intervene would constitute too great an infringement on an individual's liberty.

2.03 The Commission notes that this remains the position in the aftermath of the development of the modern concept of negligence. In this context, it is worth referring to the House of Lords decision of *Donoghue v Stevenson*,³ in which Lord Atkin developed the modern legal duty of care based on negligence, also known as the "neighbour principle". In light of the questions posed by the Attorney General's request, it is worth quoting the relevant passage in full:⁴

"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. 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."

2.04 This passage involves a number of elements. First, Lord Atkin makes clear that he has borrowed the idea of the "neighbour" from the moral - and religious - principle that we should help our neighbour. He specifically refers to the "rule" that you should "love your neighbour," which is a direct reference to the biblical parable of the Good Samaritan.⁵ This parable, in effect, places a moral demand on all persons to help those who are less well off. It instructs us to actively volunteer to help our neighbour in need. In *Donoghue v Stevenson*, however, Lord Atkin emphasises that it would be completely inappropriate to translate this *moral* principle that we should help or love our neighbour into a *legal* principle. He emphasises that many legal principles have a moral basis, but that is clearly different from imposing legal sanctions for failing to meet private

³ [1932] AC 562.

⁴ [1932] AC 562 at 580.

⁵ Gospel of Luke, 10:25-37.

moral principles to which we might subscribe. To allow such a claim, he explains, would be to create a precedent that would ground innumerable claims. This would be contrary to the philosophy of the common law, which limits the circumstances in which a case may be pursued. In “adapting” the moral obligation to love your neighbour into a legal principle, Lord Atkin develops two significant limits.

2.05 First, we have no legal duty to “love” - or help – our neighbour. As the quotation makes clear, the moral rule that we must love or help our neighbour becomes the much less onerous duty not to injure our neighbour. This clearly indicates that we have no legal duty to volunteer to help a person in need, which is a crucial point in the context of the Attorney General’s request to the Commission. This approach is reinforced by the comment made by Lord Atkin at the beginning of the quotation, namely that “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.” The type of damage that may result from a moral wrongdoing may be difficult or impossible to quantify, for example, moral injury or offence. In that sense, while it may be morally objectionable that we would pass by a person in the gutter and not help them, that person cannot sue us for failing to help them.

2.06 The second limit involved in the adaptation of the moral principle concerns the definition of “neighbour.” The moral principle tells us to help those with whom we have had no previous contact whatsoever, such as those we pass by in the street or, in the modern era, those we see on our TV screens. Lord Atkin states clearly that the legal duty not to injure our neighbour does not extend worldwide, but is limited to those whom we should reasonably have predicted or foreseen would be injured by our lack of care which caused them injury. Given the type of injury that may result from a moral transgression and given that the injury may very well depend on the sensibilities of the particular injured party, it would be virtually impossible to predict or foresee who may be injured.

2.07 The argument that the common law does not enforce moral obligations is just as persuasive today. Indeed, the modern day argument may be even stronger, given the decision of the Supreme Court in *Glencar Exploration plc v Mayo County Council*⁶ (citing *Caparo Industries v Dickman*⁷ with approval) which inserted an extra step in the test for negligence – the proximity requirement. This requires that there must be a sufficiently close relationship between the wrongdoer and the injured party. It is very likely, however, in a case of moral wrongdoing that the person

⁶ [2002] 1 IR 84.

⁷ [1990] 2 AC 605.

injured will be one who is not spatially, temporally or in any other way connected to the wrongdoer.

2.08 From this analysis of the development of the legal duty of care, the Commission concludes that the current law does not impose a general obligation to be a Good Samaritan or to go out of our way to assist a person in need. Therefore, a bystander will not be held liable for failing to assist a stranger, even where it is a matter of life or death for the stranger and the bystander can provide such assistance with little or no inconvenience.

2.09 The Commission notes, however, that the current law does not necessarily provide a clear answer to other related questions raised by the Attorney General's request. For instance, it is not clear what the legal position is where an individual decides to intervene as a Good Samaritan and causes an injury to the stranger in the process. Furthermore, it is not clear what the position is where an individual decides to be a voluntary assistant in a local community group or national organisation and, in the process, injures one of the people under his or her care. In the Commission's view, Lord Atkin's analysis in *Donoghue v Stevenson* indicates that liability might – or might not – be imposed depending on which approach is taken. On the one hand, it can be argued that, once a person volunteers to help and in doing so causes injury, they may be held liable if they were careless and caused injury to those they should have foreseen would be injured by their carelessness. The detailed discussion by the Commission in Chapter 3 indicates that, where the involvement of the Good Samaritan or volunteer becomes more intensive and is based on professional training or qualifications, the more likely it is that liability will be imposed. On the other hand, if such persons have no legal duty to be a Good Samaritan in the first place or to volunteer to help – in the sense that they could (legally) have waved to a drowning person and let them die – it might appear strange to impose liability on the rescuer for breaking the arm of the person whose life they have saved. In this respect, while Lord Atkin does not provide a definitive answer, it is arguable that this situation comes within his general comment that “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.”

(2) Other Jurisdictions

2.10 Aside from some notable exceptions, the principle of no-duty-to-intervene is prevalent across the common law world. This may be contrasted with the approach taken by civil law jurisdictions, in which a duty to intervene is imposed. In this section, the Commission provides a general analysis of the position in other jurisdictions.

(a) United States

2.11 Most states in the United States adhere to the general common law approach that there is no duty to intervene, whether that translates into a duty to rescue or a duty to volunteer in normal circumstances. By way of exception, chapter 604A.01 of the *Revised Minnesota Statutes 2007* imposes an affirmative duty to assist in an emergency as follows:

“A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.”

It is worth noting that this type of provision is both exceptional in terms of other jurisdictions and, in any event, is limited in scope.

(b) Australia

2.12 Australia, for the most part, also adheres to the general common law approach that there is no duty to intervene, whether that entails a duty to rescue or a duty to volunteer. There have been some deviations from this approach.

2.13 In the first place, Australian courts may find a public authority under a duty to perform a particular function under the theory of general reliance. Under this theory, the public authority may be held liable to a private individual for an injury resulting from a failure to perform the particular function with which it has been entrusted. The reason for this is that by virtue of the nature of the authority and the character of the function, society as a whole may reasonably rely on its performance. The rule was stated in *Sutherland Shire Council v Heyman*.⁸

“There will be cases in which the plaintiff’s reasonable reliance will arise out of a general dependence on an authority’s performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of the plaintiff.”

2.14 This may be contrasted with the approach followed in Ireland and England, which refrains from imposing a positive duty to act on public authorities. Liability will normally not arise unless the public authority is

⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

responsible for causing more damage than would have occurred without its intervention.⁹

2.15 In the second place, the Australian courts have imposed a positive duty to intervene on doctors. In *Lowns v Woods*,¹⁰ a doctor was found liable for refusing to treat a boy, who was having a serious epileptic seizure, when the doctor had no reasonable excuse for his refusal. This led to a suggestion that there should be a duty on persons for whom rescue is the very thing for which they are trained.¹¹

(c) Canada

2.16 Quebec is the only province in Canada to have enacted legislation which provides for an affirmative duty to rescue. Unlike France, discussed below, Quebec does not base its duty to rescue on its *Civil Code 1991*.¹² Instead, article 2 of the *Charter of Human Rights and Freedoms 1975* obliges every person to render emergency assistance to one whose life is in peril. This may be done by personally intervening in the situation or by procuring emergency assistance from another source. This duty does not apply where it would pose a risk to the person in peril or to third parties or for any other reasonable reason. Even though article 2 of the Charter would appear to limit the duty to rescue to situations in which the victim's life is in peril, there is an argument that the "bon père de famille", the French equivalent of the reasonable person, would assist in situations other than those where the life of the victim is, strictly speaking, in peril.¹³

(d) France

2.17 The French equivalent to the law of tort, *le droit des obligations délictuelles*, is set out in articles 1382-1386 of the French *Civil Code*. Articles 1382 and 1383 are of particular importance, laying down the general rules for imposing liability for personal negligence. Article 1383 of the French *Civil Code* states that everyone is liable for the harm which he or she has caused not only by his or her deed, *but also by his or her failure to act* or his or her lack of care.

⁹ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 533-534. See also *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 referred to in the Supreme Court decision *Duffy v Dublin Corporation* [1974] IR 3.3

¹⁰ (1996) Aust Torts Reports 81-376 (NSW CA).

¹¹ Gray and Edelman "Developing the Law of Omissions: a Common Law Duty to Rescue?" (1998) 6 TLJ 240.

¹² The relevant provision of the *Civil Code of Quebec* is equivalent of article 1382 of the French *Civil Code*.

¹³ Drouin Barakett and Jobin "Une Modeste Loi du Bon Samaritain pour le Québec" (1976) Vol LIV CBR 290.

2.18 This liability may be imposed for acts of omission. It is argued that while French jurists distinguish between omissions in action, such as the classic example of the driver failing to apply the brakes, and pure omissions, such as the failure of the bystander to assist the injured stranger, the French courts do not. Some jurists suggest that even where the case is one of pure omission, the courts may impose liability where a “bon père de famille” would have intervened in similar circumstances.

2.19 In any case, under the concept of the unity of criminal and civil faults, the French legal system regards the commission of any criminal offence which causes harm to another as a fault for the purposes of articles 1382 and 1383. Since article 63 paragraph 2 of the *Criminal Code* makes it an offence to deliberately fail to help a person in peril where there is no risk to oneself or others in doing so, such a failure may give rise to civil liability under article 1383 of the *Civil Code*.¹⁴ In 1947, the Tribunal Correctionnel d’Aix awarded damages to the plaintiff, who had nearly drowned when he fell through ice into a deep canal. The defendant, the plaintiff’s father-in-law, had walked away from the scene after refusing to assist a third person who tried to rescue the plaintiff by handing him an iron bar to which he might cling.¹⁵

(e) Germany

2.20 The German equivalent of negligence can be found in section 823 of the *German Civil Code (BGB)*:¹⁶

“A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person is liable to make compensation to the other party for the damage arising from this.”

2.21 The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.

2.22 It would seem that no distinction is made in this section between liability for feausance and liability for nonfeausance. However, when interpreting the requirement of unlawfulness in section 823, the courts have taken a different approach towards actions on the one hand and inaction on the other. If one of the protected interests has been infringed through a positive act, this act is presumed to have been unlawful. However, if one of

¹⁴ Bell, Boyron & Whittaker *Principles of French Law* (Oxford University Press 1998) at 366.

¹⁵ *Tribunal Correctionnel d’Aix 27 March 1947*, D 1947, 304.

¹⁶ The German Civil Code is available at <http://bundesrecht.juris.de>.

the protected interests has been infringed by inaction, the inaction is only regarded as unlawful if it violates a duty to act.

2.23 In a similar approach to that taken by France, section 823 BGB may be invoked where a person is injured as a result of the violation of a statutory provision. Section 323 (c) of the *German Criminal Code (StGB)* penalises anyone who:

“... fails to render assistance in case of accident, common danger or emergency, although such assistance was needed and could have been expected from him under the circumstances, especially since he could have rendered it without placing himself in significant danger and without violating any important duties...”¹⁷

2.24 While it is likely that this provision was intended to give rise to a private law duty under section 823 (2) *BGB*, the prevailing legal opinion now is that it was not intended to protect individual persons but society as a whole.¹⁸

(3) Summary

2.25 The Commission notes that the common law has generally refrained from imposing a positive duty to intervene. This approach is prevalent in most common law jurisdictions subject to some isolated exceptions in the United States, Australia and Canada. This may be contrasted with the approach taken by most civil law jurisdictions. The Commission notes, however, that while the common law is against imposing a positive duty to intervene, it is less clear as to what the consequences of voluntarily intervening are. These will be discussed in greater detail in Chapter 3. Section C will now consider the extent to which a positive duty to intervene in an emergency may already exist.

C Statutory Duty to Intervene

2.26 In this section, the Commission notes that there are a number of statutory duties imposing positive obligations on individuals. The main areas of concern appear to be those duties imposed on professional rescuers and those duties imposed on individuals involved in road traffic accidents.

(1) Professional Rescuers

2.27 The Commission notes that for those professional rescuers governed by statute, a distinction is often made between a statutory power of

¹⁷ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 41-43.

¹⁸ *OLG Frankfurt*, 27 October 1988, NJW-RR 1989/II, 794.

discretion and a statutory duty.¹⁹ In the case of a statutory power of discretion, a duty to intervene does not usually arise, as this would impede the freedom of the particular body to choose how to manage its resources.²⁰ In the case of a statutory duty, the duty may be one which is owed to the public at large rather than to the particular individual.²¹ The purpose of the particular statute may also be a deciding factor.²²

2.28 Even if there is an intervention in an accident or emergency situation, the Commission observes that the rescue body is not generally held to have voluntarily assumed responsibility for the rescue. Thus, even if the rescue is performed carelessly or negligently, the body will not be held liable, unless it causes damage which would not have occurred but for its intervention. In *Capital and Counties plc v Hampshire County Council*,²³ the English Court of Appeal considered whether a fire brigade could be said to have assumed responsibility when it arrived at the scene of a fire. The Court held that by taking control of operations, the senior fire officer was not to be seen as voluntarily assuming responsibility for the particular incident, regardless of whether the owner of the premises relied on the fire brigade. The Court held that a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of the premises, giving rise to a duty of care, merely by attending at the fire ground and fighting the fire. This is so even though the senior officer actually assumes control of the fire fighting operations. The Commission notes that this principle has also been applied to a case involving the coastguard.²⁴

2.29 The position may be different with regard to those rescuers considered to be part of the health services. From the decision of the English Court of Appeal in *Kent v Griffiths*,²⁵ it would seem that ambulances come

¹⁹ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 534. See also *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 (public authority).

²⁰ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 534.

²¹ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 539-546, comparing the Supreme Court decisions of *Ward v McMaster* [1988] IR 337, *Sunderland v Louth County Council* [1990] ILRM 58 and *Convery v Dublin County Council* [1996] 3 IR 153. See also *Alexandrou v Oxford* [1993] 4 All ER 328 (police), cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 171.

²² See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 546.

²³ [1997] 2 All ER 865 (fire brigade), cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 171, 534, 741.

²⁴ *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897, cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 171.

²⁵ [2000] 2 WLR 1158, cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 171.

under a duty of care. Furthermore, this duty of care is owed to the particular individual rather than to the public at large. The doctrines of assumption of responsibility and detrimental reliance appear to have had some influence in the decision. In the absence of a justifiable excuse, such as a conflict of resources, the ambulance service may be held liable for failing to turn up promptly or failing to turn up at all. The Commission notes that a similar conclusion was reached in Ireland in respect of doctors. In the High Court decision *O'Doherty v Whelan*,²⁶ O'Hanlon J held that in the particular circumstances of the case the defendant doctor had been negligent in failing to make a home visit to her patient. This may be compared with the Australian case of *Lowns v Woods*,²⁷ in which a doctor was found liable for failing to treat a young boy who was not his patient. The court based its decision on a finding that there was physical, circumstantial and causal proximity between the parties. In effect, this decision may have gone further than *Kent v Griffiths*, in that the doctor was under a duty to respond even though he had not agreed to attend the boy.

(2) Road Traffic Accidents

(a) Ireland

2.30 The Commission notes that, unlike many of its common law counterparts, Ireland does not impose a duty to intervene in situations involving road traffic accidents. The nearest obligation that exists is a duty to report an accident involving personal injury to the Garda Síochána under section 106 of the *Road Traffic Act 1961*.

(b) United States

2.31 Many States in the US impose a duty on drivers involved in road traffic accidents to assist endangered persons. While such a duty does not appear in the statute books of Ireland or England, it would be inaccurate to suggest that it is a complete aberration of the common law approach. To impose a duty on a person who is responsible for creating a risk which has resulted in injury is not an unheard of phenomenon. Section 4202(a) of the *Delaware Code 1953* is a clear illustration of this:

“The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident. The driver shall give the driver’s name, address and the registration number of the driver’s vehicle and exhibit a driver’s license or other documentation of driving privileges to the person struck or the driver or occupants of any

²⁶ High Court, Unreported, 18 January 1993.

²⁷ [1996] Aust Torts Reports 81-376 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 170 and 372

vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a hospital or physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, or by contacting appropriate law enforcement or emergency personnel and awaiting their arrival.”

(c) Canada

2.32 It would appear that the majority of provinces in Canada have enacted some form of legislation, obliging drivers involved in accidents to render assistance to injured people. For example, section 200 (1) of the *Ontario Highway Traffic Act* obliges every person in charge of a vehicle or street car that is directly or indirectly involved in an accident to remain at or immediately return to the scene of the accident, to render all possible assistance and to give his or her particulars, in writing, to anyone sustaining loss or injury, any police officer or witness. S 200(2) imposes a criminal sanction for breach of section 200(1). Similarly, article 168 of the *Highway Safety Code of Quebec* obliges the driver of a road vehicle involved in an accident to remain at or immediately return to the scene of the accident and render the necessary assistance to any person who has sustained injury or damage.

(3) Safety and Health at Work

2.33 Employers have statutory duties under the *Safety, Health and Welfare at Work Act 2005* which go beyond the duty to act in a reasonably careful manner. The duties in sections 8, 12 and 15 of the 2005 Act extend to the obligation to avoid omissions which are likely to cause injury both to employees and persons other than employees who may be affected by the employer’s activities. This imposes a positive obligation to intervene to put in place certain precautions and preventative measures, and these measures must be set out in writing in a safety management document called the Safety Statement, which section 20 of the 2005 Act mandates must deal with the measures concerning both employees and persons other than employees.

2.34 In addition, Chapter 2, Part 7 of the *Safety, Health and Welfare at Work (General Application) Regulations 2007*, which were made under the 2005 Act, sets out duties on employers concerning the provision of first-aid at all places of work. While the 2007 Regulations do not explicitly require the provision of automated external defibrillators (AEDs) in all places of work, a Guide to the 2007 Regulations published by the Health and Safety Authority (the regulatory body for the 2005 Act) states:

“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-aider(s) 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 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.”²⁸

This Guide to the 2007 Regulations, published by the regulatory body for the *Safety, Health and Welfare at Work Act 2005* is, in the Commission’s view, an acknowledgement of the increasing significance attached to the importance of automated external defibrillators (AEDs) in general. The specific reference in the Guide to the prevention of sudden cardiac death must be taken to be an implicit echoing of the views of the 2006 *Report of the Task Force on Sudden Cardiac Death*, discussed by the Commission in Chapter 1, and which also influenced the publication of the *Good Samaritan Bill 2005*.

(4) Summary

2.35 The Commission notes that certain legislative provisions in common law jurisdictions may involve the imposition of a positive duty to intervene in certain defined circumstances. First, professional rescuers may come under a positive duty to intervene where they may be considered members of the health services. Second, some common law jurisdictions, (though not Ireland), impose a positive duty on drivers involved in an accident to assist the injured. Finally, safety at work legislation may impose a duty to act in the sense of imposing a duty that penalises omissions and there is recent acknowledgement in relevant guidance issued by the Health

²⁸ Guide to the Safety, Health and Welfare at Work (General Application) Regulations 2007 Chapter 2 of Part 7: First-Aid, p 7, available at www.hsa.ie.

and Safety Authority of the relevance of automated external defibrillators (AEDs) in a workplace setting.

D Imposition of a Duty to Intervene

2.36 As to whether the law should recognise a general positive duty to intervene, there are a number of persuasive arguments for and against this policy. Bearing this in mind, the Commission emphasises the setting outlined in Chapter 1 concerning volunteerism in general.

2.37 The Commission notes that a number of intertwining arguments, both theoretical and practical, have been advanced opposing the imposition of a positive duty to intervene.²⁹ While they have been expressed, almost exclusively, in the context of a positive duty to act as a Good Samaritan, they are of undoubted relevance with respect to volunteers as well.

(1) Altruism

2.38 As was noted above, one of the most prevalent arguments against the imposition of a positive duty concerns the principle of altruism. The rationale behind this argument is that the duty to intervene is morally motivated. Thus, it has been asserted that it is inappropriate to set a legal sanction to enforce a moral obligation. Since altruism entails voluntary action in favour of another, it is argued that to transform the duty to rescue into a legal obligation would be to deprive it of its altruistic quality.

(2) Personal Liberty

2.39 It has been argued that this approach is consistent with the individualistic spirit of the common law.³⁰ The common law endeavours to protect the personal liberty of each individual as far as possible and only those restrictions which are necessary to enable peaceful co-existence are permitted. In other words, common law encourages the individual to pursue his or her desires, without requiring him or her to benefit another.

2.40 It is argued that the imposition of a positive duty to rescue would constitute too great an infringement on personal liberty.³¹ While a negative duty permits the individual to do everything except for the prohibited conduct, a positive duty prevents the individual from doing anything but the required activity. It is also noted that a positive duty may require more of the individual than a negative duty, in the sense that a negative duty will only oblige an individual to refrain, while the positive duty will require the individual to take positive steps.

²⁹ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 9-28.

³⁰ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 10-15.

³¹ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 15-16.

(3) *Distinction between Misfeasance and Nonfeasance*

2.41 There may also be practical concerns about imposing a positive duty to intervene. Thus, the common law distinguishes between misfeasance and nonfeasance.³² While legal liability may flow from an act of misfeasance, it may not flow from an act of nonfeasance. It is argued that the distinction here is between active misconduct and passive inaction. In a case of misfeasance, the actor causes a new risk, while in a case of nonfeasance the actor fails to confer a benefit. In the context of rescue, the term misfeasance suggests that the actor has some part to play in the creation of the risk, while the term nonfeasance suggests that the actor fails to abate a risk that is independently created. In terms of duty, misfeasance may be translated as the breach of a negative duty, while nonfeasance is the breach of a positive duty. In other words, misfeasance is a breach of the duty not to do something, while nonfeasance is a breach of the duty to do something in particular. Since the duty to rescue would constitute a positive duty rather than a negative duty, it is argued that the common law has no capacity to recognise it as legally enforceable.

(4) *Causation*

2.42 It has been asserted that one who fails to comply with a positive duty to intervene cannot be said to be causally responsible for damage accruing.³³ While one who fails to comply with a negative duty may be understood as creating a new risk of harm, one who fails to comply with a positive duty may only be understood as failing to prevent a harm from occurring. In the context of a rescue, it is argued that the bystander only fails to confer a benefit on the stranger, in the sense that he or she fails to abate an independently arising harm.

2.43 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. This would go against the philosophy of negligence, which seeks to redress those situations in which damage has been caused.

2.44 While this may appear convincing, the Commission notes that it has also been asserted that there may be some confusion between the issue of causation and the issue of duty. From this it follows that inaction is just as likely to give rise to harm as positive action. However, if there is no duty to act, then a failure to act will not give rise to legal liability.

³² Bohlen "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U Pa L Rev 217 at 220. Weinrib "The Case for a Duty to Rescue" (1980) 90(2) *Yale Law Journal* 247 at 251-258.

³³ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 24-27. Weinrib "The Case for a Duty to Rescue" (1980) 90(2) *Yale Law Journal* 247 at 249-251.

(5) Several Tortfeasors

2.45 While it may be relatively easy to identify those responsible in a case of misfeasance, the same may not be said for cases of nonfeasance.³⁴ In any scenario involving nonfeasance or passive inaction, it is likely that there may be more than one person guilty of failing to act. In contrast to cases of misfeasance, cases of inaction do not afford the opportunity of analysing whose inaction is most responsible for the harm.

2.46 As against this argument, there is nothing to prevent a case being taken against one tortfeasor, who may then bring an action against any other tortfeasor for contribution.

(6) Easy Rescue

2.47 Some writers have advocated a modified stance, in the sense of imposing a positive duty to conduct an “easy rescue.”³⁵ In support of this, it has been noted that there has been an erosion of the general principle of no-duty-to-intervene and that a rescuer may now recover damages for injuries sustained.³⁶ In addition, it has been asserted that the defences of voluntary assumption of risk and novus actus interveniens are no longer available.³⁷ While Irish law may not have gone so far, it would certainly seem that the courts are less likely to consider these defences unless it can be shown that the rescuer has acted in some reckless or wanton way.³⁸ Furthermore, it has been argued that there is an ever-increasing number of situations in which a duty to intervene is being found on the basis of some new special relationship.³⁹ It has also been noted that, in practice, a rescuer will rarely be found liable, unless he or she has acted wantonly either in his or her assessment of the situation or in his or her reaction to the situation.

2.48 In consequence, it has been argued that there may be room to recognise a modified duty to intervene. Such a duty might require the bystander to undertake some activity to assist the stranger, where that activity does not unduly inconvenience the bystander. The ease with which

³⁴ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 16-17. Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 262.

³⁵ Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247.

³⁶ Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 248.

³⁷ Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 248.

³⁸ *Phillips v Durgan* [1991] ILRM 321 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 581-584.

³⁹ Amongst these special relationships, Weinrib includes the relationship of employer/employee, proprietor/customer, landlord/trespasser and boat operator/passenger. See Weinrib “The Case for a Duty to Rescue” (1980) 90(2) *Yale Law Journal* 247 at 248.

the act may be performed may be analysed by reference to the nature of the particular activity. For instance, where all that is needed is a phone call to the emergency services, it may be expected that a bystander with a mobile phone could easily perform this task.⁴⁰ The ease with which the task may be performed may also be adjudged with reference to the skill of the particular bystander. For example, a trained paramedic may be in a much better position to administer CPR to an injured stranger than an inexperienced bystander.

2.49 The Commission notes that such a duty to intervene, 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.

E Conclusion

2.50 The Commission has concluded that the arguments against the imposition of a positive duty to intervene have a great deal of weight, in particular because they are consistent with the general basis of the duty of care in negligence which has not been criticised in any significant respect. Some commentators have taken a modified stance in advocating an “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. While it may be more reasonable to expect an individual to conduct an easy rescue, the Commission notes that there is no greater legal basis for such an obligation than there is for a full blown duty to rescue. In this regard, the Commission is particularly concerned about the uncertainty that the operation of such a duty might entail.

2.51 On this basis, the Commission has concluded that the arguments against imposing a duty to intervene outweigh any which would impose a general duty. The Commission has concluded that existing statutory duties to intervene, such as those which apply in connection with professional rescuers, road traffic accidents or the duties of employers for the safety of their employees and the public, are best left to individual development by the Oireachtas, taking into account the specific settings in which they arise.

2.52 *The Commission provisionally recommends that there should be no reform of the law to impose a duty on citizens in general, or any*

⁴⁰ While not obliging a bystander to intervene, section 106(1)(c) of the *Road Traffic Act 1961* comes close in that it obliges the driver or person in charge of a vehicle, involved in an accident, to provide information to a member of the Garda Síochána or another person entitled under the 1961 Act to demand information.

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.

CHAPTER 3 DUTY OF CARE

A Introduction

3.01 In Chapter 1, the Commission discussed in some detail the policy setting against which the Attorney General's request was received and against which the *Good Samaritan Bill 2005* was constructed. In Chapter 2, the Commission noted that current law refrains from imposing any general positive duty to intervene as a Good Samaritan or, indeed, as a volunteer of any kind and provisionally recommended that there should be no change in this position. The Commission also noted, however, that this did not resolve the issue of whether an individual, acting as a Good Samaritan or volunteer, comes under a duty to act with reasonable care. The Commission now turns to examine this aspect of the Attorney General's request. In Part B, the Commission examines the position of Good Samaritans. In Part C, the Commission examines the position of voluntary rescuers, while in Part D, the Commission deals with voluntary service providers. In Part E, the Commission sets out its conclusions.

B Good Samaritans

3.02 Drawing from the discussion in Chapter 1, the Commission notes that the term Good Samaritan may be defined broadly as:¹

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).

Thus, the Good Samaritan might be an unskilled passerby, an off-duty voluntary rescuer, an off-duty voluntary service provider or an off-duty professional.

3.03 The Commission emphasises that situations involving the Good Samaritan are relatively rare.² Any provisional recommendations, therefore,

¹ See paragraph 1.51 to paragraph 1.55 above.

² *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).

will only apply to a small number of cases. In this respect, it is useful to describe a scenario in which the Good Samaritan is likely to intervene. For instance, let us consider a situation in which a stranger is clinging to a floating log in the middle of a lake. The stranger has no means of getting to shore and so requires outside intervention to abate the risk that he or she faces. It is in the context of such a situation that the Attorney General inquires as to the appropriate duty of care and standard of care to be applied to an individual intervening as a Good Samaritan.

(1) Duty of Care

3.04 In *Glencar Exploration v Mayo County Council*³ and *Fletcher v Commissioner of Public Works*,⁴ the Supreme Court has stated that to establish a duty of care it must be shown that:⁵

- There is proximity between the alleged duty holder and the injured person;
- The injury caused was foreseeable by the alleged duty holder;
- It is just and reasonable to impose a duty.

3.05 In this three-stage test, the concepts of “proximity” and “foreseeability” continue to be important considerations, but new weight is given to the third element in determining whether it is just and reasonable to impose a duty of care. This third element is sometimes referred to as the policy factor which, in a previous test applied by the courts,⁶ had a less important default position. The added importance given to the third policy factor is of great significance in the context of the Attorney General’s request.

(a) Proximity

3.06 The Commission notes that in order to establish a duty of care, it must first be shown that there is a relationship of proximity between the Good Samaritan and the stranger.⁷ While it has been asserted that the Good

³ [2002] 1 IR 84.

⁴ [2003] 1 IR 465.

⁵ McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 111: a duty of care is a “legally recognised obligation requiring the defendant to conform to a certain standard of behaviour for the protection of others against unreasonable risks.”

⁶ See *Anns v Merton London Borough Council* [1978] AC 728 and *Ward v McMaster* [1988] IR 337, which proposed a two-stage test that accorded a lesser weight to public policy concerns.

⁷ See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 119 which indicates that proximity is a term, perhaps synonymous with “neighbourhood”, suggesting a closeness between the parties that is not confined to considerations of space or time.

Samaritan voluntarily assumes responsibility by intervening,⁸ it is not always clear what is meant by this expression.⁹ It would seem, however, that the essential elements are those laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.¹⁰ In that case, it was held that a person may come under a duty of care in favour of another, where the person voluntarily uses a skill in favour of that other, in circumstances where the person knows or ought to know that that other will reasonably rely on the skill being exercised.

3.07 Applied to the rescue scenario, the Good Samaritan must voluntarily intervene in favour of the stranger, the stranger must rely on this voluntary intervention and the Good Samaritan must or should know that the stranger is so relying. While this may aptly describe those rescue situations in which there are relationships of undertaking and reliance, separate conditions may apply to rescue situations involving relationships of control and dependence.

(i) Undertaking and Reliance

3.08 The Commission turns first to consider those rescue situations in which the prevailing relationship is one of undertaking and reliance.¹¹ In the scenario described above, the Good Samaritan may *voluntarily intervene* to assist the stranger clinging to the log and the stranger may *rely* on this voluntary intervention to extract him or her from the predicament. The Commission notes the importance, therefore, of understanding what is meant by the terms “voluntary intervention” and “reliance.”

(I) Voluntary Intervention

3.09 The principal ways in which a Good Samaritan may voluntarily intervene in a rescue situation are by making a promise or performing an act in favour of the stranger.

(a) Promise

3.10 For example, where the Good Samaritan throws a rope to the stranger clinging to the log and says that he or she will pull the stranger to safety if the stranger grabs the rope, this is an express promise. If the Good Samaritan, on the other hand, throws the rope in the direction of the stranger

⁸ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 58-68.

⁹ *White v Jones* [1995] 2 AC 207, *Smith v Eric S Bush* [1990] 1 AC 831, *Henderson v Merrett Syndicates* [1995] 2 AC 145, *Spring v Guardian Assurance* [1995] 2 AC 296. Barker “Unreliable Assumptions in the Modern Law of Negligence” (1993) 109 LQR 461.

¹⁰ [1964] AC 465, cited with approval in *Securities Trust Ltd v Hugh Moore & Alexander Ltd* [1964] IR 417.

¹¹ The Commission notes that a voluntary intervention may also be known as a “voluntary undertaking” or a “voluntary assumption of responsibility.”

and merely advises the stranger to grab the rope, it might be implied from this that the Good Samaritan intends to pull the stranger to safety.

3.11 The law does not generally recognise a statement of intention as legally enforceable, unless made in the context of contractual relations. Thus, the Good Samaritan may justifiably change his or her mind at any stage. Alternatively, the execution of the promise may be frustrated. While it may seem callous to suggest that the Good Samaritan could promise to rescue a stranger and then change his or her mind, it is readily apparent that a promise to rescue may not always meet with a successful outcome. This raises the issue as to the exact nature of the promise.

3.12 The promise to rescue may be more aptly described as a promise to endeavour rather than a promise to achieve a successful outcome. This is an important distinction as the nature and content of a promise to endeavour, rather than to achieve a successful outcome, is less specific and so, less likely to lend itself to becoming an enforceable obligation. With a promise to endeavour, every minute effort made by the Good Samaritan may count in his or her favour. In contrast, where the Good Samaritan promises to achieve a successful outcome, he or she will not fulfil his or her promise until he or she saves the stranger. Furthermore, where the Good Samaritan promises to endeavour, he or she concedes that he or she may only be capable of stabilising or abating the risk, while a promise to achieve a successful outcome suggests that the Good Samaritan must complete the rescue operation.

(b) Voluntary Act

3.13 A voluntary intervention may simply mean that the Good Samaritan has voluntarily undertaken a particular course of conduct in favour of the stranger. By using the term “voluntarily”, it should be understood that the Good Samaritan has intentionally acted for the benefit of the stranger. Situations involving a Good Samaritan unintentionally acting in favour of the stranger and situations involving a Good Samaritan who, despite his or her best efforts, fails to avoid acting in favour of a stranger are extremely rare.

3.14 In the context of a rescue situation, there is a wide range of activities that a Good Samaritan may potentially undertake in favour of the stranger. Generally, the conduct pursued by the Good Samaritan will relate directly to the injury, if any, suffered by the stranger and the skill that the Good Samaritan may contribute. First, the Good Samaritan may set himself or herself apart from the situation, by alerting the predicament of the stranger to a third party, such as the emergency services. Second, the Good Samaritan may involve himself or herself to some extent, by alerting the stranger to an imminent risk. Third, the Good Samaritan may become directly involved by physically intervening in the predicament of the

stranger. It may be noted at this point that there is a greater chance that the Good Samaritan will cause an injury to the stranger the more direct and physical his or her intervention becomes.

3.15 The Commission queries whether the issue of reliance is really a necessary condition for those voluntary interventions constituted by a voluntary act. The Commission accepts, however, that reliance may be a necessary condition where the voluntary intervention is constituted by an act that is unintentionally in favour of the stranger.

(c) *Reliance*

3.16 The law is reluctant to recognise a relationship of proximity in every case where there is a voluntary intervention in favour of one party. This is so, irrespective of whether the voluntary intervention is constituted by a promise or a voluntary act. Under the *Hedley Byrne* principle,¹² the Commission observes that the additional element of reliance may also be required. If by voluntarily intervening the Good Samaritan induces the stranger to rely upon him or her, this may give rise to a proximate relationship. This raises the issue as to what constitutes reliance in the context of a rescue situation.¹³

3.17 In general terms, reliance may mean that the stranger has, in some way, changed his or her position on faith of the intervention made by the Good Samaritan. In this sense, a proximate relationship does not arise when the Good Samaritan throws the rope to the stranger clinging to the log, but rather when the stranger swims towards the rope in order to grab a hold. However, reliance alone may not be sufficient. Under the *Hedley Byrne* principle, it must also be shown that the Good Samaritan knows or ought to have known that the stranger would rely on the Good Samaritan's intervention. This will only be the case in those situations where reliance by the stranger is objectively reasonable.

3.18 In the context of a rescue, however, what may be considered objectively reasonable may be a far cry from what may ordinarily be considered objectively reasonable. First, in any rescue situation it is likely that the stranger's capacity for reasoned judgment will be lower than usual. Injury, illness, panic and exhaustion are factors which are likely to impede the stranger's normal thought processes. Since the stranger may find himself or herself in a life or death situation, instinct may compel the stranger to undertake a course of conduct, which is not without inherent risks but offers

¹² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, cited with approval in *Securities Trust Ltd v Hugh Moore & Alexander Ltd* [1964] IR 417.

¹³ The term "reliance" implies that the stranger has the opportunity to choose between the course of conduct advised by the Good Samaritan and alternative courses of conduct.

him or her a glimmer of hope. The identity of the Good Samaritan may also be a crucial factor in this analysis. Where the Good Samaritan is skilled, for example as a doctor, the stranger may be more inclined to rely on his or her advice. Other factors may need to be taken into account, such as the alternative courses of conduct open to the stranger.

3.19 Assuming that the stranger's reliance is reasonable, a question arises as to the exact nature of that reliance. On the one hand, reliance may be non-detrimental in the sense that the stranger is no worse off, having changed his or her position on faith of the Good Samaritan's intervention. For instance, the Good Samaritan may throw a rope to the stranger, advising him or her to tie the rope to the log so that the Good Samaritan may pull him or her to shore. If the rope breaks before the Good Samaritan can complete the operation, the stranger's position is no worse than it was before the Good Samaritan's intervention, so long as the stranger is still clinging to the log.

3.20 The same might hold true even where the stranger is at risk of imminent injury or death. For instance, let us imagine a situation in which the stranger is no longer clinging to the log and is drowning. The Good Samaritan may throw a rope to the stranger and attempt to pull him or her to shore. If the rope breaks before the Good Samaritan can complete the operation and the stranger drowns, the stranger's position is technically no worse than it would have been before the Good Samaritan intervened.

3.21 A question then arises regarding situations in which injury or death is not an imminent threat, but the ultimate consequence of non-intervention. For instance, the Good Samaritan may throw a rope to the stranger, who is clinging to a log. If no intervention is made, the stranger will cling to the log until he or she is too weak to hold on. The Good Samaritan may advise the stranger to tie the rope to the log so that the Good Samaritan may pull him or her to shore. If the force of the pull causes the log to snap and the stranger drowns, a question arises as to whether the Good Samaritan may be held liable for speeding up an inevitable consequence. It may be the case that since the stranger was not under an imminent threat of death, the Good Samaritan should have spent extra time planning the rescue operation.

3.22 The law is reluctant to recognise non-detrimental reliance as a ground for holding the Good Samaritan liable for his or her intervention. This is so because non-detrimental reliance implies that the stranger has not succumbed to any injury or damage because of the reliance. Where there is no injury or damage, there is no claim in negligence. This raises a question in respect of situations in which there is no alternative to the Good Samaritan's intervention or a certain amount of damage is necessary to its overall success.

3.23 The law is more receptive to the idea of detrimental reliance. Detrimental reliance suggests that the stranger changes his or her position for the worse, on faith of the Good Samaritan's intervention. The question then arises as to how detriment is assessed. On the one hand, detriment may suggest that the stranger is in a worse position than he or she was just before the Good Samaritan intervened. For instance, the Good Samaritan may throw a rope to the stranger and advise the stranger to let go of the log and hold on to the rope instead. If, in the meantime, the log floats away and the rope snaps, it may be asserted that the stranger is in a worse position than he or she would have been had the Good Samaritan not intervened. In that sense, the Good Samaritan's intervention has caused the stranger to be in a position of greater risk.

3.24 On the other hand, detriment may suggest that, on faith of the Good Samaritan's intervention, the stranger sacrifices an alternative option. In this sense, the damage to the stranger may simply be the loss of an alternative. However, such a conclusion must surely depend on whether the alternative was likely to inspire a more successful outcome. Distinguishing options on the basis of their potential for success may not always be an easy task. Firstly, such an assessment may require excessive use of the faculty of hindsight. Furthermore, the more obvious it is which option has the greatest potential for success, the less realistic the scenario becomes. It is unlikely, for instance, that the stranger will choose the option proffered by the Good Samaritan where it is clearly less favourable. Finally, it should be noted that some interventions may be considered less favourable in the sense that while they have a greater potential for success they involve a greater risk of injury. For instance, in saving the stranger's life by using the rope to pull him or her to shore, the Good Samaritan may inadvertently dislocate the stranger's shoulder.

3.25 Thus, the Commission notes that where the voluntary intervention is a promise, it is most likely that the stranger will rely, in some way, on the Good Samaritan. Where the voluntary intervention is a voluntary act, the issue of reliance may depend on the nature of the act. For instance, where the Good Samaritan informs a third party of the stranger's predicament, it is likely that the stranger will rely on the third party rather than the Good Samaritan. Where the Good Samaritan intervenes by alerting the stranger to an imminent risk, it might be asserted that the Good Samaritan has maintained a sufficient amount of distance to dispel any argument in relation to reliance. However, where the Good Samaritan directly and physically intervenes into the predicament of the stranger, it is most likely that the stranger will rely on the Good Samaritan.

(ii) Control and Dependence

3.26 Not all rescue situations involve relationships of undertaking and reliance. Whereas such rescue situations anticipate a stranger choosing to rely on the Good Samaritan's intervention, it is not difficult to imagine a number of rescue situations in which the stranger is unable to choose, either because there is no alternative to the Good Samaritan's intervention or because the stranger is incapable of making a choice, such as where the stranger is unconscious. Such rescue situations may be more aptly described as involving relationships of control and dependence, where the Good Samaritan asserts control over the stranger's predicament. The law may be reluctant to recognise such relationships as giving rise to a duty of care.¹⁴ It is important, then, to address the meaning of the terms control and dependence in the context of the rescue situation.

(I) Control

3.27 Like the term "voluntary intervention", a number of meanings may be attributed to the term "control." A broad interpretation is that the term control relates to the respective powers of the parties involved. Relative to each another, the Good Samaritan occupies a comparatively strong position while the stranger occupies a comparatively weak position. Of the two parties, the only one who is capable of asserting some measure of control over the situation is the Good Samaritan.

3.28 A narrower interpretation of the term control seems to suggest that the Good Samaritan intentionally takes charge of the situation. This may be illustrated by an express statement of intention or may be inferred from the conduct of the Good Samaritan. In line with this interpretation, the Good Samaritan may assume initial control of the situation. For instance, the Good Samaritan may alert the stranger to an imminent risk, affording the stranger the opportunity to assert control over the situation. Alternatively, the Good Samaritan may initiate the rescue operation by alerting a lifeguard to the predicament of the stranger. In this sense, the Good Samaritan is only in control of the situation for a specific period of time. Control over the situation may pass to the lifeguard, or whoever, once he or she has been informed. Alternatively, the Good Samaritan may assume total control over the situation, sometimes to the extent of excluding the efforts of others. In this way, the Good Samaritan may give the impression that he or she is capable of carrying out the rescue operation alone. For instance, the Good Samaritan may claim to have a particular skill that puts him or her in the best position to render assistance.

¹⁴ Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 64.

(II) *Dependence*

3.29 Where the Good Samaritan asserts control, it is most likely that the stranger will be in a situation of dependence. As such, the dependent stranger may be distinguished from the reliant stranger.

3.30 First, the dependent stranger may have no choice but to succumb to the will of the Good Samaritan. This may be because there are no alternatives to the Good Samaritan's intervention. Alternatively, it may be because there are no real alternatives to the Good Samaritan's intervention, in the sense that the alternative may entail imminent injury or death. The Commission notes that common sense would seem to indicate that the natural instinct of most people would be to choose the method that provides at least some chance of success over injury or death. Thus, it may be more accurate to say that the stranger acts out of natural impulse rather than choice.

3.31 The situation may be slightly different where the stranger is in a position which poses a threat of ultimate injury or death, rather than imminent injury or death. In this sense, the stranger may have some time at his or her disposal before such an eventuality occurs. It is quite conceivable, therefore, that the stranger might choose to do nothing for the time being rather than opt for the method proposed by the Good Samaritan.

3.32 Even where a real choice is available to the stranger, there may be many rescue situations in which the stranger is incapable of choosing. In other words, the stranger may be in a position that prevents him or her from absorbing any representation made by the Good Samaritan and from changing his or her position on faith of it. This is likely to be the case where the stranger has become incoherent or has fallen unconscious. In such a situation, it may be asserted that the Good Samaritan acts on behalf of the stranger.

3.33 By intervening in either of these situations, the Good Samaritan must be aware of the power that he or she holds over the fate of the stranger. In particular, it must be clear to the Good Samaritan that his or her conduct and decisions will have a direct impact on the well-being and life of the stranger. Furthermore, the Good Samaritan must know that by intervening, he or she may aggravate an existing condition or create a new risk of harm. The voluntary intervention, then, may signify that the Good Samaritan appreciates the gravity of the situation and accepts to take responsibility for it. It is unclear, however, whether "responsibility", in this sense, may be equated with "legal responsibility."

(b) *Foreseeability*

3.34 Once it has been established that there is a relationship of proximity between the Good Samaritan and the stranger, the next question to

be answered is whether it was reasonably foreseeable that the intervention of the Good Samaritan would injure the stranger.¹⁵ If it can be shown that the Good Samaritan knew or ought to have known that his or her intervention would injure the stranger, then it might be asserted that the Good Samaritan ought to have modified his or her conduct.¹⁶ The test in this respect is objective, in the sense that the law will not look to the actual knowledge of the Good Samaritan, but to the knowledge that would be expected of a reasonable person in similar circumstances.¹⁷ Furthermore, since the issue of foreseeability ultimately depends on the circumstances of the particular case, this section involves a broad discussion around the relevant factors.

3.35 First, the risk of injury may be greater, and therefore more foreseeable, where the stranger is in a particularly perilous situation or has already incurred a certain amount of damage.¹⁸ Related to this, foreseeability is whether the Good Samaritan is privy to knowledge of the circumstances which have given rise to the stranger's predicament. Second, the chance of injury arising may also depend on the type of intervention undertaken by the Good Samaritan. For instance, injury may be more likely where the Good Samaritan undertakes to administer medical assistance than where the Good Samaritan undertakes to ring the emergency services. In this context, the type and level of skill possessed by the Good Samaritan may also be relevant. If the Good Samaritan attempts to do something for which he or she does not have the requisite skill, then the likelihood of harm arising may be greater. The Commission recognises that this may pose a problem, in the sense that the Good Samaritan may have no alternative but to undertake the particular task in question. Furthermore, it should be noted that there may be situations in which injury is an inevitable consequence. The question then arises as to whether the Good Samaritan should be held liable for an injury that he or she foresaw, even where that injury was unavoidable in the overall rescue operation.

3.36 Foreseeability may also relate to the type of relationship that exists between the Good Samaritan and the stranger. As was noted in the

¹⁵ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388.

¹⁶ The issue of foreseeability may also arise in the context of remoteness of damage, which entails an examination of whether the Good Samaritan knew or ought to have known that his or her conduct would cause the particular type of damage to the stranger.

¹⁷ 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.

¹⁸ 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.

previous section, a proximate relationship may be established on the basis that there has been an undertaking by the Good Samaritan and corresponding reliance by the stranger. The extent to which the Good Samaritan may foresee injury may depend on whether the reliance in question is of a non-detrimental or a detrimental nature. Where the reliance is non-detrimental, for instance, the Good Samaritan may expect the stranger to change his or her position on faith of the Good Samaritan's intervention, but to be in no worse a position as a result. Where the reliance is detrimental in nature, on the other hand, the Good Samaritan may expect the stranger to change his or her position on faith of the Good Samaritan's intervention and to be in a worse position. The problem with such a theoretical argument, however, is that it is unlikely that considerations of non-detrimental or detrimental reliance will be at the forefront of the Good Samaritan's mind.

3.37 Relationships of proximity may also be established where a Good Samaritan asserts control over an entirely dependent stranger. Regardless of the reason for the absence of choice, dependency arises from a situation in which the stranger is already in a vulnerable position. As such, the possibility of the Good Samaritan inflicting injury may be greater, to the extent that the Good Samaritan may be aggravating a precarious situation or an existing injury.

3.38 These considerations are by no means an exhaustive list. They do, however, help to illustrate the elusive nature of foreseeability in the Good Samaritan scenario.

(c) *Just and Reasonable*

3.39 Even where the conditions of proximity and foreseeability may be satisfied, the Commission notes that under the three-point test adopted by the Supreme Court in *Glencar Explorations plc v Mayo County Council*¹⁹ the law will not impose a duty of care unless it is "just and reasonable" to do so. In other words, it must be shown that there are no issues of public policy which may 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 which are recoverable. This must be considered in light of the particular case and in light of the precedent that the decision may create.

3.40 In the first place, the Commission notes that activities undertaken by the Good Samaritan may present a particular problem at this stage of the duty of care enquiry. As was noted in Chapter 1, activities undertaken by the Good Samaritan may be understood as being activities performed for the benefit of society. Thus, it may be asserted that Good Samaritan activities should be acknowledged and encouraged. Obviously, this may be a "just and reasonable" factor to be taken into account in this respect.

¹⁹ [2002] 1 IR 84.

3.41 Secondly, the Commission notes that the main objective of imposing liability may be to identify the party who is to bear the cost of damages. In the context of the Good Samaritan scenario, this process may be particularly delicate. On the one hand, it is asserted that the law should acknowledge and encourage the good works of the Good Samaritan, while on the other hand, it is asserted that the law should not unduly prejudice the stranger, who may already be in a vulnerable situation.

3.42 Thirdly, the Commission observes that the extent to which liability may dissuade individuals from undertaking dangerous activities may have a negative impact on those who would otherwise be willing to intervene in a rescue situation. This may be so as a rescue, by definition, will usually entail some element of danger – both for the stranger and the Good Samaritan.

3.43 Finally, the Commission notes that a finding of liability may not only deter future Good Samaritans from intervening, but may also create a precedent for future claims against Good Samaritans. In this context, the Good Samaritan may appear to occupy a particularly vulnerable position. Since Good Samaritans do not generally organise themselves in groups, they may not have the benefit of training, support or advice.²⁰ Thus, Good Samaritans may range from those persons who are highly skilled to those persons capable only of making rudimentary responses. Furthermore, Good Samaritans may not benefit from the safeguards which are typically available to those involved in organisations, for instance, insurance cover and vicarious liability. Good Samaritans, therefore, may be personally liable for any damage arising from their intervention.

3.44 At this point, the Commission emphasises that there is a lack of case law on this area, not only in Ireland but in other states. The absence of case law may be attributed to a number of factors. First, it may indicate that the stranger's gratitude to the Good Samaritan generally outweighs the stranger's desire to seek compensation for any incidental injury: they are alive. Second, it may indicate that lawyers are advising their clients against suing Good Samaritans, in light of the weight given by the courts to the element of societal benefit. Third, it may indicate that the strangers who do pursue cases against Good Samaritans are settling their cases before they get to court. Finally, though less likely, it may indicate that individuals are no longer intervening as Good Samaritans. While the absence of caselaw does not definitively prove one position or another, the Commission considers that a combination of gratitude by the rescued stranger and the unlikelihood of succeeding in any event are the most likely reasons. The Commission's

²⁰ Some Good Samaritans may have benefitted from training, for instance, where the Good Samaritan is an off-duty rescuer or medically qualified person.

inquiries indicate that fear of litigation, while present, does not currently deter people from acting as Good Samaritans.²¹

(2) Standard of Care

3.45 Once it is established that the Good Samaritan owes the stranger a duty of care, the next stage of the inquiry requires an examination of whether the Good Samaritan has performed the rescue operation to the appropriate standard of care. Thus, the test is an objective one, requiring the defendant to exercise such care as would be exercised by the reasonable person in similar circumstances.²²

3.46 To a certain extent, however, regard may be had to the characteristics of the particular group to which the defendant belongs.²³ Such characteristics may include physical characteristics,²⁴ mental characteristics,²⁵ moral qualities²⁶ and skill.²⁷ With the exception of moral qualities,²⁸ the law generally takes a subjective approach to these characteristics. Of particular relevance to the Good Samaritan scenario is the issue of skill, given that the Good Samaritan may be any individual, ranging from the unskilled to the highly skilled.²⁹ While a reasonable

²¹ See *2007 Report of Taskforce on Active Citizenship* at 7 and 17, which indicates that there is no clear evidence that there are less people volunteering despite a fear of litigation. Available at [www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20to%20Government%20\(MAR%2007\).pdf](http://www.activecitizen.ie/UPLOADEDFILES/Mar07/Taskforce%20to%20Government%20(MAR%2007).pdf).

²² See *Kirby v Burke* [1944] IR 207 and *Purtill v Athlone UDC* [1968] IR 205 at 212-213 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 145 and 154 respectively.

²³ 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.

²⁴ Seavey “Negligence – Subjective or Objective?” (1927-1928) 41 Harv L Rev 1: the Commission notes that physical characteristics refer to the use of the senses, strength and height, and also the non-sentient or nervous qualities.

²⁵ The Commission notes that mental characteristics refer to knowledge and intelligence. See also the Commission’s *Report on the Liability in Tort of Mentally Disabled Persons* (LRC 18-1985).

²⁶ Seavey “Negligence – Subjective or Objective?” (1927-1928) 41 Harv L Rev 1: moral qualities may be divided into will and the ability to evaluate interests or the ability to distinguish between right and wrong.

²⁷ Seavey “Negligence – Subjective or Objective?” (1927-1928) 41 Harv L Rev 1: skill may be described as a combination of knowledge, intelligence and physical qualities.

²⁸ Seavey “Negligence – Subjective or Objective?” (1927-1928) 41 Harv L Rev 1: a purely objective principle applies to moral qualities. As such, excessive altruism is as much a departure from the standard of morality as excessive selfishness.

²⁹ Seavey “Negligence – Subjective or Objective?” (1927-1928) 41 Harv L Rev 1: while a subjective approach is taken with regard to the physical aspects of skill, common

standard of intelligence may be expected of all Good Samaritans, higher levels of skill may indicate the presence of greater physical dexterity and greater knowledge.³⁰ The question, then, is whether the standard of care to be applied to the Good Samaritan should take these variations into account.³¹ This may be complicated because the Good Samaritan may feel obliged to undertake an activity for which he or she is not sufficiently skilled. Ordinarily, the law's approach to such a situation is that one who undertakes to do a particular task requiring a minimum level of skill may be held liable for falling below that level of skill.³² This may be considered unfair in the context of the Good Samaritan.

3.47 If the Good Samaritan is expected to exercise such care as the reasonable person would in similar circumstances, then, the question arises as to the care a reasonable person would exercise in similar circumstances. Four factors have been identified to assist in this inquiry:³³

- Probability of Harm
- Gravity of Potential Injury
- Cost of Eliminating Risk
- Social Utility

(a) *Probability of Harm*

3.48 This factor is closely linked to the issue of foreseeability. The general principle is that the greater the likelihood of harm to the plaintiff, the more probable it is that the court will regard it as unreasonable for the defendant to engage in the risky conduct or to fail to take steps to avert the threatened injury.³⁴ The difficulty with applying this principle to the Good Samaritan scenario is that the Good Samaritan, by definition, happens upon a

knowledge of certain facts is attributed to all individuals and a purely objective principle applies to intelligence. It should be noted that a modified standard of care test may apply to minors, see *Gough v Thorne* [1966] 1 WLR 1387, and the mentally ill, see the Law Reform Commission *Report on the Liability in Tort of Mentally Disabled Persons* (LRC 18-1985).

³⁰ *Byrne v McDonald* Supreme Court 7 February 1957.

³¹ The Commission notes that the answer to this question may depend on the extent to which such variations may be incorporated without giving rise to a multitude of different standards of care. *Vaughan v Menlove* (1837) 3 Bing, NC 468, 132 ER 490 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 146.

³² *Brogan v Bennett* [1955] IR 119, cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 378.

³³ McMahon and Binchy *Law of Torts* (3rd ed Butterworths 2000) at 154-167.

³⁴ *Breslin v Brennan* [1937] IR 350.

situation for which the probability of harm occurring is independently high. Thus, the situation may be described as precarious, in the sense that the prevailing conditions may easily be exacerbated, or the existing injuries easily aggravated, by the Good Samaritan's intervention.³⁵

3.49 This factor, therefore, refers to the probability of harm caused by the Good Samaritan, rather than the probability of harm in general. As with the issue of foreseeability, the type of intervention undertaken by the Good Samaritan may be of particular relevance. For instance, it is much less likely that the Good Samaritan will cause harm where he or she intervenes by alerting the emergency services to the stranger's predicament than where the Good Samaritan intervenes by rendering medical assistance. Related to this, the skill possessed by the Good Samaritan may be of equal importance. The more skilled the Good Samaritan is, the better able he or she may be to assess the situation and to tailor his or her undertaking accordingly. The Commission notes, however, that just because one Good Samaritan may be particularly skilled, this does not mean that he or she is obliged to use that skill to its fullest extent. It may be just as reasonable for such a Good Samaritan to limit his or her intervention to alerting the emergency services.

(b) Gravity of Threatened Injury

3.50 Again, there is a difficulty in applying this principle to the Good Samaritan scenario, as it asserts that where the potential injury is great, the creation of even a slight risk may constitute negligence.³⁶ The problem is that the Good Samaritan, by definition, happens across situations for which there may be an independent risk of serious injury. Thus, the real issue here relates to the gravity of the injury threatened by the Good Samaritan's intervention, whether this results from the Good Samaritan exacerbating a precarious situation or aggravating an existing injury. As a result, the severity of the injury threatened by the Good Samaritan's intervention may need to be balanced against the severity of the independent threatened injury. For instance, it may seem unfair to hold the Good Samaritan liable for breaking the stranger's ribs, when such was a necessary consequence of administering vital CPR.

3.51 The Commission notes that while the potential benefits of physical intervention may be greater, so too may the risk of serious harm. For instance, it is much less likely that the Good Samaritan will cause severe harm where he or she alerts the emergency services to the predicament of the stranger than where the Good Samaritan physically intervenes by rendering medical assistance. Related to this, the skill of the Good Samaritan may be relevant. For instance, one who is trained in a rescue-related area may be

³⁵ *Doran v Dublin Plant Hire Ltd* [1990] 1 IR 488.

³⁶ *Sullivan v Creed* [1904] 2 IR 317.

better equipped to assess the predicament of the stranger and to tailor his or her response appropriately. However, the Good Samaritan may not always be privy to the circumstances which have led to the stranger's predicament or to the exact nature of the stranger's injury.³⁷ In that respect, it may seem unfair to hold the Good Samaritan liable for something that he or she would not have done had he or she had further information. In such a situation the Good Samaritan might ordinarily be expected to err on the side of caution. This may not always be possible in the context of a rescue.

(c) Cost of Eliminating the Risk

3.52 In an organised setting, the cost of eliminating the risk usually refers to the financial cost of implementing safeguards around an activity.³⁸ This does not easily translate in the Good Samaritan scenario. Given the spontaneous and one-off nature of the Good Samaritan intervention, it is unlikely that the Good Samaritan will ever be in a position to implement such safety measures. This is not to suggest, however, that the Good Samaritan does not have the opportunity to limit the risk to which he or she exposes the stranger. In this context, regard may be had to the alternative methods of intervening that are reasonably available to the Good Samaritan at the time of his or her intervention. As was noted above, some methods of intervening may expose the stranger to a great deal of risk while other methods may entail little or no risk at all. For instance, the Good Samaritan may be best advised to refrain from rendering physical assistance (as advised in the *Rules of the Road*, the guide to road traffic legislation published by the Road Safety Authority) where it is safer in the circumstances to alert the emergency services to the stranger's predicament. In such a case, the Good Samaritan may be instrumental in securing the scene and attracting attention to the stranger's plight, rather than in undertaking the rescue operation himself or herself. This may be problematic in those rescue situations where direct, physical intervention is urgently required and any delay by the emergency services may prove fatal. There is a concern, therefore, that the Good Samaritan may become so preoccupied with limiting the risk of liability to which he or she is exposed that he or she will be distracted from the ultimate purpose of his or her intervention.

(d) Social Utility

3.53 Where the defendant's conduct has a high social utility it will be regarded with more indulgence than where it has none.³⁹ In particular, the saving of life or limb may justify taking risks which would not be

³⁷ *Sydney County Council v Dell'Ore* (1964) 132 Comm LR 97.

³⁸ *O'Gorman v Ritz (Clonmel) Ltd* [1947] Ir Jur Rep 35.

³⁹ *Tomlinson v Congleton Borough Council* [2003] 3 All ER 1122.

permissible in the case of an ordinary commercial enterprise.⁴⁰ This principle is of particular relevance to the Good Samaritan scenario.

3.54 The social utility of the Good Samaritan intervening to assist the stranger is clear. The Good Samaritan may be the first person on the scene and, as such, may be instrumental in attracting attention, securing the scene and even conducting a rescue operation. The Commission notes, however, that the extent to which the Good Samaritan may be willing to get involved may relate to the level of skill that he or she possesses. In the context of a rescue, there is a particular social benefit in encouraging those with specialist life-saving skills to intervene.

(3) Summary

3.55 In respect of the duty of care question, despite the lack of relevant case law, the general principles of negligence do not clearly exempt the Good Samaritan from liability. For those rescue situations entailing physical intervention at least, it is likely that the relationship between the Good Samaritan and the stranger will be recognised as sufficiently proximate to give rise to a duty of care. Furthermore, in such rescue situations, it is foreseeable that the Good Samaritan may cause some injury to the stranger, though this may not often happen in practice, certainly evidenced by the absence of litigation. It may be of course that a duty of care would not be imposed on the basis that it is not “just and reasonable” and the Commission considers that the arguments here are persuasive.

3.56 As to the standard of care to be applied to the Good Samaritan, the Commission notes that this will vary with the individual Good Samaritan, including the Good Samaritan’s level or lack of skill.⁴¹ This, however, may give rise to numerous standards being set, none of which pay 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 possessed by Good Samaritans while also acknowledging the social utility of the Good Samaritan’s intervention. This will be discussed in greater detail in Chapter 4.

C Voluntary Rescuers

3.57 In Chapter 1, the Commission observed that the term “voluntary rescuer” generally refers to any person who is a member of a voluntary

⁴⁰ *Watt v Hertfordshire County Council* [1954] 2 All ER 368.

⁴¹ *Cattley v St John’s Ambulance Brigade* Unreported, Queen’s Bench Division, 25 November 1988, in respect of voluntary rescuers. See *O’Donovan v Cork County Council* [1967] IR 173, in respect of members of the medical profession.

rescue organisation,⁴² 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. Thus, a voluntary rescuer may be any person who has received the requisite amount of training, whether he or she is a lay person or an off-duty professional.

3.58 Given the specialist nature of the services provided, the strategic role that voluntary rescuers and their organisations play in terms of emergency management should be noted.⁴³ In this regard, voluntary rescuers support the work of statutory bodies, both by supplementing existing services and by providing additional services. The Commission emphasises the importance of considering this role and the extent to which it benefits society when making any recommendations.

3.59 Furthermore, voluntary rescuers are usually stationed either at help-centres or locations where the risk of accident or emergency is particularly high. Thus, for any incident requiring the voluntary rescuer's assistance there will be a certain amount of anticipation involved. While the exact nature of the particular incident may not be foreseen, the voluntary rescuer may certainly have expected some incident to arise. This is the context in which the Attorney General's request concerning the appropriate duty of care and standard of care to be applied to the voluntary rescuer is to be considered.

(1) Duty of Care

3.60 As was noted in Part B, three conditions must be satisfied in order to establish a duty of care.⁴⁴ First, there must be a relationship of proximity. Second, damage must be reasonably foreseeable. Third, it must be just and reasonable to impose a duty of care. In contrast to the Good Samaritan, 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.⁴⁵ As a result, different

⁴² Voluntary rescue organisations may vary in size and structure. Some may be non-governmental, such as the Irish Mountain Rescue Association, while others may involve a certain level of government input, such as the Civil Defence Board operating under the *Civil Defence Act 2002*. In this respect, some voluntary rescue organisations may act as auxiliaries to statutory bodies, while others may be separate and distinct. Voluntary organisations are discussed in greater detail in Section D.

⁴³ *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).

⁴⁴ *Glencar Exploration plc v Mayo County Council* [2002] 1 IR 84.

⁴⁵ See *Barnett v Chelsea & Kensington Management Committee* [1969] 1 QB 428 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 62.

considerations apply to the discussion of the duty of care of the voluntary rescuer in comparison to the Good Samaritan.

(a) Proximity

3.61 The first question is how a relationship of sufficient proximity may be established between the voluntary rescuer and the recipient of his or her services. In this regard, there is a doubt about whether the principle applied in respect of the Good Samaritan, that is, voluntary assumption of responsibility, applies to the voluntary rescuer.⁴⁶ As before, the analysis here deals with rescue situations involving relationships of undertaking and reliance first and then rescue situations involving relationships of control and dependence.

(i) Undertaking and reliance

3.62 In the context of a rescue situation involving a relationship of undertaking and reliance, the voluntary rescuer may undertake to do something, or to voluntarily intervene, upon which the recipient may rely. If this is the case, it is necessary to examine how terms such as “voluntary intervention” and “reliance” apply to the voluntary rescuer.

(1) Voluntary Intervention

3.63 As with the Good Samaritan, the voluntary rescuer’s intervention may arise from a promise or a voluntary act.

(a) Promise

3.64 There are a number of aspects to a promise which must be borne in mind. First, a promise may be made in express terms or be inferred from the conduct of the voluntary rescuer. Second, outside a contract setting a promise is not legally enforceable unless there is reasonable reliance of which the voluntary rescuer knows or ought to have known. Thirdly, in the context of a rescue, a promise will generally be a promise to endeavour rather than a promise to achieve a successful outcome.

3.65 There are, at least, three stages at which a promise may be discerned in the context of a voluntary rescue. First, by undertaking training the voluntary rescuer, arguably, promises to intervene any time an accident or emergency arises. However, obliging the voluntary rescuer to intervene, irrespective of whether he or she is on duty may be akin to imposing a positive duty to rescue.⁴⁷ Second, by joining a voluntary rescue organisation

⁴⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, cited with approval in *Securities Trust Ltd v Hugh Moore & Alexander Ltd* [1964] IR 417. Kortmann *Altruism in Private Law* (Oxford University Press 2005) at 58-68.

⁴⁷ As was noted, on the basis of *Donoghue v Stevenson* [1932] AC 562 the Commission is not convinced that it would be appropriate to impose a positive duty to intervene on individuals: see paragraph 2.51, above.

and by committing to its schedule, the voluntary rescuer, arguably, promises to intervene only where an accident or emergency arises within the hours of his or her rota. However, a promise of that nature might still be described as a promise to society in general and as such, comes dangerously close to the theory of general reliance.⁴⁸ Alternatively, it might be argued that a promise to intervene only arises where the voluntary rescuer, like the Good Samaritan, agrees to respond to the predicament of a particular individual.⁴⁹ This approach appears to the Commission to maintain a safe distance from both the imposition of a positive duty to intervene and the theory of general reliance.

(b) *Voluntary Act*

3.66 Alternatively, a voluntary intervention may be signified by a voluntary act in favour of the individual in need. By using the term “voluntary”, anything the rescuer does on behalf of the rescue organisation may be considered a voluntary act.

3.67 In this regard, there is a wide range of activities that a voluntary rescuer may undertake to assist an individual in need. In contrast to the Good Samaritan scenario, however, it may be expected that the natural responses of the voluntary rescuer will run in reverse order. First, the voluntary rescuer, by virtue of his or her training, may be more inclined than the average Good Samaritan to become directly involved by physically intervening. As was noted in Part B, the more invasive the intervention, the greater the risk of injury. Second, the voluntary rescuer may very well be in a position to alert the individual to a danger or to direct the individual on how to extricate himself or herself from the predicament. Such an intervention may indicate a certain level of remove from the individual’s predicament. Third, while the voluntary rescuer may be more skilled than the average Good Samaritan, there may still be incidents to which the voluntary rescuer is incapable of providing an adequate response. It is likely, then, that the voluntary rescuer will call the emergency services for assistance. Nevertheless, the voluntary rescuer, more so than the Good Samaritan, may be expected to secure the scene temporarily or assist the individual until the emergency services arrive.

3.68 As was noted in Part B, the Commission queries whether the issue of reliance is really necessary for those voluntary interventions constituted by a voluntary act.

⁴⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

⁴⁹ *Kent v Griffiths* [2000] 2 All ER 474. A statutory ambulance was held to owe a duty of care, once it agreed to respond to an emergency.

(c) *Reliance*

3.69 Under the *Hedley Byrne* principle, the law is reluctant to recognise relationships of proximity in every case involving a voluntary intervention, irrespective of whether that intervention is constituted by a promise or a voluntary act. As was noted in Part B, the additional element of reasonable reliance may be required. In the current discussion, the Commission reiterates a number of elements relating to the concept of “reasonable reliance.”

3.70 First, the term “reliance” suggests that the individual in need changes his or her position on faith of the particular intervention. Thus, an individual may be more likely to rely on an intervention where it is undertaken by the skilled voluntary rescuer than where it is undertaken by the average Good Samaritan. This is the case, regardless of whether the reliance is of a non-detrimental or a detrimental nature.⁵⁰

3.71 Second, in the context of a rescue, what may be considered reasonable in the legal context may be a far cry from that which may ordinarily be considered reasonable. As against this, reliance on the intervention of the skilled voluntary rescuer may rarely be considered unreasonable. However, voluntary rescuers neither have, nor hold themselves out as having, unlimited skills and, thus, only a certain level of reliance may be considered reasonable. For example, it might not be considered reasonable for an individual to rely on a voluntary rescuer to cure his or her cancer.

3.72 Since the voluntary rescuer may be more inclined to become directly involved by rendering physical assistance, it is likely that the individual will rely directly on the voluntary rescuer. A certain distance may be maintained, however, where the voluntary rescuer merely alerts the individual to a risk or directs the individual on how to extricate himself or herself from a predicament. In such a scenario, while the voluntary rescuer’s expert advice may be persuasive, the individual relies to some extent on himself or herself. Where the voluntary rescuer engages the emergency services to assist, however, it is likely that the individual will transfer his or her reliance from the voluntary rescuer to the emergency services once the emergency services take over.

(ii) *Control and Dependence*

3.73 As already noted, some rescue situations may involve relationships of control and dependence rather than relationships of undertaking and reliance. Thus, the individual in need may find that he or

⁵⁰ In Part B, the Commission discusses the risk of imminent injury or death and the risk of ultimate injury or death.

she has no choice but to rely on the voluntary rescuer's intervention, whether this is due to a lack of comparable alternatives or incapacity to choose. In this regard, by virtue of his or her skill and the reputation of his or her organisation, the voluntary rescuer may be more inclined to play an authoritative role in any given rescue situation. It is, therefore, likely that situations involving the voluntary rescuer will entail relationships more akin to those based on control and dependence than those based on undertaking and reliance. It is useful, therefore, to examine the notions of "control" and "dependence" in the context of the voluntary rescuer.

(I) Control

3.74 As observed above, voluntary rescuers, by virtue of their skill and reputation, may be in a particularly strong position to assert control over accident and emergency situations. Given the strategic role that voluntary rescue organisations play in supplementing the services of statutory bodies, a call for assistance may indicate either that there is no statutory body available to intervene or that there is no organisation of comparable expertise. In this respect, the individual does not have a real alternative to engaging the voluntary rescuer to assist.

3.75 Furthermore, voluntary rescue organisations tend to place themselves at help-centres or locations where there is a particularly high risk of accidents and emergencies. The voluntary organisation, therefore, makes itself available to requests for assistance and represents that it is willing and able to take charge. In this regard, the voluntary organisation may assert total control over the operation, conducting the rescue from start to finish, or partial control, temporarily securing the scene or abating the risk, while ultimately relying on another party to save the individual.

(II) Dependence

3.76 As there may be no alternative to the voluntary rescue organisation's intervention, whether because there is no statutory body available to assist or no organisation of comparable expertise, the individual may be described as being dependent on the intervention of the voluntary rescuer. This dependency may be partial, as where the voluntary rescuer asserts partial, or initial control, or total, as where the voluntary rescuer asserts total control over the operation.

3.77 The Commission also notes that a call to the voluntary rescue organisation may suggest that there is a particularly delicate situation that requires a suitably skilled intervention. For instance, the individual may be in a particularly precarious situation, be injured or unconscious. In that case, the individual may not be sufficiently coherent to choose between the voluntary rescuer's intervention and possible alternatives. If so, the

individual may depend, to some extent, on the voluntary rescuer's intervention.

(b) Foreseeability

3.78 Once a sufficiently proximate relationship has been established, the issue arises as to whether it was reasonably foreseeable that the voluntary rescuer's intervention would cause injury. As was noted in Part B, the test is objective, in the sense that it seeks to calibrate the knowledge possessed by the defendant against the knowledge possessed by the reasonable person in similar circumstances. In this context, the voluntary rescuer might be distinguished from the Good Samaritan, on the basis that a greater depth of knowledge may be expected of the voluntary rescuer. Thus, the reasonable voluntary rescuer may be in a better position to foresee the potential risks inherent in a situation or a particular intervention.

3.79 This is of particular relevance where the voluntary rescuer finds the individual in a precarious situation or with existing injuries. While the extent to which the voluntary rescuer is privy to the events that have led to the individual's predicament may be relevant, the ability of the voluntary rescuer to assess the situation and to tailor his or her conduct appropriately is of greater consequence. In particular, the voluntary rescuer is more likely than the average Good Samaritan to be aware of latent risks and best practice precautions. There may, therefore, be less of a chance that the voluntary rescuer will inadvertently exacerbate the situation or aggravate any existing injury.

3.80 Foreseeability may depend on the type of intervention undertaken and the level of skill possessed by the defendant. While the voluntary rescuer may be trained to undertake a variety of interventions, there may still be certain interventions that 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. The Commission observes, however, that particularly where life is at stake, the voluntary rescuer may feel that he or she has no choice but to intervene.

3.81 Finally, foreseeability of harm may, to some extent, depend on the nature of the relationship between the voluntary rescuer and the individual in need. For instance, where the relationship is based on undertaking and reliance, harm may be a more foreseeable consequence where the reliance is of a detrimental, rather than a non-detrimental, nature. Furthermore, where the relationship is based on control and dependence, there may be a greater risk of aggravating prevailing vulnerabilities. In that respect, it may be more foreseeable that harm will result.

(c) ***Just and Reasonable***

3.82 Once it is established that there is a sufficiently proximate relationship and that damage is reasonably foreseeable, it must then be shown that it is just and reasonable to impose a duty of care on the voluntary rescuer. As noted in Part B, this necessitates an analysis of relevant policy issues, which may negative, limit or reduce the scope of the duty of care, the class of persons to which it is owed or the amount of damages that are recoverable.

3.83 In the first place, the activities undertaken by voluntary rescuers and their organisations are for the benefit of society. On the one hand, by bolstering the services provided by statutory bodies, voluntary rescuers save lives. Not only do they save lives, voluntary rescuers also facilitate the organisation of large-scale events, also for the benefit of society, by providing a presence to guard against accidents and emergencies. With a particular emphasis on the organisation, voluntary organisations, in general, benefit society by providing a forum for their members to interact and to develop skills. It might, therefore, be asserted that, to the extent that the fear of litigation may pose an impediment to such activities, it may not be just and reasonable to impose a duty of care.

3.84 Secondly, in the context of identifying the party who is to bear the cost of damages, the duty of care analysis may necessitate a delicate balancing exercise. First, it may be asserted that the good works of voluntary rescuers should be recognised and encouraged, particularly in light of the time sacrificed to training and committed to the organisation's rota. However, it may also be asserted that, given the nature of the service provided, it would be inappropriate to be more lenient in respect of the duty of care owed. It might, therefore, be argued that those participating in the voluntary organisation's activities have willingly and knowingly put themselves at risk of litigation.⁵¹ In this regard, it might be noted that voluntary rescuers and their organisations will most likely be covered by insurance.⁵²

3.85 Thirdly, in the context of dissuading individuals from undertaking dangerous activities, the imposition of a duty of care may have a particularly deleterious effect on the activities of the voluntary rescuer. As was noted in Part B, a rescue, by definition, will usually involve some element of danger. In this regard, however, the voluntary rescuer may be distinguished from the Good Samaritan to the extent that the voluntary rescuer opts to intervene on

⁵¹ In this regard, voluntary assumption of risk is inadmissible in defence of an action by a Good Samaritan. *Haynes v Harwood* [1935] 1 KB 146. Weinrib "The Case for a Duty to Rescue" (1980) 90 Yale LJ 247.

⁵² *Cook v Cook* (1985) 162 CLR 376.

a regular basis. Cumulatively, then, the voluntary rescuer may be more exposed to the danger that the Good Samaritan experiences on a one-off basis.

3.86 Finally, a finding of liability may not only deter individuals from becoming voluntary rescuers, but may also create a precedent for future claims against voluntary rescuers.⁵³ On the one hand, the Commission notes that volunteers engaged in the activities of voluntary organisations may be better protected than most, to the extent that they may benefit from training, insurance cover and vicarious liability. On the other hand, however, the Commission notes that the cost of litigation and expensive insurance premiums may place an inordinate financial burden on voluntary rescue organisations, particularly where their survival depends on charitable donations. Ultimately, this may force the voluntary rescue organisation to reduce the number of members it engages and the level of activities it undertakes. The Commission is aware that while this is not a pressing issue for organisations at present, it has been raised as a matter of some potential concern.

(2) Standard of Care

3.87 If it is established that the voluntary rescuer owes the individual in need a duty of care, the next issue is whether the voluntary rescuer has performed the rescue operation to the appropriate standard of care. As was noted in Part B, the test is objective, requiring the defendant to exercise such care as would be exercised by the reasonable person in similar circumstances. Given the level of training that the voluntary rescuer has undergone, a higher level of skill might be expected of the voluntary rescuer than the average Good Samaritan. Thus, the appropriate standard may relate to the standard applicable to the reasonable rescuer rather than the reasonable person.⁵⁴ In this regard, reference may be made to general and approved practice, as stated in the training manual of the particular voluntary group.⁵⁵ The Commission notes, however, that an issue may arise where the particular voluntary rescuer is additionally skilled, perhaps as the result of professional training. The question then is whether the appropriate standard is that related to the voluntary rescuer or that related to the particular profession.⁵⁶ Aside from this complication, each case involves an

⁵³ See *Cattley v St John's Ambulance Brigade* QBD 25 November 1988 and *Boccasile v Cajun Music Ltd* 694 A2d 686 (Rhode Island 1997).

⁵⁴ The voluntary rescuer, by his or her intervention, holds himself or herself out as being particularly skilled. See *Barnett v Chelsea & Kensington Management Committee* [1969] 1 QB 428.

⁵⁵ *Cattley v St John's Ambulance Brigade* QBD 25 November 1988.

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.

(a) The Probability of Harm

3.88 As was noted in Part B, the greater the likelihood of harm, the more probable it is that the court will regard it as unreasonable for the defendant to engage in risky conduct or to fail to take steps to avert the injury. The Commission notes the difficulty of applying this principle to the scenario of the voluntary rescuer. In the first place, the voluntary rescuer will generally intervene in situations where there is an independent risk of injury. Thus, the likelihood of harm may be greater, in the sense that the voluntary rescuer may easily exacerbate the prevailing conditions or aggravate any existing injuries. Therefore, the voluntary rescuer may be required to choose between the risk independently arising and the risk posed by his or her intervention. Related to this, voluntary rescuers may be more inclined to undertake physical interventions, to which a greater risk of harm may be attributed. Furthermore, irrespective of the course of action undertaken, the voluntary rescuer is likely to encounter situations where injury is an inevitable consequence.

3.89 As distinct from the Good Samaritan, however, the voluntary rescuer may be in a particularly strong position to deal with such rescue situations. The risk posed by the voluntary rescuer's intervention may, therefore, be minimal. In this regard, the voluntary rescuer will usually have undergone a certain amount of specialised training. Thus, 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. Furthermore, any such intervention is likely to be performed with the benefit of appropriate equipment and the support of other voluntary rescuers. In any event, the voluntary rescuer anticipates, to some extent, that a rescue situation will arise. Therefore, the voluntary rescuer generally has adequate time to consider and prepare his or her response.

(b) The Gravity of the Threatened Injury

3.90 As was noted in Part B, where the potential injury is great, the creation of even a slight risk may constitute negligence. Again, the Commission observes the difficulty of applying this principle to the scenario of the voluntary rescuer. First, it should be noted that the voluntary rescuer is very likely to come across and intervene in a situation where there is an

⁵⁶ See *Dunne v National Maternity Hospital* [1989] IR 91 for the standard of care applicable to the medical profession. See also *Condon v Basi* [1985] 1 WLR 866 as to how the standard of care applicable to the amateur sporting participant may be distinguished from that applicable to the professional.

independent risk of serious harm. In that respect, by intervening, the voluntary rescuer might easily exacerbate the prevailing conditions or aggravate any existing injuries. Related to this is that the voluntary rescuer may be more inclined to undertake a physical intervention, which is more likely to give rise to serious harm than a more remote intervention, such as calling the emergency services. However, it must be noted that, by intervening, the voluntary rescuer may indeed improve the condition of the individual in need.

3.91 The voluntary rescuer will, however, most likely have undergone a certain amount of training. By virtue of this training, the voluntary rescuer should be better able to assess the situation and to tailor his or her intervention appropriately. While the voluntary rescuer might not be able to diagnose the exact nature of any existing injury or predict, with certainty, the severity of a potential injury, he or she might be expected to proceed cautiously where there is a real risk of serious harm. This may leave the voluntary rescuer with nothing to do other than secure the scene or abate the risk to the individual until third party assistance may be obtained. However, there may be situations in which the voluntary rescuer has no third party to fall back on. If so, it might be that greater leniency should be shown to the voluntary rescuer who intervenes, even though he or she might otherwise be advised to refrain.

(c) *Cost of Eliminating the Risk*

3.92 As was noted in Part B, the cost of eliminating the risk usually refers to the financial cost of implementing safeguards around an activity. In this regard, particular difficulties may arise in the context of voluntary rescue, which is an inherently dangerous activity.⁵⁷ While it may be impossible to eliminate all the risks involved in undertaking a rescue, much can be done to lessen the likelihood of such risks materialising.

3.93 In the first place, voluntary rescue organisations may provide training and refresher courses to develop skills and ensure that they are kept up to date. Secondly, such organisations may adopt some method of ensuring that those who are engaged as voluntary rescuers are appropriate candidates. For instance, candidates may be required to pass an examination before being engaged. Thirdly, they may ensure that voluntary rescuers have adequate equipment and support at their disposal.

3.94 In the context of a specific rescue, certain interventions may involve a greater degree of risk than others. While it may be preferable that

⁵⁷ The courts recognise that particular difficulties arise in the context of jobs that cannot be done without risk. See *Depuis v Haulbowline Industries Ltd* Supreme Court 14 February 1962, in which it was accepted that it is impossible to make some work activities risk-free.

the voluntary rescuer opt for the intervention involving the least amount of risk, there may be situations where the voluntary rescuer has no alternative but to opt for a more dangerous method. For instance, where the voluntary rescue organisation provides a unique service in a remote area, there may be no other group qualified to provide the service or close enough to provide assistance without injurious delay.

3.95 With regard to the risk of litigation, certain measures may be taken to protect voluntary rescuers and their organisations, notably, through insurance. The Commission notes, however, that this might be problematic to the extent that the cost of insurance may place a burden on voluntary rescuers and their organisations.⁵⁸

(d) The Social Utility

3.96 In Part B, it was noted that where an activity has a high social utility, it will be regarded with more indulgence than where it has none. This has particular relevance to the voluntary rescuer. Indeed, it may be asserted that the social utility of the voluntary rescuer's activity goes beyond the specific intervention in the particular accident or emergency. In a broader context, the voluntary rescuer provides a service for the benefit of the public, by supplementing the services provide by statutory bodies and by providing additional services. In addition, voluntary rescue organisations ensure that the service provided by its members is given against the background of adequate instruction, training and experience. As such, those in need of emergency assistance are less likely to be put at risk by the voluntary rescuer's intervention. Furthermore, the knowledge imparted to voluntary rescuers 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) Summary

3.97 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, a relationship of proximity is likely to be established once the voluntary rescuer intervenes. Second, given that the voluntary rescuer's intervention is likely to be direct and physical, injury to the individual in need may be a foreseeable risk in most cases. Thus, it is only at the "just and reasonable" stage of the enquiry that a question arises as to whether a duty of care *should* be imposed on the voluntary rescuer. While there are very persuasive policy considerations, the Commission notes that the voluntary rescuer, to some extent, advertises his or her willingness and

⁵⁸ The Commission notes that a distinction must be drawn between personal benefit insurance and liability insurance. The Irish Mountain Rescue Association has indicated to the Commission that its main concern is with actions pursued by members of its organisation rather than actions pursued by recipients of its services.

ability to assist in emergency situations. Thus, it may be argued that the voluntary rescuer, to some extent, assumes responsibility and, therefore, assumes a duty of care.

3.98 As with the Good Samaritan, the Commission notes that there is some uncertainty regarding the standard of care to be applied to the voluntary rescuer. On the one hand, it may be asserted that the standard should be set according to the individual's status as a voluntary rescuer. This may be problematic, however, to the extent that it does not recognise the particular skills of certain volunteers, such as those who may be professional rescuers or medics. Alternatively, the standard may be set according to the particular voluntary rescuer's level or lack of skill, but this may result in the creation of numerous standards of care. In the Commission's view the solution is to have a standard that will appreciate the various skills possessed by voluntary rescuers while at the same time acknowledge that voluntary rescuers are motivated by a desire to do good. This will be discussed in greater detail in Chapter 4.

D Voluntary Service Provider

3.99 In Chapter 1, 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. The voluntary service provider is thus 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" and those defined as "formal volunteers."

3.100 The voluntary service provider may be involved in an array of activities, most often involving social services and social inclusion. The services provided by the voluntary service provider may, therefore, be distinguished from those provided by the Good Samaritan and the voluntary rescuer. First, the range of activities may be much broader. Second, the activities will not necessarily be of an inherently dangerous nature. The analysis of the duty of care and the standard of care question may, therefore, be based on a more subtle premise. Finally, while the Good Samaritan and the voluntary rescuer tend to respond to risks independently arising, the voluntary service provider may actually be responsible for the risk that has led to the individual's predicament.

3.101 As a result, while there may be some overlap between this Part and Parts B and C, dealing with the Good Samaritan and the voluntary rescuer, the Commission concludes that the distinguishing traits of the voluntary service provider justify the re-examination of certain issues.

(1) Duty of Care

3.102 In respect of the voluntary service provider, there are two branches to the duty of care question. In the first place, certain activities, whether or not undertaken by a voluntary service provider, may be regulated by statute.⁵⁹ For instance, a voluntary service provider who is also an employer may be subject to health and safety legislation. Likewise, a voluntary service provider who organises an event may be subject to obligations under the *Occupiers' Liability Act 1995*, the *Planning and Development Act 2000* (licensing of outdoor events) or the *Licensing of Indoor Events Act 2003*. However, the Commission notes that duties may also arise by virtue of the relationship between the voluntary service provider and the recipient of the service. In this respect, the general test to be applied, irrespective of whether the voluntary service provider is an individual or an organisation, is that laid down in *Glencar Exploration plc v Mayo County Council*.⁶⁰ As was noted previously, this test requires an examination of whether there is a sufficiently proximate relationship between the voluntary service provider and the recipient of the service; whether the damage is reasonably foreseeable; and, whether it is just and reasonable to impose a duty of care on the voluntary service provider.

(a) Proximity

3.103 As to proximity, the issue is whether the provision of a voluntary service draws the provider and the recipient of that service into such a close relationship that the voluntary service provider ought to have foreseen that his or her actions would cause harm to the recipient. In respect of the formal volunteer, a direct relationship of proximity may be established with the recipient of the service, as well as an indirect relationship of proximity by virtue of the relationship between the formal volunteer and the voluntary organisation and the relationship between the voluntary organisation and the recipient of the service. Given the range of services that the voluntary service provider could provide and the various entities that might constitute a voluntary service provider, the Commission proposes to discuss the three most common types of scenario giving rise to a proximate relationship. The first is where the voluntary service provider is in a special relationship with the recipient of the service. The second is where the voluntary service provider is in a special position in relation to the danger. The third is where the voluntary service provider voluntarily assumes responsibility with respect to the recipient.

⁵⁹ The relevant legislation may include the *Road Traffic Acts 1961 to 2006*, the *Fire Services Act 1981*, the *Occupiers Liability Act 1995*, the *Planning and Development Act 2000* (licensing of outdoor events), the *Licensing of Indoor Events Act 2003*, and the *Safety, Health and Welfare at Work Act 2005*.

⁶⁰ [2002] 1 IR 84.

(i) Special Relationship

3.104 The term “special relationship” is most commonly used to describe those relationships giving rise to a legal duty. These exist in at least two types of situation.

3.105 Firstly, it may exist where the defendant is, in some way, responsible for the well-being of the plaintiff. For example, a parent may be responsible for the welfare of his or her child.⁶¹ While this is not usually applied directly to the voluntary service provider, it is possible to do so. It would not be very difficult to imagine a situation in which the voluntary service provider is, in some way, responsible for the recipient’s well-being. For instance, where a voluntary service provider performs caring functions, it might be asserted that it is responsible for the well-being of the individual in whose favour the caring functions are being performed.

3.106 In the second place, a special relationship may also be held to exist where the defendant exercises some element of control over the (injurious) actions of a third party. For instance, prison officers may exercise control over the conduct of prisoners.⁶² Again, while it is not usually applied directly to the voluntary service provider, it could be applied. For instance, where a voluntary service provider opts to bring a group of youths on a field trip, it might be asserted that the voluntary service provider has a duty to supervise those youths. Such a duty to supervise not only protects the youths from harm, but also protects third parties from harm by preventing the youths from getting up to mischief.

(ii) Special Position in relation to the Danger

3.107 Proximity may also be established where the voluntary service provider is, in some way, connected to the source of the damage. This may be so where the voluntary service provider exercises some element of control over the source of the danger. This may be of particular relevance where a voluntary service provider is contemplating a fund-raising event, such as a sports competition, concert or fair. By organising such an event, 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*.

3.108 Proximity might also be established where the voluntary service provider creates a risk which it fails to control.⁶³ This is so, even where the voluntary service provider is legally entitled to create the risk. For instance,

⁶¹ *Curley v Mannion* [1965] IR 543.

⁶² *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

⁶³ *Cahill v Kenneally* [1955-1956] Ir Jur Rep 15.

where the voluntary service provider organises an event, it is likely that a crowd will be drawn to it. Where there is a crowd, there is a greater risk of harm occurring. Thus, it may be asserted that the voluntary service provider has created a risk, which it must now control. In this regard, the voluntary service provider may be required by the relevant legislation to implement certain crowd control measures, such as ensuring that the maximum capacity is not exceeded and that there is an adequate emergency evacuation plan.

3.109 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.⁶⁴ This might be the case where a voluntary youth group organises a hill-walk for its members. While hill-walking may entail some inherent risks, these might be aggravated where the voluntary service provider fails to provide adequate equipment or proceeds with the walk despite forecasts of adverse weather conditions.

(iii) Voluntary Assumption of Responsibility

3.110 Even where proximity cannot be established on the ground that there is a special relationship or on the ground that the voluntary service provider is in a special position in relation to the danger, proximity may still be established on the ground that there is a voluntary assumption of responsibility. As was noted previously, a voluntary assumption of responsibility may be based on a relationship of undertaking and reliance or a relationship of control and dependence.

(I) Undertaking and Reliance

(a) Undertaking

3.111 Where the undertaking is a promise, the Commission emphasises three essential factors. First, a promise may be express or inferred from the voluntary service provider's conduct. Second, given that the involvement of the voluntary service provider is not limited to rescue situations, the promise of the voluntary service provider is just as likely to be a promise to endeavour as a promise to achieve a successful outcome. Third, it is generally accepted that the law will refrain from enforcing a simple promise, unless it can be shown that there was reasonable reliance of which the voluntary service provider was aware.

3.112 In the first place, it is necessary to consider the point at which the promise to voluntarily provide services arises. As was noted above, the promise may be express or implied. Thus, the Commission observes that the promise may be made directly to the recipient of the service or be inferred from the voluntary service provider's conduct in favour of the recipient. This is so regardless of whether the voluntary service provider is an informal

⁶⁴ *Doran v Dublin Plant Hire Ltd* [1990] 1 IR 488.

volunteer, a formal volunteer or a voluntary organisation. Where the voluntary service provider is a formal volunteer, however, the promise may also be made directly to or inferred from conduct in favour of the voluntary organisation. Registration with the voluntary organisation may, then, be understood as an express promise to carry out the organisation's work. From this it might be inferred that the formal volunteer intends to help those people targeted by the voluntary organisation and to render such help to the standard expected of the voluntary organisation.⁶⁵ Where the voluntary service provider is a voluntary organisation, an express promise may be made to the world at large or be inferred from the organisation's general activities.⁶⁶

3.113 The question then arises as to the nature of the particular promise. As was noted above, given the array of activities that the voluntary service provider may undertake, 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. For instance, where a volunteer makes a promise to achieve a particular outcome, such as to mow the lawn, it will be clear at what point the volunteer has fulfilled his or her promise. Where a volunteer makes a promise to endeavour, such as prepare hot meals for the elderly, however, it may be more difficult to discern the point at which that promise is fulfilled. Such seemingly open-ended engagements may be curtailed where the volunteer commits to providing the service for a certain period only.

3.114 The Commission reiterates that simple promises are not generally enforceable. To have it otherwise might be to impose too onerous a burden on the voluntary service provider. This might be a particular problem for individual volunteers who have made promises in respect of open-ended engagements that are not time-limited. This may be less of a problem for voluntary organisations, as they may continue to exist so long as the service is required. Furthermore, there may be situations in which the personal commitments of the individual may conflict with the undertaking to provide 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 to trump the provision of services.

3.115 An undertaking may also consist of a voluntary act in favour of the recipient of the service. For the purpose of this section, "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

⁶⁵ The Commission reiterates the criticism that to enforce such a promise might be akin to imposing a positive duty to voluntarily provide services.

⁶⁶ The Commission also reiterates here the criticism that to enforce such a promise might come dangerously close to accepting the theory of general reliance.

volunteers at administrative level, such as those on the board of directors, may be included.

3.116 Given the immense range of activities that might be undertaken by the voluntary service provider, it is not possible to analyse each one individually. The Commission observes, however, that certain activities will necessarily entail a greater degree of risk than others. Thus, the more a service concerns the physical integrity of an individual, the more likely it is that harm will occur. In this regard, the identity of persons to whom the service is provided may be relevant. For instance, where the service is provided to a particularly vulnerable group, it is more likely that harm will occur, than where the service is provided to a more robust group. Such activities may be contrasted with those activities which have a more remote effect, either because they do not touch upon the physical integrity of the recipient or because the voluntary service provider distances itself from the actual provision of the service. For instance, a voluntary group might provide training to enable volunteers to provide a service, but may refrain from getting involved in the provision of the service.

3.117 The Commission also notes that the voluntary service provider may commit to providing a service on a once-off basis, for a certain period of time or on a regular and recurring basis. As was noted above, it might be easier for the voluntary organisation to provide a service on an indefinite basis than it would be for an individual volunteer. In this regard, it may be observed that the voluntary organisation is less likely to be impeded by those obstacles encountered by the individual volunteer, such as conflicting personal commitments and fatigue.

3.118 Furthermore, the nature of a voluntary act may vary depending on the type of voluntary service provider that undertakes it. For instance, where the informal volunteer undertakes to provide 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, on the other hand, it is likely that he or she will personally undertake the service but 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.

3.119 As in the context of the Good Samaritan and the voluntary rescuer, the law is reluctant to recognise a relationship of proximity on the basis of a voluntary intervention alone. The Commission notes that it must also be shown that there is reasonable reliance of which the voluntary service provider is aware.⁶⁷ This is so regardless of whether the voluntary

⁶⁷ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, cited with approval in *Securities Trust Ltd v Hugh Moore & Alexander Ltd* [1964] IR 417.

service provider is an informal volunteer, a formal volunteer or a voluntary organisation. It is useful, in this context, to reiterate that the term “reliance” refers to those situations in which the recipient of the voluntary service has, in some way, changed his or her position on faith of the voluntary service provider’s undertaking.

3.120 In this respect, reliance may be of a non-detrimental nature.⁶⁸ Where there is non-detrimental reliance, 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. 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. Alternatively, reliance may be of a detrimental nature. In such a scenario, the recipient of the voluntary service may have changed his or her position for the worse, on faith of the volunteer’s undertaking. For instance, in the scenario above, the elderly neighbour may, on faith of the volunteer’s undertaking, get rid of his or her cooker. As a result, if the volunteer fails to turn up, it is very likely that the elderly neighbour would find it difficult to make an alternative arrangement.

3.121 The question then arises as to what type of reliance may be considered “reasonable.” A number of elements must be considered in this respect. First, while we are no longer dealing with the urgency of a rescue situation, many of those receiving voluntary services may be particularly vulnerable. As such, they may be more inclined to rely on the voluntary provision of services. Second, the extent to which reliance, particularly detrimental reliance, is “reasonable” may depend on the nature of the volunteer’s promise. For instance, where the volunteer expressly promises to do something at a future date, it might be considered hasty of the recipient to change his or her position before he or she can ascertain that the volunteer will keep his or her promise. There is, in that context, a greater chance that the reliance will be considered reasonable where the promise is either inferred from or supported by conduct, particularly where the conduct is on a regular and recurrent basis.⁶⁹ Third, the formal volunteer may be coloured by the reputation of the voluntary organisation with which he or she associates. In that respect, the recipient of the voluntary activity may be

⁶⁸ The law is more reluctant to recognise a relationship of proximity where reliance is non-detrimental as opposed to detrimental.

⁶⁹ The Commission notes that it might be asserted that reliance on a voluntary promise may never be considered “reasonable,” as the promise is made without consideration and enforcement would place too great a burden on the volunteer.

more inclined to rely on the formal volunteer's undertaking than, perhaps, the informal volunteer's undertaking. In this regard, the recipient may anticipate that the formal volunteer has received a certain amount of training, will provide the service to the standard set by the voluntary organisation and can avail of sufficient and appropriate resources. Finally, in a related context, reliance may be induced by the particular volunteer's undertaking or by the voluntary organisation's overall undertaking. Where reliance is triggered by the voluntary organisation's overall undertaking, it may be that the individual volunteer and his or her undertaking are dispensable. In other words, even where the individual volunteer fails, the voluntary organisation may continue with the undertaking and even substitute another volunteer for the original one. In such a case, it may be debatable as to whether reliance on the individual volunteer, rather than the overall organisation, would be reasonable.

(II) Control and dependence

3.122 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. To classify the relationship as such might suggest that the voluntary service provider plays an authoritative role, while the recipient of the service has no choice but to succumb to the will of the provider. That the recipient of the service has "no choice" may be because there are no comparable alternatives to the voluntary service provider's undertaking or that the recipient does not have the capacity to choose.

(a) Control

3.123 In a general sense, "control" refers to where the voluntary service provider is in a relatively powerful position compared to the recipient of the service. In some instances, the voluntary service provider may be especially well placed to provide a particular service. For instance, the volunteer may have relevant professional training or may be attached to a voluntary organisation that specialises in the provision of a particular service.

3.124 A narrower interpretation may also be attributed to the term "control", namely, the voluntary service provider takes charge of a situation. In this context, the voluntary service provider may assert general control. For instance, the voluntary service provider may organise an event and thus be expected to manage the operations in accordance with the relevant legislation.⁷⁰ Alternatively, the voluntary service provider may take charge of a particular task. For instance, the voluntary service provider may provide an art class, free of charge, to the local youth club.

⁷⁰ On the relevant legislation applicable, see paragraph 3.102, above.

3.125 In line with this, relationships of control and dependence are most likely to arise where the voluntary service provider is a voluntary organisation. Realistically, the voluntary organisation is one of the few actors that has the capacity, resources and authority to assert control. For instance, a voluntary organisation may assert control every time it directs its volunteers, provides a specialised service or organises an event. Relationships of control and dependence may also arise where the voluntary service provider is a formal volunteer. While the formal volunteer may have direct control over the particular task with which he or she is charged, ultimate control, however, is likely to rest with the voluntary organisation. In this regard, a distinction should be drawn between those voluntary organisations that maintain an authoritative involvement and those that prefer to limit their involvement to the provision of resources, such as training. Relationships of control and dependence may also arise where the voluntary service provider is an informal volunteer.

(b) Dependence

3.126 The term “dependence” suggests that the recipient of the voluntary service has no alternative but to succumb to the will of the voluntary service provider.⁷¹ This may be because no other entity provides a comparable service or that the recipient of the service does not have the capacity to choose between alternatives. Furthermore, “dependence” seems to suggest that the recipient of the voluntary service is incapable of performing the operation alone.

3.127 Some voluntary service providers tend to supplement the services provided by statutory bodies. As such, voluntary service providers tend to provide necessary services. Therefore, where the recipient of a service turns to a volunteer or voluntary organisation to provide a particular service, the inference may be that there is nobody else to provide that service on those terms.

3.128 Other voluntary service providers are constituted specifically for the purpose of assisting vulnerable people, whether this vulnerability may be attributed to personal or financial circumstances. While the voluntary service provider may have full knowledge of the recipient’s dependence, partial dependence may develop into complete dependence over time. As was noted above, a voluntary organisation may be in a better position to provide a constant service than the average individual volunteer, whose personal commitments may at times conflict with the provision of the service.

⁷¹ The Commission notes that it is often stated that dependence is not a sufficient ground for acknowledging a relationship of proximity. This presents a particular problem in the context of volunteering.

3.129 It might 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. It may also be apparent to the voluntary service provider that the recipient is dependent on the voluntary service provider, in particular, to safeguard his or her well-being.

(b) Foreseeability

3.130 Once it is established that there is a relationship of proximity between the voluntary service provider and the recipient, it is then necessary to consider whether it was reasonably foreseeable that the voluntary service provider's conduct might cause harm to the recipient. This is so irrespective of whether the voluntary service provider is an informal volunteer, a formal volunteer or a voluntary organisation.

3.131 Firstly, the extent to which harm is foreseeable may relate to the nature of the service being provided. At one end of the spectrum there are services which do not affect the physical integrity of the recipient at all, while at the other end are services which affect it greatly. This end of the spectrum involves a higher degree of inherent risk. For instance, where a voluntary service provider undertakes to mow the lawn, it is much less likely that this will cause harm than where it undertakes to organise a sporting event.

3.132 In the second place, the extent to which harm is foreseeable may relate, at some level, to the skill possessed by the particular voluntary service provider. In this regard, a higher level of skill might be expected of the formal volunteer than the informal volunteer – the implication being that harm is more foreseeable where the voluntary service provider is an informal volunteer. Such a comparison might only be appropriate, however, where the formal volunteer and the informal volunteer are providing equivalent services. In such a scenario, the formal volunteer has received specialised training and guidance from the voluntary organisation, aimed at reducing the risk to which the voluntary organisation, the volunteer and the recipient of the service are exposed. However, any volunteer, whether informal or formal, may also have relevant professional training. Thus, it may be more accurate to assert that regardless of whether the voluntary service provider is an informal volunteer, a formal volunteer or a voluntary organisation, the foreseeability of harm is greater where the provider departs from its area of competence.

3.133 On a related note, where the voluntary service provider is an organisation it may be foreseeable that some harm will arise, by virtue of the simple fact that the voluntary organisation depends on many individuals to provide its service. As a result, there may be a greater chance of human error. In this regard, it must be examined whether it was reasonably

foreseeable that harm would arise from the means employed by the voluntary organisation in selecting, training and directing its volunteers.⁷²

3.134 In the third place, the extent to which harm is foreseeable may relate to the nature of the relationship between the voluntary service provider and the recipient of the voluntary service. For instance, where the relationship is one of undertaking and non-detrimental reliance, the voluntary service provider may foresee that there is less risk of harm as the recipient of the voluntary service has retained a certain amount of autonomy and can, therefore, participate in safeguarding his or her own well-being. Where the relationship is one of undertaking and detrimental reliance, however, the voluntary service provider may anticipate a greater risk of harm, since the recipient of the voluntary service has placed himself or herself in a more vulnerable position on faith of the voluntary service provider's undertaking. The Commission notes that harm may be a particularly foreseeable consequence where the relationship is one of control and dependence. In such a scenario, the voluntary service provider ought to appreciate the potential impact of its exercise of power on the recipient of the voluntary service, in the sense that it may exacerbate an existing vulnerability. Furthermore, it should be clear to the voluntary service provider, 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.

3.135 Finally, the issue of "inevitable harm" may be less persuasive in the context of the voluntary service provider than in the context of the Good Samaritan or the voluntary rescuer. In this regard, the Good Samaritan and the voluntary rescuer might assert that some harm was inevitable to ensure the overall success of the rescue and as such, constitute the lesser of two evils. The voluntary service provider, on the other hand, may face a more onerous task in establishing that some harm was outweighed by the overall benefits of the voluntary provision of services. In the specific context of the voluntary organisation, this might be translated into the argument that injury to one individual is justified by the success of the organisation's overall goal.

(c) *Just and Reasonable*

3.136 Once it is established that there is a sufficiently proximate relationship and that the harm was foreseeable, it must also be shown that it is just and reasonable to impose a duty of care on the voluntary service

⁷² This may relate to the voluntary organisation's direct responsibility to the recipient of the voluntary service. This must be contrasted with the voluntary organisation's indirect responsibility, or vicarious liability, arising out of the principal-agent relationship between the voluntary organisation and the volunteer.

provider in accordance with the three-part test set out in *Glencar Exploration plc v Mayo County Council*.⁷³

3.137 In this respect, it might be argued that the voluntary provision of services is for the benefit of society. Of course, the extent to which this is true may depend on the nature of the services being provided. In respect of the recipients, the Commission observes that by supplementing the statutory provision of services, voluntary service providers ensure that many more people may benefit from those services. In respect of the volunteers themselves, by opting to become a voluntary service provider, an individual becomes a more engaged member of society. Furthermore, where the voluntary service provider is a voluntary organisation, a forum is created for volunteers to interact, develop skills and work towards a common purpose. Thus, it may be argued that, to the extent that potential liability threatens such activities, it may not be just and reasonable to impose a duty of care.

3.138 Second, in the context of identifying the party who is to bear the cost of damages, the risk of harm must be weighed against the potential benefit to society. Where the balance falls in favour of imposing a duty of care, the voluntary organisation may be in a better position to bear the cost of damages than the individual volunteer.⁷⁴ By virtue of its resources, structure and experience, it might be asserted that the voluntary organisation is most likely to have anticipated the risk of damage. In that respect, it is likely that the voluntary organisation will have implemented precautions to guard against the risk and mechanisms to deal with the risk should it arise. Therefore, the voluntary organisation may be better able to absorb the cost of damage without endangering its activities. In respect of individual volunteers, the formal volunteer may be in a stronger position to bear the cost of damages than the informal volunteer. In this regard, the formal volunteer is likely to benefit from the support of its voluntary organisation, in terms of vicarious liability and insurance. By contrast, the informal volunteer may have to resort to personal resources, which may not be sufficient, to meet the cost of damages. Given the weight of such a burden, it might be asserted that it may not be just and reasonable to find the informal volunteer to bear the cost of damages. As against this, the Commission notes that it may be just and reasonable to completely deny the recipient of the voluntary service the right to seek redress.

3.139 Thirdly, in the context of dissuading organisations and individuals from participating in dangerous activities, the imposition of a duty of care may have a severe impact on the provision of voluntary services. The

⁷³ [2003] 1 IR 84.

⁷⁴ The Commission notes that certain activities may involve inherent risks. As such, there may instances where it can be shown that the recipient of the voluntary service has voluntarily assumed a certain amount of risk.

Commission notes that this may have a particularly disastrous effect on those activities importing a greater degree of inherent risk.

3.140 Finally, a finding of liability may not only deter individuals from volunteering but may also create a precedent for future claims against voluntary service providers. While it might be asserted that voluntary organisations and formal volunteers may be in a better position to bear this risk, it must be remembered that the cost of litigation and insurance may impose too onerous a burden, particularly on those that are dependent on charitable donations for their survival. The Commission notes that the situation may be even worse for informal volunteers, who in the majority of cases finance their work from their own resources.

(2) *Standard of Care*

3.141 Once it is established that the voluntary service provider owes the recipient of the voluntary service a duty of care,⁷⁵ it must then be shown that the voluntary service provider has not provided the service to the appropriate standard of care. As noted previously, the test that is usually applied is an objective test, at least, to the extent that it seeks to examine whether the conduct of the voluntary service provider was reasonable in the circumstances. The Commission notes, however, that an element of subjectivity may be introduced to the extent that the test may acknowledge that where the voluntary service provider is skilled it may be capable of exercising a higher degree of care.⁷⁶ In this regard, it might be asserted that, by virtue of his or her training, the formal volunteer should be held to a higher standard of care than the informal volunteer and that the off-duty professional should be held to a higher standard again. Such a comparison should, however, only be made where the volunteers are providing equivalent services and where the skills referred to are relevant to the particular service being provided, irrespective of whether those skills derive from the professional or the voluntary sector.

3.142 At a most basic level, the voluntary service provider should exercise such care as would be exercised by the reasonable person in similar circumstances. The Commission notes, however, that where the voluntary service provider undertakes to perform a particular function, the voluntary service provider may be considered negligent unless it has, or reasonably believes that it has, the requisite skill to perform that function. This is

⁷⁵ The Commission notes that certain voluntary service providers may distance themselves from the service being provided. For instance, certain voluntary organisations may facilitate volunteers in their work but refrain from getting directly involved. As such, these voluntary service providers might not owe the recipient of the service a duty of care.

⁷⁶ *Condon v Basi* [1985] 1 WLR 866, drawing a distinction between the amateur sports participant and the professional player.

because by undertaking to perform the particular function the voluntary service provider represents that it has the requisite level of skill. In that regard, the voluntary service provider's conduct may be judged against that level of skill, regardless of whether or not the voluntary service provider is actually that skilled.⁷⁷ The Commission notes, however, that the law must be realistic. As a result, where the voluntary service provider claims, legitimately or not, to be a specialist in a particular field, the law will expect the voluntary service provider to have the ordinary level of skill amongst those who specialise in that field. The voluntary service provider will not be expected to have a higher degree of skill or competence.⁷⁸ It would seem, then, that regard may be had to the "general and approved practice" in the particular field, irrespective of whether the service is being provided by a lay volunteer⁷⁹ or a professional volunteer.⁸⁰ The Commission notes, however, that a question arises as to whether a practice that is general and approved in the voluntary sector will necessarily be a practice that is general and approved in the professional sector.

3.143 These general principles apply across the board to all voluntary service providers. As such, they apply to voluntary organisations and individuals, amateurs and off-duty professionals. The extent to which the distinctions between these categories of voluntary service provider may affect the issue of liability will ultimately depend on the facts of that case. Because of this, the Commission proposes to analyse this issue further under the headings of probability of harm, gravity of threatened injury, cost of preventing the risk and social utility.

(a) The Probability of Harm

3.144 Under this principle, the greater the likelihood of harm, the more probable that the law will regard it as unreasonable for a person to engage in risky conduct or to fail to take measures that guard against the injury.

3.145 In this respect, it is notable that voluntary service providers undertake to provide a wide variety of services, not all of which carry the same potential for injury. For instance, harm may be more likely where the particular services affect the physical integrity of the recipient or are provided to particularly vulnerable individuals. Where this is so, there is a certain element of inherent risk or sensitivity that might easily be

⁷⁷ *Brogan v Bennett* [1955] IR 119 cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 378; *Philips v Whiteley* [1938] 1 All ER 566.

⁷⁸ Walsh J, *O'Donovan v Cork County Council* [1967] IR 173.

⁷⁹ *Cattley v St John's Ambulance Brigade* QBD 25 Nov 1988.

⁸⁰ *Dunne v National Maternity Hospital* [1989] IR 91; *Roche v Peilow* [1986] ILRM 189; *O'Donovan v Cork County Council* [1967] IR 173.

exacerbated or aggravated.⁸¹ Where it is common knowledge that the particular activity is inherently risky, the voluntary service provider may be expected to put in place precautions that will guard against the risk. In contrast to the Good Samaritan and the voluntary rescuer, the voluntary service provider may have a greater opportunity to make preparations and implement precautions in advance of the provision of the service.

3.146 Second, harm may be a more likely consequence where the voluntary service provider is insufficiently skilled to provide the particular service or departs from the guidance or instruction it has received. Voluntary organisations may be guided by legislation, principles or best practice that has been developed in their field of expertise, which are passed on to their members, the formal volunteers. Thus, voluntary organisations and formal volunteers may be in a particularly strong position to assess the risks of a given service and to identify the most appropriate precautions. By contrast, the informal volunteer's capacity to assess the situation will depend very much on the volunteer's personal experience. This would seem to imply that the standard of care to be applied to the informal volunteer may be that applicable to the reasonable person. However, it must also be recognised that any volunteer, formal or informal, may also have relevant professional skills that may put him or her in a particularly strong position. The 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 by the voluntary organisation.

3.147 Finally, where the voluntary service provider is a voluntary organisation rather than an individual volunteer, there may be a greater likelihood of harm arising at some stage. This may be because that the voluntary organisation is likely to be involved in orchestrating the particular activity, to be directing a number of volunteers and overseeing a number of recipients.

(b) *The Gravity of the Threatened Injury*

3.148 Where the gravity of the potential injury is great the creation of even a slight risk may constitute negligence. By contrast with those scenarios involving the Good Samaritan or the voluntary rescuer, the voluntary service provider may not intervene in situations that are quite so precarious. As already noted, however, certain activities undertaken by the voluntary service provider may be inherently risky, either because they affect the physical integrity of the recipient or because they are provided to particularly vulnerable individuals. Some of these may even be risks of

⁸¹ The Commission notes that the recipient of the service may have voluntarily assumed a certain amount of risk when participating in the particular activity.

serious harm, depending on how dangerous the activity or fragile the recipient.

3.149 It may, therefore, be asserted that voluntary organisations and formal volunteers, by virtue of their skill and organisation, may be in the strongest position to assess the gravity of the threatened harm, the appropriate means to avoid such harm or the method of treating such harm should it arise. Nonetheless, volunteers, whether formal or informal, may have relevant professional training to contribute. As such, a clear distinction cannot be drawn between the formal and the informal volunteer.

(c) *The Cost of Eliminating the Risk*

3.150 The cost of eliminating the risk usually refers to the financial cost of implementing safeguards around an activity. This may be an especially relevant consideration in relation to voluntary service providers, particularly those voluntary service providers that depend on charitable donations or personal finances to fund their activities.

3.151 A number of measures may be taken to eliminate, or at least reduce, the risk posed by the service being provided. First, voluntary organisations may ensure that those engaged as volunteers are appropriate candidates. Applicants may have to undergo a Garda vetting process.⁸² Second, voluntary organisations may ensure that their volunteers are adequately skilled to provide the particular service. In this regard, the voluntary organisation will often provide relevant training and refresher courses. Formal volunteers will have to commit a certain amount of time to undertaking these courses. Third, voluntary organisations may ensure that their volunteers are adequately equipped and supported. While the cost may be covered by the voluntary organisation, there may be instances in which the formal volunteer is obliged to cover the cost. Fourth, voluntary organisations may take out group insurance policies or require their volunteers to take out individual policies. Finally, certain voluntary organisations may require the recipients of their services to sign waiver forms to acknowledge that they assume the risk of anything adverse happening.

3.152 These measures may place a financial burden on voluntary organisations and their members and the Commission notes that it may not be possible, logistically and financially, for informal volunteers to implement them all. Where the financial burden of implementing safety precautions is too great, the voluntary service provider may have to rationalise. In such a case, society may ultimately bear the cost where there are fewer services on offer.

⁸² See generally the Commission's *Report on Spent Convictions* (LRC 84-2007), Chapter 4.

(d) *The Social Utility*

3.153 Where an activity has a high social utility, it may be regarded with more indulgence than where it has none, which has particular relevance for the voluntary service provider. In this regard, 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 in, at least, two contexts. First, they may be of benefit to the recipients of those services. While enhancing the well-being of the recipients, the fact that the services are provided free of charge ensures that more people may benefit from them. In addition to this, they may be of benefit to the individual provider of those services. While encouraging a concern for his or her fellow human beings, associations with voluntary organisations may also provide an opportunity for individual volunteers to exchange ideas and develop skills. The Commission emphasises, 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) *Summary*

3.154 By contrast with the Good Samaritan and voluntary rescuer scenarios, the Commission notes that there may be a wider array of grounds for establishing a proximate relationship where voluntary service providers are involved. Thus, a proximate relationship may be established where there is a special relationship between the voluntary service provider and the recipient of the service, where the voluntary service provider stands in a special position in relation to the danger or where the voluntary service provider voluntarily assumes responsibility. While injury is a foreseeable consequence where the service provided affects the physical integrity of the recipient or where the service is provided to a particularly vulnerable recipient, the voluntary service provider is not as confined as the Good Samaritan or the voluntary rescuer to providing such services. A question arises again, however, at the final stage of the duty of care inquiry, as to whether it is “just and reasonable” to impose a duty of care on voluntary service providers.

3.155 Assuming liability under the duty of care arises, there is some uncertainty as to the standard of care to be applied to the voluntary service provider. On the one hand, it may be asserted that the standard should be set according to the organisation’s or individual’s status as a voluntary service provider. However, this approach may relegate the issue to an inappropriate distinction between formal and informal volunteers, ignoring the particular skills of certain volunteers. Alternatively, the standard may be set according to the particular voluntary service provider’s level or lack of skill. This

approach, however, may also be problematic to the extent that it would result in the setting of numerous standards of care and would fail to recognise the particular value of providing a service voluntarily. As with the Good Samaritan and the voluntary rescuer, the ideal situation would be to set a standard that appreciates the various skills contributed by voluntary service providers, while acknowledging the fact that voluntary service providers participate for the public good. This will be discussed in greater detail in Chapter 4.

E Conclusions

3.156 It is clear from the analysis in this Chapter that, applying the tests of proximity and foreseeability, it is likely that Good Samaritans, voluntary rescuers and voluntary service providers face the potential risk of liability at least to some extent. It is equally clear that the greater the involvement of each category in the activity concerned and the greater the risk of injury, the more likely that a duty will arise. Because there is an absence of litigation in Ireland in this area, the Commission's analysis is largely based on general principles.

3.157 The Commission also accepts that the reasons for the absence of litigation are a matter of conjecture. It may be, as the Commission has suggested, that most people who are rescued or saved by Good Samaritans and volunteers are simply glad to be alive and are unlikely to sue even where there has been an accidental injury. It may also be that sound legal advice would indicate that an action would be unlikely to succeed because either proximity or foreseeability may be difficult to establish, for the detailed reasons set out above. The Commission also accepts that the "just and reasonable" test, which takes into account countervailing policy reasons for not imposing liability, may also have influenced the absence of litigation in this area. The Commission is aware from its discussions with various parties that there have been few calls on their insurance policies in this respect, though it seems likely that this is also linked to the high standards actually adopted by those organisations who might otherwise be open to litigation.

3.158 In effect, therefore, the current law does not appear to involve an actual exposure to litigation on a wide scale basis, but the Commission's analysis in this Chapter indicates that liability could, nonetheless, arise, although the "just and reasonable" test may act as a high threshold in this respect.

3.159 In this context, the Commission has a choice. It could leave the law in its present state, which appears not to expose Good Samaritans or volunteers to any appreciable risk of litigation. Alternatively, the Commission could take the view that the current law approximates to a situation that because Good Samaritans, voluntary rescuers and voluntary

organisations carry out a socially beneficial function they are not likely to be sued, even where they act in a way that would ordinarily be described as negligent.

3.160 Taking account of the policy setting outlined in Chapter 1, the Commission has concluded that it would be preferable to have the law in a state where those who might come across an emergency (Good Samaritans) or those who volunteer their services, whether as individuals or in an organisational setting, should clearly understand the legal position.

3.161 In that respect, the Commission has concluded that it would be preferable that the law should state with clarity the precise scope of liability, if any, that arises. For this reason, the Commission provisionally recommends that some form of statutory regime should set out precisely the issue of liability in this area. The Commission will examine the precise nature and scope of such a law in Chapter 4. For convenience, the Commission refers to this as a Good Samaritan law, as this is the term frequently used in other jurisdictions, and of course was the title used in the *Good Samaritan Bill 2005* which led to the Attorney General's request to the Commission.

3.162 *The Commission provisionally recommends that the legal duty of care, if any, of Good Samaritans, voluntary rescuers and voluntary service providers, should be set out in statutory form.*

CHAPTER 4 GOOD SAMARITAN STATUTE

A Introduction

4.01 In Chapter 3, the Commission analysed the extent to which a voluntary intervention, whether by a Good Samaritan or volunteer, may attract a duty of care under the current law of negligence. In this regard, the Commission concluded that it would be appropriate to set out clearly in statutory form the precise scope, if any, of the legal duty of care, taking into account the policy background set out in Chapter 1. In this Chapter the Commission sets out the parameters of such a Good Samaritan law. In Part B, the Commission considers the general mechanisms employed in other jurisdictions. In Part C, the Commission considers a particular aspect of the proposed law, the gross negligence test for liability.

B Good Samaritan Statutes in Other Jurisdictions

(1) Introduction

4.02 In this Part, the Commission considers the general scope of the Good Samaritan statute which it recommended in Chapter 3. The Commission notes that the Private Members Bill, the *Good Samaritan Bill 2005*, which formed the immediate background to the Attorney General's request had a relatively limited remit in that it proposed protection only to those Good Samaritans who render emergency first aid assistance at the scene of the accident or emergency. As a result, Good Samaritans who render a different species of assistance and other types of volunteer would have been excluded from the protection proposed in that 2005 Bill. The Commission has examined how comparable common law jurisdictions have dealt with the matter.

4.03 The Commission notes that there is no single approach adhered to by common law jurisdictions. While most jurisdictions have introduced some form of legislation, they vary greatly. In Section 2 the Commission examines each jurisdiction in accordance with whether it has introduced some form of Good Samaritan legislation.¹ In Section 3 the Commission examines each jurisdiction in accordance with whether it has introduced

¹ The Commission notes that the term "Good Samaritan" legislation may be used to describe legislation that treats both Good Samaritans and volunteers.

some form of volunteer protection and in Section 4 the Commission examines a number of alternative provisions that have been made. In Section 5, the Commission sets out its conclusions.

(2) Good Samaritans

4.04 A number of jurisdictions have enacted laws specifically aimed at protecting Good Samaritans from liability.

(a) United States

4.05 In 1953, California was the first to introduce a Good Samaritan statute. Since then, the remaining States and the District of Columbia have followed suit. While many statutes have followed a similar format, others have been influenced by particular incidents encountered by the particular legislating State. As a result, there are variations in the protections offered to Good Samaritans.

4.06 At one end of the scale there are those statutes, such as the Oklahoma statute, which have a very narrow remit, regulating the conduct of licensed health care professionals alone.² At the other end of the scale, the Minnesota statute applies to any person, regardless of whether they have undergone any medical training.³ In between these two extremes, the Maryland statute seeks to protect health care professionals and various types of rescue group,⁴ while the South Dakota statute seeks to protect any type of volunteer, in addition to health care professionals.⁵

4.07 Variations also appear in relation to the types of conduct to be protected by the statute. Some, such as the Connecticut statute, seek to protect a narrow category of conduct, referring to emergency medical assistance or first aid alone.⁶ Others have a broader remit, such as the Arizona statute,⁷ which refers to the conduct of volunteers in general, and the Kansas statute,⁸ which refers to the activities of state agencies. Despite these discrepancies, however, the Commission notes a type of consensus to protect those who provide emergency medical care and assistance, in good faith and without remuneration.

² 59 Okl St Ann § 518 (2006).

³ Minn Stat § 604A.01 (2007).

⁴ Courts and Judicial Proceedings § 5-603 (2008).

⁵ SD Codified Laws § 20-9-3, § 20-9-4, § 47-23-29 (2006).

⁶ Con Gen Stat Ann § 52-557b (2007).

⁷ Ariz Rev Stat § 36-2263(1), § 36-2263 (2-3), § 36-2263(4), § 36-2263(5), § 12-982, § 32-1471 (2006).

⁸ Kan Stat Ann § 65-2891, § 60-3601, § 48-915 (2005).

4.08 The Commission notes that most statutes, such as the Illinois statute, stipulate that assistance must be rendered at the scene of the accident.⁹ Many, such as the Georgia statute, have expanded this by allowing for assistance to be given at the scene of the accident or emergency.¹⁰ The distinction is that the situation of emergency may extend beyond the confines of the place or moment in which the accident occurs. Some statutes, such as the New Jersey statute, have gone even further by permitting protection to those who transport injured persons from the scene of the accident or emergency.¹¹

4.09 Once these conditions have been satisfied, most of the statutes set the threshold for liability at gross negligence or wilful and wanton misconduct. It is notable, however, that a minority of statutes do no more than codify the existing principles of negligence. The threshold set by the Connecticut statute, for instance, is that applicable to ordinary negligence.¹²

4.10 The 1997 decision of the Rhode Island courts, *Boccasile et al v Cajun Music Ltd* illustrates the effect of such statutes.¹³ The deceased, Ralph Boccasile, was attending a music festival, when he suffered a severe allergic reaction to some seafood gumbo he had been eating. The defendants were a doctor, a nurse and a physician's assistant, who had volunteered as first-aiders at the music festival. After being notified that there was a man in difficulty, 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 (who she believed to be another doctor) administered chest compressions. An ambulance arrived and the physician's assistant accompanied Mr Boccasile to the hospital. Mr Boccasile never regained consciousness. The defendants were sued for the death of Mr Boccasile. The plaintiff asserted that when the defendants responded to the emergency, they failed to bring along the necessary equipment and to administer the

⁹ 745 Il Comp Stat 49/1.

¹⁰ Ga Code Ann § 51-1-29 (2005).

¹¹ NJSA 2A:62A-1, 2A:62A-8, 2A:62A-9 (2007).

¹² Con Gen Stat Ann § 52-557b (2007).

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

medication in a timely manner. 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 was the plaintiff's failure to submit sufficient evidence as to the appropriate standard of care.

(b) Australia

4.11 Good Samaritan legislation has also been introduced in many states and territories in Australia.¹⁴ As in the United States, the legislation varies but a number of common themes emerge.

4.12 For instance, while New South Wales does not protect volunteers in general, the protection afforded to the Good Samaritan is quite extensive. Section 57 of the *Civil Liability Act 2002* protects any individual from civil liability, where he or she intervenes in an emergency in good faith without reward or expectation of reward.¹⁵ The Act does not limit protection to Good Samaritans who are medically trained, but neither does it limit protection to medical interventions or interventions made at the scene of the accident.

4.13 A similar provision exists in Western Australia. Section 5AD of the *Civil Liability Act 2002* protects any person rendering emergency assistance at or near the scene of an emergency. In contrast to the legislation of New South Wales, the Western Australian Act specifies that any medically qualified person giving advice, in good faith and without recklessness, is also protected. It may of course be argued that this is implicit in the New South Wales legislation.

4.14 While the South Australia legislation replicates the New South Wales provision about medically qualified persons giving advice,¹⁶ it only affords protection to Good Samaritans who render medical assistance. Thus, section 38 of the *Civil Liability Act 1936*, as inserted by the *Civil Law (Wrongs) Act 2002*, protects any person who renders emergency medical assistance in good faith and without recklessness.¹⁷

¹⁴ Eburn "Protecting Volunteers?" (November 2003) Vol 18 No 4 *The Australian Journal of Emergency Management* 7.

¹⁵ Eburn "Protecting Volunteers?" (November 2003) Vol 18 No 4 *The Australian Journal of Emergency Management* 7 at 8.

¹⁶ Section 38(3) of the *Civil Liability Act 1936* protects any medically qualified person who gives advice, via telephone for example, without expectation of reward.

¹⁷ The *Wrongs (Liability and Damages for Personal Injuries) Amendment Act 2002* reinforces the protection afforded to Good Samaritans and volunteers.

4.15 In Victoria, section 31B of the *Wrongs Act 1958* provides similar protection to the South Australian *Civil Liability Act of 1936*. By contrast, however, the Victoria legislation extends protection to *any* person who provides advice, via telephone for example, regardless of whether they have medical qualifications.¹⁸ Furthermore, the Act does not stipulate that the Good Samaritan should act without recklessness.¹⁹

4.16 The protection afforded in Queensland appears to be the most limited. The *Law Reform (Miscellaneous Provisions) Act 1995* protects *doctors and nurses*, who act at or near the scene of an emergency or who transport the person to hospital, in good faith without gross negligence, without fee or reward and without expectation of receiving such a fee or reward. 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.

(c) Canada

4.17 Many of the Canadian provinces have enacted some form of Good Samaritan legislation.

4.18 The broadest protection is found in the Prince Edward Island *Volunteers Liability Act 1988*, which seeks to protect both Good Samaritans and volunteers, including volunteer fire-fighters. Under this statute, the Good Samaritan is a volunteer who “renders services or assistance at any place” and is protected from liability unless his or her conduct constitutes gross negligence. The provisions in the Nova Scotia *Volunteer Services Act (Good Samaritan) 1989* are virtually identical.

4.19 The protection afforded by the British Columbia *Good Samaritan Act 1996* appears to be slightly narrower. The Act provides protection to any person rendering emergency medical services or aid 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.” It is unclear, however, whether the use of the term “aid” in this context refers to first aid in particular or assistance in general. Again, protection extends only so far as the conduct of the person in question does not constitute gross negligence.

4.20 A more limited form of protection is offered by the Saskatchewan *Emergency Medical Aid Act 1979*, which protects two categories of person. In the first place, it protects physicians and registered nurses who render

¹⁸ Eburn “Protecting Volunteers?” (November 2003) Vol 18 No 4 *The Australian Journal of Emergency Management* 7 at 8.

¹⁹ The *Civil Law (Wrongs) Act 2002* reinforces the protection afforded to Good Samaritans, volunteers and donators of free food.

emergency medical services or first aid, voluntarily and without expectation of reward, outside a hospital or other place having adequate medical facilities and equipment. Secondly, it protects any person who voluntarily renders first aid assistance at the immediate scene of the accident or 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 of a medical nature. The Newfoundland *Emergency Medical Aid Act 1997* is virtually identical.

4.21 While the Alberta *Emergency Medical Aid Act 2000* is similar, it extends protection to any “registered health discipline member.” The Ontario *Good Samaritan Act 2001* extends protection to “health care professionals” in general. The Act also provides for the reasonable reimbursement of expenses reasonably incurred.

4.22 The Manitoba *Medical Act* takes a different approach to the Good Samaritan. While the Act restricts the practice of medicine to those with medical qualifications, it permits any person to give “necessary medical or surgical aid in case of urgent need if that aid is given without hire, gain or hope of reward.” There is no provision in the Act, however, dealing with the consequences for negligent acts or omissions.

4.23 As a province with civil law origins, Quebec has a code-based system. Article 1471 of the *Civil Code* of Quebec states:

“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.”

4.24 It would thus appear 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.

4.25 When the intervention involves significant danger to the rescuer, the Quebec *Act to Promote Good Citizenship* states that this may be recognised as an exceptional act of good citizenship and earn the rescuer a decoration or distinction from the Quebec government. In this regard, the act must have been performed in hazardous or difficult circumstances which put the rescuer’s life in danger.²⁰

²⁰ Available at www.justice.gouv.qc.ca/english/ministere/civisme/civisme-a.htm.

(3) Volunteer Protection

4.26 A number of jurisdictions have enacted laws specifically aimed at protecting from liability those engaged in volunteering or active citizenship.

(a) United States

4.27 Under the Federal *Volunteer Protection Act 1997*,²¹ protection is limited to volunteers engaged in the activities of non-profit organisations and governmental entities. In this regard, protection is afforded where the volunteer is acting within the scope of his or her responsibilities and where the harm was not caused by wilful, criminal or reckless misconduct, gross negligence or a conscious, flagrant indifference to the rights or safety of the individual harmed.²² Since every state in the US had already introduced some form of volunteer protection legislation by the time the *Volunteer Protection Act 1997* was enacted, the 1997 Act pre-empts state laws to the extent that they are inconsistent with the Act.²³

4.28 As to the laws enacted by individual states, some of the Good Samaritan statutes also afford protection to the volunteer. As might be expected, there is some variance in the levels of protection provided. The Arizona statute²⁴ and the Colorado statute,²⁵ for instance, extend protection to any “volunteer” without distinction Delaware is more selective,²⁶ to the extent that its code refers to “volunteers of certain nonprofit organisations” and volunteer health care professionals.²⁷ Kansas takes a similar approach with regard to volunteers of certain nonprofit organisations²⁸ and refers specifically to emergency management volunteers.²⁹ Mississippi³⁰ specifies that the “qualified volunteer” and the “retired physician granted special

²¹ 42 USC 14501. See also Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 9-15. Available at www.nonprofitrisk.org.

²² The volunteer, where relevant, must be properly licensed, certified or authorised to act and must not be operating a motor vehicle, vessel or aircraft where the state requires an operator’s licence and insurance.

²³ State law pre-emption does not apply where state law provides greater protection, where certain conditions are incorporated into the state law or where the state has declared that the *Volunteer Protection Act 1997* is inapplicable.

²⁴ Ariz Rev Stat s 12-982 (2006).

²⁵ Colo Rev Stat s 13-21-115.5 (4(a)) (2007).

²⁶ Del Code Ann tit 10, s 8133 (2005).

²⁷ Del Code Ann tit 10, s 8135 (2005).

²⁸ Kan Stat Ann s 65-2891 (2005).

²⁹ Kan Stat Ann s 48-915 (2005).

³⁰ Miss Code Ann s 95-9-1 (2005).

volunteer medical license” are to be protected.³¹ The New Jersey statute, on the other hand, limits protection to volunteers with certain types of rescue group,³² while the Alabama statute limits protection to members of an “organised volunteer fire department.”³³ Some state laws, such as that in California, limit protection to volunteers who serve as directors and officers for non-profits.³⁴

(b) Australia

4.29 The Federal *Commonwealth Volunteers Protection Act 2003* protects volunteers working for the Commonwealth of Australia from civil liability.

4.30 Similarly, many of the Australian states and territories have also introduced volunteer protection legislation.³⁵ While they differ in the detailed provisions,³⁶ they share a common approach that formal volunteers, as distinct from informal volunteers, acting in good faith should be protected.³⁷ For example, the Queensland *Civil Liability Act 2003* protects volunteers who perform, in good faith, community work organised by a community organisation.³⁸ Similar provisions are found in Victoria³⁹ and Western Australia.⁴⁰ Most statutes exclude protection, however, where the volunteer’s conduct is outside the scope of the organisation’s activities, is contrary to instruction or is specifically excluded.⁴¹ This might be the case where injury results from a criminal act, defamation, intoxication or the

³¹ Miss Code Ann s 73-25-38 (3) (2005).

³² NJS 2A:62A-1, 2a:62A-8, 2A:62A-9 (2005).

³³ Ala code 1975 § 6-5-332(a).

³⁴ Cal Gov Code §5239. See also Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 4. Available at www.nonprofitrisk.org.

³⁵ Available at www.bus.qut.edu.au/research/cpns/whatweresear/publicliabil.jsp.

³⁶ The Western Australia *Fire and Emergency Services Legislation Act 2002* protects volunteer fire units and marine rescue units and their members from civil liability.

³⁷ The Australian Capital Territory *Civil Law (Wrongs) Act 2002* takes a slightly different approach, protecting volunteers for any act or omission made *honestly*.

³⁸ It also protects volunteers who are office holders of the community organisation and donators of food in particular circumstances.

³⁹ The *Wrongs and other Acts (Public Liability Insurance Reform) Act 2002*.

⁴⁰ The *Volunteer (Protection from Liability) Act 2002* and the *Civil Liability Act 2002*, as amended by the *Civil Liability Amendment Act 2003*.

⁴¹ The Victoria *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002*, the Western Australia *Volunteer (Protection from Liability) Act 2002*, and the South Australia *Volunteer Protection Act 2001*.

operation of a motor vehicle. While no statute appears to set a “gross negligence” test, the Commission observes that at least three statutes specify that the volunteer must act *without recklessness*.⁴²

(c) Canada

4.31 In its *Reform of the Canada Corporations Act: Discussion Issues for a New Not-for-Profit Corporations Act*, the Commission notes that the federal government of Canada expressed its opposition to the grant of immunity to volunteers: “The framework would put the responsibility for harm where it belongs, on those responsible, rather than on those who have been made to suffer.”⁴³

4.32 Nonetheless, two Canadian provinces have enacted legislation immunising volunteers from liability. In 2003, Nova Scotia adopted the *Volunteer Protection Act 2002*, which was inspired by the US *Volunteer Protection Act 1997*. In the same year, Saskatchewan enacted the *Nonprofit Corporations Amendment Act 2003*, which grants immunity to the directors and officers of nonprofit corporations.⁴⁴ While immunity is restricted to directors and officers, the threshold for liability is set at gross negligence and wilful conduct.⁴⁵

(4) Other Provisions

4.33 Aside from those instruments that may be described as Good Samaritan statutes or volunteer protection acts, a number of other methods have been employed to protect volunteers from liability. These include provisions to protect so-called desirable activities, governmental immunity provisions, emergency statutes, mutual aid compacts and the doctrine of charitable immunity. The Commission’s discussion of these is largely focused on the United States as illustrative of this approach.

(a) Protection for Desirable Activities

4.34 As was noted in Chapter 1,⁴⁶ under section 1 of the UK *Compensation Act 2006* courts are required to consider the potentially deterrent effect a finding of liability under the common law duty of care in

⁴² The South Australia *Volunteer Protection Act 2001*, the Northern Territory *Personal Injuries (Liabilities and Damages) Act 2007*, and the Capital Territory *Civil Law (Wrongs) Act 2002*.

⁴³ Ottawa: Industry Canada 2002 at 23.

⁴⁴ This was based on the Saskatchewan Law Reform Commission’s *Report on Liability of Directors and Officers in Non-Profit Organizations* (2003). Available at <http://www.lawreformcommission.sk.ca/ResearchPapers.htm>.

⁴⁵ Flannigan “Tort Immunity for Nonprofit Volunteers” 2005 84 CBR 1.

⁴⁶ Paragraphs 1.106-1.109.

negligence may have on the undertaking of desirable activities. While the 2006 Act does not specifically refer to Good Samaritans or volunteers, it is clear that the activities undertaken by Good Samaritans and volunteers may very well be included in that category of activities considered desirable. Thus, it is likely that the 2006 Act will have a bearing on any actions involving Good Samaritans and volunteers.

(b) Governmental Immunity Provisions

4.35 The Eleventh Amendment to the US Constitution provides that federal and state governments are protected by sovereign immunity.⁴⁷ Sovereign immunity may also have originally protected those volunteers considered government employees or agents, but a general erosion of sovereign immunity has occurred with the enactment of torts claims legislation in most states. In this regard, some states have abolished sovereign immunity in general, listing the exceptional situations in which there may still be protection from liability.⁴⁸ In contrast, some states have retained state immunity in general, listing the exceptional situations in which civil liability may arise.⁴⁹ Some states, such as New Jersey, have specifically extended immunity protections to volunteers under their torts claim's acts.⁵⁰

4.36 The *Federal Tort Claims Act 1946* constitutes a limited waiver to federal sovereign immunity, which protects the US from liability for the tortious acts of its employees. For the most part, the Act is the only means by which victims of negligence may seek redress for harm occasioned by Federal government employees. Redress may also be sought against Federal government *volunteers*, where protection has been extended to them by statute and where they are acting within the scope of their duties.

4.37 In the Irish context, of course, the decision of the Supreme Court in *Byrne v Ireland*⁵¹ in effect abolished by judicial decision any immunity from suit which it may have been thought to have existed.⁵²

⁴⁷ Tribe *American Constitutional Law* (2nd ed Foundation Press 1988) at 173-95. See also www.hrsa.gov/esarvhp/legregissues/CivilLiability.htm.

⁴⁸ Alaska Stat § 09.50.250 (Michie 2002).

⁴⁹ Colo Rev Stat Ann § 24-10-106 (West 2004).

⁵⁰ NJSA § 59:1-3 (2007).

⁵¹ [1972] IR 241.

⁵² See generally Hogan and Whyte *Kelly's The Irish Constitution* 4th ed (Butterworths 2003) for a discussion of the survival of any elements of the former sovereign immunity.

(c) Emergency Statutes

4.38 Many states in the US have also adopted emergency statutes and regulations to protect voluntary healthcare professionals from civil liability.⁵³ Where there is a declared emergency, model emergency laws grant emergency responders immunity from civil liability. In some, out-of-state emergency health care professionals may be protected, so long as their conduct does not constitute reckless disregard to the health or life of the patient.⁵⁴ In others, voluntary healthcare professionals responding within a state may be protected to the extent that they can be recognised as employees of that state.⁵⁵ In this regard, voluntary healthcare professionals may benefit from sovereign immunity provisions, so long as their conduct does not constitute wilful misconduct, gross negligence or bad faith.

4.39 In addition, some states, such as New Jersey, have specifically extended immunity protections to volunteers under their torts claim's acts.⁵⁶ Other states, such as Maryland,⁵⁷ have achieved this by including unpaid individuals performing state functions in the definition of the term "personnel." Other states, such as New York, have opted for defence and indemnification guarantees.⁵⁸ Under this regime the state is obliged to provide state volunteers with legal representation and cover any resulting awards of damages.

(d) Mutual Aid Compacts

4.40 Volunteers may also be protected from civil liability by emergency compacts, which are agreements between states that officers or employees of a party state rendering aid in another state will be considered an agent of the requesting state for tort liability and immunity purposes. The US *Emergency Management Assistance Compact*, for instance, provides that

"officers or employees of a party state rendering aid in another state ... shall be considered agents of the requesting state for tort liability and immunity purposes".⁵⁹

⁵³ Available at www.hrsa.gov/esarvhp/legregissues/CivilLiability.htm.

⁵⁴ *Model State Emergency Health Powers Act 2001* (MSEHPA).

⁵⁵ *Model Intrastate Mutual Agreement Legislation 2004* (MIMAL). See also www.hrsa.gov/esarvhp/legregissues/CivilLiability.htm.

⁵⁶ NJSA § 59:1-3 (2005).

⁵⁷ Md Code State Gov't § 12-101 (2005).

⁵⁸ NY Unconsol Law § 9193 (McKinney 2001).

⁵⁹ Available at www.hrsa.gov/esarvhp/legregissues/CivilLiability.htm.

To benefit from this immunity, volunteers must act in good faith and their conduct must not constitute wilful misconduct, gross negligence or recklessness.

4.41 International and other multi-jurisdictional mutual aid compacts may also provide immunity for volunteers. The International Emergency Management Compact (IEMAC), for instance, immunises from liability any “person or entity of a party jurisdiction,” while the Southern Regional Emergency Management Compact (SREMAC) protects the party state and their officers and employees rendering aid in another state.

4.42 The use of inter-facility Memoranda of Understanding to share staff and meet surge capacity needs is also a common practice in the private sector. For instance, most urban hospitals in the US have agreements with other hospitals to share resources in the event of bioterrorism.⁶⁰

(e) Charitable Immunity

4.43 It must be emphasised that Good Samaritan statutes and volunteer protection laws, particularly those in the United States, do not extend protection to voluntary organisations. The legislative intent behind these statutes was to ensure that voluntary organisations retaining the services of a volunteer were responsible for the harm caused by that volunteer.⁶¹ The common law doctrine of charitable immunity, however, exists to some extent in a number of States, though it has been abolished in most of them.⁶² The states with the least restrictive forms of charitable immunity appear to be Arkansas,⁶³ New Jersey⁶⁴ and Virginia⁶⁵. In Alabama,⁶⁶ charities are only immune with respect to claims brought by beneficiaries. In Georgia,⁶⁷ they enjoy immunity unless they fail to exercise ordinary care in the selection or retention of competent officers and employees, or where the plaintiff is a paying recipient of the services. In Maine,⁶⁸ charitable immunity only

⁶⁰ US General Accounting Office *Hospital Preparedness: Most urban hospitals have emergency plans but lack certain capacities for bioterrorism* Response 13, GAO-03-924 (2003). Available at <http://www.mipt.org/pdf/gao03924.pdf>.

⁶¹ Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 8. Available at www.nonprofitrisk.org.

⁶² *Ibid* at 8-9.

⁶³ *Ibid* at 20.

⁶⁴ NJSA §2A:53A-7 (2007).

⁶⁵ Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 107. Available at www.nonprofitrisk.org.

⁶⁶ *Ibid* at 15.

⁶⁷ *Ibid.* at 32.

⁶⁸ *Ibid* at 50.

applies if an organisation derives its funds from charitable donations. In Maryland,⁶⁹ charitable immunity applies only if an organisation's assets are held in trust and it has no liability insurance. In New Jersey,⁷⁰ the organisations are not liable for injuries caused to a beneficiary. In Virginia,⁷¹ they are immune from claims by beneficiaries alleging negligence, but are susceptible to claims of corporate negligence. In Utah,⁷² there is a limit to the liability of a tax exempt charity, under certain circumstances, for acts or omissions of a volunteer. In Wyoming,⁷³ a charitable immunity defence is available to organisations that provide services without charge. In Colorado,⁷⁴ Massachusetts⁷⁵ and South Carolina,⁷⁶ the amount of damages for which a charity may be liable is capped at a certain amount.⁷⁷

4.44 In addition, the tortious actions of volunteers may, in certain circumstances, be attributed to the organisation through the principle of vicarious liability.⁷⁸ Vicarious liability may arise through the theories of *respondeat superior* and ostensible agency. Under the theory of *respondeat superior*, it is presumed that the employer has control over and is therefore responsible for the acts of his or her employees. For the most part, the employer will only be liable for acts of the employee undertaken within the scope of employment. Under the theory of ostensible agency, an organisation may be liable for its volunteers' actions when the third party looks to the organisation rather than the volunteer to provide him or her with care and the organisation holds the volunteer out as its employee.⁷⁹

4.45 While there may be a variety of provisions to protect individual voluntary healthcare professionals, voluntary organisations rarely qualify for

⁶⁹ *Ibid* at 52.

⁷⁰ NJSA §2A:53A-7 (2007).

⁷¹ Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 107. Available at www.nonprofitrisk.org.

⁷² Utah Code Ann §78-19-3 (2007).

⁷³ Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 118.

⁷⁴ Colo Rev Stat Ann §7-123-105 (West 2004).

⁷⁵ Mass Gen Laws Ann ch 231 §85K (2007).

⁷⁶ Nonprofit Risk Management Center *Report on State Liability Laws for Charitable Organizations and Volunteers* (2001) at 93.

⁷⁷ *Ibid* at 24, 55 and 93.

⁷⁸ Fleming *The Law of Torts* (7th ed The Law Book Company Ltd 1987) at 339-365. See also www.hrsa.gov/esarvhp/legregissues/CivilLiability.htm.

⁷⁹ *Simmons v St Clair Memorial Hospital* 481 A2d 870, 874 (Pa Super 1984).

immunity.⁸⁰ Organisations, such as health care entities, may qualify for sovereign immunity, where they are considered to be a government entity or contractor. Alternatively, Memoranda of Understanding may be an important source of liability protection for hospitals, because in many instances they may assign legal liability for the acts of individual health care practitioners to the hospital who receives their services.

(5) Conclusions

4.46 The Commission has drawn on this discussion of the experience of comparable common law jurisdictions in deciding how to set the parameters of any Good Samaritan legislation, bearing in mind that such parameters will define to whom and in what circumstances a duty of care, if any, will apply.

4.47 The Commission notes that some common law jurisdictions have enacted separate pieces of legislation to deal with Good Samaritans and volunteers. Given that the Good Samaritan may be seen as a specific type of volunteer⁸¹ and having regard to the general policy setting of encouraging active citizenship and volunteerism in Ireland, the Commission sees great merit in a single piece of legislation which deals with both Good Samaritans and volunteers. To the extent that the *Good Samaritan Bill 2005* may have applied to Good Samaritans and a specific species of volunteer engaged in a specific type of activity, the Commission favours a more wide-ranging legislative approach.

4.48 The Commission notes that some common law jurisdictions have limited the application of their Good Samaritan and volunteer protection legislation to narrow categories of persons, for instance, individuals who are medically trained or who participate in the activities of a voluntary organisation. In this regard, the Commission is of the view that limiting the concepts of Good Samaritan and volunteer to very specific categories of person would be incompatible with the broad notion of “active citizenship,” as discussed in Chapter 1.⁸² Firstly, the Commission notes that the term “active citizen” may be used to describe both individuals and organisations.⁸³ Thus, any legislation should be broad enough to reflect both categories of “person.” The Commission is of the view, however, that given the different considerations that may apply to both categories, it would be advisable for any legislation to distinguish clearly between individual

⁸⁰ Available at www.hrsa.gov/esarvhp/legregissues/CivilLiability.htm.

⁸¹ See paragraph 1.68.

⁸² See paragraph 1.85.

⁸³ See paragraph 1.86.

volunteers and voluntary organisations.⁸⁴ In this regard, the Commission notes that much of the Good Samaritan and volunteer protection legislation in comparable common law jurisdictions applies to individuals alone and not organisations. Regarding individuals, the Commission notes that the term “active citizen” does not distinguish between individuals who volunteer in an informal capacity and individuals who volunteer in a formal capacity.⁸⁵ The Commission considers that the proposed legislation should, therefore, be broad enough to cover both categories.

4.49 The Commission notes that some jurisdictions limit the application of their legislation to certain species of conduct, for instance, medical and first aid assistance or activities specified by the voluntary organisation. In this regard, the Commission is of the view that it would not be feasible to delimit the range of activities that may legitimately be considered acts of active citizenship and any attempt would have the further impact of delimiting the range of persons to which any proposed legislation would apply. As noted above, this would also be difficult to reconcile with the broad concept of “active citizenship.”

4.50 The Commission notes that some jurisdictions limit the application of their legislation to certain types of situation, for instance, by stipulating that an intervention must take place at the immediate scene of the accident. In this regard the Commission notes that such conditions do not accurately reflect the relative value of one intervention, which is undertaken in the stipulated situation, as compared with another intervention that takes place outside the stipulated situation. The Commission has therefore concluded that it would be inappropriate for any legislation to set down strict circumstantial paradigms in which the intervention must be undertaken, so as to be classified as an act of active citizenship.

4.51 Bearing these factors in mind, *the Commission provisionally recommends that its proposed legislation should be drafted broadly enough to 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.*

4.52 The remaining question is whether such legislation should simply clarify existing law or, like the majority of the common law jurisdictions above, introduce a moderated standard in respect of Good Samaritans and volunteers. The Commission therefore now turns to that issue.

⁸⁴ See paragraph 1.68 and paragraph 1.74 respectively.

⁸⁵ See paragraph 1.71.

C A Gross Negligence Standard of Liability

(1) Purpose

4.53 As was noted above, a minority of jurisdictions who have enacted Good Samaritan or volunteer protection legislation apply the ordinary standard of care of negligence. By contrast, the *Good Samaritan Bill 2005* proposed to set the threshold for liability at “gross negligence” and this is in line with most of the jurisdictions discussed in Part B. The Commission considers that the “gross negligence” threshold has the dual benefit of mitigating the potential deterrent effect of imposing liability, while not unduly prejudicing the plaintiff by denying him or her the right to seek redress.

4.54 The Commission also considers that the gross negligence test may be particularly appropriate in the context of situations where an independently arising risk arises, irrespective of whether they relate to rescue or the provision of voluntary services in delicate circumstances. In this regard, the Commission also considers that a gross negligence threshold is compatible with other relevant principles, notably, necessity and *novus actus interveniens*.⁸⁶

(a) Necessity

4.55 The principle of necessity is of particular relevance to situations of rescue, since it appears to afford a good defence where there is an emergency that has not been caused by the prior negligence of the defendant.⁸⁷ In this regard, an emergency must be of such a nature as would justify a person reasonably to take the action that the defendant took, even where, with the benefit of hindsight, the action was not necessary.⁸⁸ As a defence, necessity might enable the Good Samaritan or voluntary rescuer to escape liability for the intentional interference with the security of the endangered party’s person⁸⁹ or property,⁹⁰ on the ground that the acts complained of were necessary to prevent greater damage to the community

⁸⁶ The Commission also notes that the issue of concurrent wrongdoing, as regulated by the *Civil Liability Act 1961*, may also be relevant.

⁸⁷ *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218. Cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 672.

⁸⁸ *Cope v Sharpe (No 2)* [1912] 1 KB 496. Cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 673.

⁸⁹ *Leigh v Gladstone* (1909) 26 Times LR 139; not followed in the *Secretary of State for Home Office v Robb* [1995] 1 All ER 677. Both cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 642.

⁹⁰ *London Borough of Southwark v Williams* [1971] Ch 734. Cited in McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 673.

or to another or to the Good Samaritan or voluntary rescuer himself or herself.⁹¹

(b) *Novus Actus Interveniens*

4.56 Where the act of the Good Samaritan, voluntary rescuer or voluntary service provider is of such a nature that it breaks the chain of causation between the original source of damage and the injury, that act may be considered the new or sole cause of the injury.⁹²

4.57 In the context of the Good Samaritan and the volunteer, however, the Commission notes that the principle of novus actus interveniens may be more appropriately employed for the purpose of analogy than direct application. First, the Commission notes that it has been held that gross negligence, in terms of objective recklessness, is insufficient to constitute a new and intervening act.⁹³ As will be shown below, the proposed gross negligence test may fall short of the subjective recklessness required.⁹⁴ Second, the Commission notes that where the intervening act is foreseeable, it may not constitute a new and intervening act.⁹⁵ In this regard, the Commission refers to the adage that danger invites rescue.⁹⁶ As such, it could hardly be asserted that a rescue attempt is unanticipated. Finally, the Commission notes that certain acts may not be considered “voluntary” for the purposes of a new and intervening act. These include activities undertaken pursuant to a moral duty⁹⁷ and activities undertaken because the original wrong has compelled the actor to intervene.⁹⁸ In this regard the Commission observes that the Good Samaritan or volunteer generally becomes involved because he or she feels morally bound to do so. As such, there may be very few occasions on which his or her act may be considered new and intervening.

⁹¹ The Commission notes that a distinction may be made between public and private necessity. See *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

⁹² See McMahon and Binchy *Irish Law of Torts* (3rd ed Butterworths 2000) at 77-78

⁹³ *Connolly v South of Ireland Asphalt Co Ltd* [1977] IR 99. The Commission notes that the term “recklessness” in the context of novus actus interveniens refers to “subjective recklessness.” See *Conole v Redbank Oyster Co Ltd* [1976] IR 191

⁹⁴ The Commission notes that the term “recklessness” in the context of novus actus interveniens refers to “subjective recklessness.” Subjective recklessness entails taking a risk conscious of the fact that harm is not an unlikely consequence. See *Conole v Redbank Oyster Co Ltd* [1976] IR 191

⁹⁵ *Connolly v South of Ireland Asphalt Co Ltd* [1977] IR 99.

⁹⁶ *Wagner v International Railroad Co* (1921) 232 NYS 176, 133 NE 437

⁹⁷ *Haynes v Harwood* [1935] 1 KB 146

⁹⁸ *Hogg v Keane* [1956] IR 155

(2) Gross Negligence Test

4.58 In respect of the specific elements of the gross negligence test, the Commission has previously recommended that the essential elements formulated by the Court of Criminal Appeal in *The People (Attorney General) v Dunleavy*⁹⁹ provide sufficient clarity. In the current context, the key elements of gross negligence are that:

- a) The negligence was of a very high degree;
- b) The act fell far below what could have been expected in the circumstances and
- c) The actions contributed to the injury sustained.

4.59 The Commission notes that gross negligence is to be determined by the degree of departure from the expected standard and the test is an objective one, in that the accused need not have been aware that he or she had taken an unjustifiable risk. Ultimately, the task of distinguishing whether the departure from the expected standard of care constitutes ordinary negligence or gross negligence is for a trier of fact, based on the test set out.

4.60 In line with the experience of comparable common law jurisdictions, however, the Commission is of the view that such a gross negligence test should apply to individuals alone and not organisations. Given the structure of voluntary organisations, the control they exercise, the responsibility they assume, the statutory duties to which they are already subjected and the various means of protection available to them, it is appropriate that they should bear the burden of acts of ordinary negligence, whether these are directly or vicariously attributable to them. The Commission notes that to extend any protection in their favour would put the victim of damage at a disproportionate disadvantage and would not be a justifiable means of furthering the policy of encouraging volunteerism.

4.61 The Commission provisionally recommends that any Good Samaritan legislation should introduce a gross negligence threshold in respect of the activities undertaken by individual Good Samaritans and volunteers. In this regard, the Commission provisionally recommends that the test for gross negligence should be as set out in *The People (Attorney General) v Dunleavy* [1948] IR 95, namely, that the negligence must be of a very high degree, that the act must fall far below what could have been expected in the circumstances and that the actions must have contributed to the injury sustained.

⁹⁹ [1948] IR 95, 102. See the Commission's *Report on Corporate Killing* (LRC 77-2005) paragraphs 2.59-2.63 (corporate liability) and paragraphs 3.26-3.43 (individual liability).

CHAPTER 5 SUMMARY OF PROVISIONAL RECOMMENDATIONS

5.01 The provisional recommendations contained in this Paper may be summarised as follows:

5.02 The Commission provisionally 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 2.52]

5.03 The Commission provisionally recommends that the legal duty of care, if any, of Good Samaritans, voluntary rescuers and voluntary service providers, should be set out in statutory form. [Paragraph 3.162]

5.04 The Commission provisionally recommends that its proposed legislation should be drafted broadly enough to 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 4.51]

5.05 The Commission provisionally recommends that any Good Samaritan legislation should introduce a gross negligence threshold in respect of the activities undertaken by individual Good Samaritans and volunteers. In this regard, the Commission provisionally recommends that the test for gross negligence should be as set out in *The People (Attorney General) v Dunleavy* [1948] IR 95, namely, that the negligence must be of a very high degree, that the act must fall far below what could have been expected in the circumstances and that the actions must have contributed to the injury sustained. [Paragraph 4.61]