



New South Wales

Civil Liability Amendment (Personal Responsibility) Act 2002 No 92

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Civil Liability Act 2002 No 22	2
4 Consequential repeals and amendment of other Acts	2
Schedules	
1 Principal amendments	3
2 Consequential and other amendments	33
3 Repeals	41
4 Amendment of other Acts	42



New South Wales

Civil Liability Amendment (Personal Responsibility) Act 2002 No 92

Act No 92, 2002

An Act to amend the *Civil Liability Act 2002* and other Acts to effect further civil liability reforms; and for other purposes. [Assented to 28 November 2002]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Civil Liability Act 2002 No 22

The *Civil Liability Act 2002* is amended as set out in Schedules 1 and 2.

4 Consequential repeals and amendment of other Acts

- (1) The Acts (and provisions of Acts) specified in Schedule 3 are repealed.
- (2) The Acts specified in Schedule 4 are amended as set out in that Schedule.

Schedule 1 Principal amendments

(Section 3)

[1] Part 1A

Insert after Part 1:

Part 1A Negligence

Division 1 Preliminary

5 Definitions

In this Part:

harm means harm of any kind, including the following:

- (a) personal injury or death,
- (b) damage to property,
- (c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

- (a) pre-natal injury, and
- (b) impairment of a person's physical or mental condition,
and
- (c) disease.

5A Application of Part

- (1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

Division 2 Duty of care

5B General principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
 - (b) the risk was not insignificant, and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
 - (a) the probability that the harm would occur if care were not taken,
 - (b) the likely seriousness of the harm,
 - (c) the burden of taking precautions to avoid the risk of harm,
 - (d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 3 Causation

5D General principles

- (1) A determination that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
 - (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
 - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4 Assumption of risk

5F Meaning of “obvious risk”

- (1) For the purposes of this Division, an *obvious risk* to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

5G Injured persons presumed to be aware of obvious risks

- (1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
- (2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5H No proactive duty to warn of obvious risk

- (1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to warn of an obvious risk to the plaintiff.
- (2) This section does not apply if:
 - (a) the plaintiff has requested advice or information about the risk from the defendant, or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk, or
 - (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

5I No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
- (2) An *inherent risk* is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 5 Recreational activities

5J Application of Division

- (1) This Division applies only in respect of liability in negligence for harm to a person (*the plaintiff*) resulting from a recreational activity engaged in by the plaintiff.
- (2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

5K Definitions

In this Division:

dangerous recreational activity means a recreational activity that involves a significant risk of physical harm.

obvious risk has the same meaning as it has in Division 4.

recreational activity includes:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

5L No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) A person (*the defendant*) is not liable in negligence for harm suffered by another person (*the plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

5M No duty of care for recreational activity where risk warning

- (1) A person (*the defendant*) does not owe a duty of care to another person who engages in a recreational activity (*the plaintiff*) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
- (2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:
 - (a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or
 - (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).
- (3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

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- (5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).
- (6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.
- (7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.
- (8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.
- (9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.
- (10) The fact that a risk is the subject of a risk warning does not of itself mean:
- (a) that the risk is not an obvious or inherent risk of an activity, or
 - (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.
- (11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.
- (12) In this section:
- incapable person*** means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

parent of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

5N Waiver of contractual duty of care for recreational activities

- (1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.
- (3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (4) In this section, *recreation services* means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.
- (5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.
- (6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

Division 6 Professional negligence

5O Standard of care for professionals

- (1) A person practising a profession (*a professional*) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

Division 7 Non-delegable duties and vicarious liability

5Q Liability based on non-delegable duty

- (1) The extent of liability in tort of a person (*the defendant*) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

- (2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

Division 8 Contributory negligence

5R Standard of contributory negligence

- (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
- (2) For that purpose:
- (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
 - (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

5T Contributory negligence—claims under the Compensation to Relatives Act 1897

- (1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.
- (2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.

[2] Section 15A

Insert after section 15:

15A Damages for loss of superannuation entitlements

- (1) The maximum amount of damages that may be awarded for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in accordance with this Part) for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based.
- (2) The relevant percentage is the percentage of earnings that is the minimum percentage required by law to be paid as employer superannuation contributions.

[3] Section 17A

Insert after section 17:

17A Tariffs for damages for non-economic loss

- (1) In determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings.
- (2) For that purpose, the parties to the proceedings or their counsel may bring the court's attention to awards of damages for non-economic loss in those earlier decisions.
- (3) This section does not alter the rules for the determination of other damages.

[4] Part 2, Division 7

Omit section 22. Insert instead:

Division 7 Structured settlements

22 What is a structured settlement

For the purposes of this Division, a *structured settlement* is an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

23 Court required to inform parties of proposed award

- (1) The purpose of this section is to enable the court to give the parties to proceedings a reasonable opportunity to negotiate a structured settlement.
- (2) A court that decides to make an award of personal injury damages in respect of future loss (not including interest) exceeding \$100,000 must first notify all the parties to the proceedings of the terms of the award it proposes to make.
- (3) In addition, if the court considers that the person may be a person in need of protection, the court is to notify the Protective Commissioner under the *Protected Estates Act 1983* of the terms of the award it proposes to make.
- (4) The notification must set out the amount of each component part of the proposed award in accordance with the requirements of the regulations and rules of court.
- (5) In this section:
person in need of protection means a person who is liable to be subject to an order that the estate of the person be subject to management under the *Protected Estates Act 1983* because the person is not capable of managing his or her own affairs.

24 Court may make consent order for structured settlement

A court may, on the application of the parties to a claim for personal injury damages, make an order approving of or in the terms of a structured settlement even though the payment of damages is not in the form of a lump sum award of damages.

25 Obligation of legal practitioners to provide advice

A legal practitioner must advise, in writing, a plaintiff who proposes to negotiate a settlement of a claim for personal injury damages about the following:

- (a) the availability of structured settlements,
- (b) the desirability of the plaintiff obtaining independent financial advice about structured settlements and lump sum settlements of the claim.

26 Offer of structured settlement—legal costs

- (1) Section 198F of the *Legal Profession Act 1987* extends to an offer of compromise by way of a structured settlement on a claim for personal injury damages.
- (2) In that case, the court is to have regard to the cost to the defendant of the proposed structured settlement as compared to the lump sum payment of damages when determining whether a reasonable offer of compromise has been made.

[5] Parts 3–10

Insert before Schedule 1:

Part 3 Mental harm

27 Definitions

In this Part:

consequential mental harm means mental harm that is a consequence of a personal injury of any other kind.

mental harm means impairment of a person's mental condition.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

- (a) pre-natal injury, and
- (b) impairment of a person's physical or mental condition, and
- (c) disease.

pure mental harm means mental harm other than consequential mental harm.

28 Application of Part

- (1) This Part (except section 29) applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

- (2) Section 29 applies to a claim for damages in any civil proceedings.
- (3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

29 Personal injury arising from mental or nervous shock

In any action for personal injury, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock.

30 Limitation on recovery for pure mental harm arising from shock

- (1) This section applies to the liability of a person (*the defendant*) for pure mental harm to a person (*the plaintiff*) arising wholly or partly from mental or nervous shock in connection with another person (*the victim*) being killed, injured or put in peril by the act or omission of the defendant.
- (2) The plaintiff is not entitled to recover damages for pure mental harm unless:
 - (a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or
 - (b) the plaintiff is a close member of the family of the victim.
- (3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.
- (4) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.
- (5) In this section:

close member of the family of a victim means:

 - (a) a parent of the victim or other person with parental responsibility for the victim, or
 - (b) the spouse or partner of the victim, or

- (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
- (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

spouse or partner means:

- (a) a husband or wife, or
- (b) the other party to a de facto relationship within the meaning of the *Property (Relationships) Act 1984*,

but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

31 Pure mental harm—liability only for recognised psychiatric illness

There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

32 Mental harm—duty of care

- (1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:
 - (a) whether or not the mental harm was suffered as the result of a sudden shock,
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
 - (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,
 - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

- (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

33 Liability for economic loss for consequential mental harm

A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

Part 4 Proportionate liability

34 Application of Part

- (1) This Part applies to the following claims (*apportionable claims*):
- (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from the failure of two or more concurrent wrongdoers to exercise reasonable care (but not including any claim arising out of personal injury),
 - (b) a claim for damages for a contravention of section 42 of the *Fair Trading Act 1987* arising from the acts or omissions of two or more concurrent wrongdoers.
- (2) A *concurrent wrongdoer*, in relation to a claim, is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.
- (5) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

35 Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim:
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and
 - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

36 Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
- (b) cannot be required to indemnify any such wrongdoer.

37 Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

38 Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

39 Application of Part

Nothing in this Part:

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or

- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Part 5 Liability of public and other authorities

40 Application of Part

- (1) This Part applies to civil liability in tort.
- (2) This Part extends to any such liability even if the damages are sought in an action for breach of contract or any other action.
- (3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

41 Definitions

In this Part:

exercise a function includes perform a duty.

function includes a power, authority or duty.

public or other authority means:

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*), or
- (b) a Government department, or
- (c) a public health organisation within the meaning of the *Health Services Act 1997*, or
- (d) a local council, or
- (e) any public or local authority constituted by or under an Act, or
- (f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions), or
- (g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.

42 Principles concerning resources, responsibilities etc of public or other authorities

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings to which this Part applies:

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,
- (b) the general allocation of those resources by the authority is not open to challenge,
- (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),
- (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

43 Proceedings against public or other authorities based on breach of statutory duty

- (1) This section applies to proceedings to which this Part applies that are based on an alleged breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.
- (2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.
- (3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.

44 When public or other authority not liable for failure to exercise regulatory functions

- (1) A public or other authority is not liable in proceedings to which this Part applies to the extent that the claim is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the claimant.
- (2) Without limiting what constitutes a function to regulate an activity for the purposes of this section, a function to issue a licence, permit or other authority in respect of an activity, or to register or otherwise authorise a person in connection with an activity, constitutes a function to regulate the activity.

45 Special non-feasance protection for roads authorities

- (1) A roads authority is not liable in proceedings to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.
- (2) This section does not operate:
 - (a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or
 - (b) to affect any standard of care that would otherwise be applicable in respect of a risk.
- (3) In this section:

carry out road work means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the *Roads Act 1993*.

roads authority has the same meaning as in the *Roads Act 1993*.

46 Exercise of function or decision to exercise does not create duty

In proceedings to which this Part applies, the fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Part 6 Intoxication

47 Part applies to civil liability for death, injury or property damage

- (1) This Part applies to civil liability of any kind for personal injury damages (as defined in Part 2) or damage to property.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

48 Definition of “intoxication”

A reference in this Part to a person being *intoxicated* is a reference to a person being under the influence of alcohol or a drug (whether or not taken for a medicinal purpose and whether or not lawfully taken).

49 Effect of intoxication on duty and standard of care

- (1) The following principles apply in connection with the effect that a person’s intoxication has on the duty and standard of care that the person is owed:
 - (a) in determining whether a duty of care arises, it is not relevant to consider the possibility or likelihood that a person may be intoxicated or that a person who is intoxicated may be exposed to increased risk because the person’s capacity to exercise reasonable care and skill is impaired as a result of being intoxicated,
 - (b) a person is not owed a duty of care merely because the person is intoxicated,
 - (c) the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person.

- (2) This section applies in place of a provision of section 74 of the *Motor Accidents Act 1988* or section 138 of the *Motor Accidents Compensation Act 1999* to the extent of any inconsistency between this section and the provision.

50 No recovery where person intoxicated

- (1) This section applies when it is established that the person whose death, injury or damage is the subject of proceedings for the recovery of damages was at the time of the act or omission that caused the death, injury or damage intoxicated to the extent that the person's capacity to exercise reasonable care and skill was impaired.
- (2) A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.
- (3) If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributorily negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.
- (4) When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.
- (5) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.

Part 7 Self-defence and recovery by criminals

51 Part applies to civil liability for death, injury or property damage

- (1) This Part applies to civil liability of any kind for personal injury damages (as defined in Part 2) or damage to property.
- (2) This Part extends to any such liability even if the damages are sought in an action for breach of contract or any other action.
- (3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

52 No civil liability for acts in self-defence

- (1) A person does not incur a liability to which this Part applies arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding was unlawful.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
 - (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - (c) to protect property from unlawful taking, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional or reckless infliction of death only:
 - (a) to protect property, or
 - (b) to prevent criminal trespass or to remove a person committing criminal trespass.

53 Damages limitations apply even if self-defence not reasonable response

- (1) If section 52 would operate to prevent a person incurring a liability to which this Part applies in respect of any conduct but for the fact that the conduct was not a reasonable response in the circumstances as he or she perceived them, a court is nevertheless not to award damages against the person in respect of the conduct unless the court is satisfied that:
 - (a) the circumstances of the case are exceptional, and
 - (b) in the circumstances of the case, a failure to award damages would be harsh and unjust.
- (2) If the court determines to award damages on the basis of subsection (1), the following limitations apply to that award:
 - (a) Part 2 (with the exception of Division 3 of that Part) applies with respect to the award of damages despite section 3B (1) (a), and
 - (b) no damages may be awarded for non-economic loss.

54 Criminals not to be awarded damages

- (1) A court is not to award damages in respect of liability to which this Part applies if the court is satisfied that:
 - (a) the person whose death, injury or damage is the subject of the proceedings was, at the time of the incident that resulted in death, injury or damage, engaged in conduct that (on the balance of probabilities) constitutes a serious offence, and
 - (b) that conduct contributed materially to the risk of death, injury or damage.
- (2) This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned constitutes an offence (whether or not a serious offence).

Note. Sections 52 and 53 can apply to prevent or limit recovery of damages even though the defendant's conduct constitutes an offence.
- (3) A *serious offence* is an offence punishable by imprisonment for 6 months or more.

- (4) This section does not affect the operation of the *Felons (Civil Proceedings) Act 1981*.
- (5) This section operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned.

Part 8 Good samaritans

55 Application of Part

- (1) This Part applies to civil liability of any kind.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

56 Who is a good samaritan

For the purposes of this Part, a *good samaritan* is a person who, in good faith and without expectation of payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured.

57 Protection of good samaritans

- (1) A good samaritan does not incur any personal civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured.
- (2) This section does not affect the vicarious liability of any other person for the acts or omissions of the good samaritan.

58 Exclusion from protection

- (1) The protection from personal liability conferred by this Part does not apply if it is the good samaritan's intentional or negligent act or omission that caused the injury or risk of injury in respect of which the good samaritan first comes to the assistance of the person.

- (2) The protection from personal liability conferred by this Part in respect of an act or omission does not apply if:
 - (a) the ability of the good samaritan to exercise reasonable care and skill was significantly impaired by reason of the good samaritan being under the influence of alcohol or a drug voluntarily consumed (whether or not it was consumed for medication), and
 - (b) the good samaritan failed to exercise reasonable care and skill in connection with the act or omission.
- (3) This Part does not confer protection from personal liability on a person in respect of any act or omission done or made while the person is impersonating a health care or emergency services worker or a police officer or is otherwise falsely representing that the person has skills or expertise in connection with the rendering of emergency assistance.

Part 9 Volunteers

59 Application of Part

- (1) This Part applies to civil liability of any kind, other than liability for defamation.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

60 Definitions

- (1) In this Part:

community organisation means any of the following that organises the doing of community work by volunteers and that is capable of being sued for damages in civil proceedings:

 - (a) a body corporate,
 - (b) a church or other religious organisation,
 - (c) an authority of the State.

community work means work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose, and includes work declared by the regulations to be community work but does not include work declared by the regulations not to be community work.

organised includes directed or supervised.

volunteer means a person who does community work on a voluntary basis.

work includes any activity.

- (2) For the purposes of this Part:
 - (a) community work done by a person under an order of a court is not to be regarded as work done on a voluntary basis, and
 - (b) community work for which a person receives remuneration by way of reimbursement of the person's reasonable expenses in doing the work, or within limits prescribed by the regulations, is to be regarded as work done on a voluntary basis.
- (3) A regulation declaring work to be community work may be expressed to extend to apply in respect of civil liability for an act or omission occurring before the commencement of the regulation, except in a case in which proceedings to recover damages for the act or omission were commenced in a court before that commencement.

61 Protection of volunteers

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

- (a) organised by a community organisation, or
- (b) as an office holder of a community organisation.

62 Liability not excluded for criminal acts

This Part does not confer protection from personal liability on a volunteer in respect of an act or omission of the volunteer if it is established (on the balance of probabilities) that at the time

of the act or omission the volunteer was engaged in conduct that constitutes an offence.

63 Liability of intoxicated volunteer not excluded

The protection from personal liability conferred on a volunteer by this Part in connection with any community work does not apply if:

- (a) the ability of the volunteer to exercise reasonable care and skill when doing the work was significantly impaired by reason of the volunteer being under the influence of alcohol or a drug voluntarily consumed (whether or not it was consumed for medication), and
- (b) the volunteer failed to exercise reasonable care and skill when doing the work.

64 Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions

This Part does not confer protection from personal liability on a volunteer in respect of an act or omission of a volunteer if the volunteer knew or ought reasonably to have known that he or she was acting:

- (a) outside the scope of the activities authorised by the community organisation concerned, or
- (b) contrary to instructions given by the community organisation.

65 Liability not excluded if insurance required

This Part does not confer protection from personal liability on a volunteer if the liability is a liability that is required by or under a written law of the State to be insured against.

66 Liability not excluded for motor accidents

The protection from personal liability conferred on a volunteer by this Part does not apply if the liability would, but for this Part, be covered by a third-party insurance policy under the *Motor Accidents Compensation Act 1999* or be recoverable from the Nominal Defendant under that Act.

Part 10 Apologies

67 Application of Part

- (1) This Part applies to civil liability of any kind.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

68 Definition

In this Part:

apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

69 Effect of apology on liability

- (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
 - (b) is not relevant to the determination of fault or liability in connection with that matter.
- (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

Schedule 2 Consequential and other amendments

(Section 3)

[1] Section 3 Definitions

Omit the definition of *damages*. Insert instead:

damages includes any form of monetary compensation but does not include:

- (a) any payment authorised or required to be made under a State industrial instrument, or
- (b) any payment authorised or required to be made under a superannuation scheme, or
- (c) any payment authorised or required to be made under an insurance policy in respect of the death of, injury to or damage suffered by the person insured under the policy.

[2] Section 3

Omit the definitions of *claimant*, *fault*, *injury* and *personal injury damages*.

[3] Sections 3A and 3B

Insert after section 3:

3A Provisions relating to operation of Act

- (1) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.
- (2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.
- (3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

3B Civil liability excluded from Act

- (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
- (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct—the whole Act except Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death,
 - (b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*—the whole Act,
 - (c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco products—the whole Act,
 - (d) civil liability relating to an award to which Part 6 of the *Motor Accidents Act 1988* applies—the whole Act except the provisions that subsection (2) provides apply to motor accidents,
 - (e) civil liability relating to an award to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988*)—the whole Act except the provisions that subsection (2) provides apply to motor accidents,
 - (f) civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies—the whole Act,
 - (g) civil liability for compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*,

the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or a benefit payable under the *Sporting Injuries Insurance Act 1978*—the whole Act.

- (2) The following provisions apply to motor accidents:
- (a) Divisions 1–4 and 8 of Part 1A (Negligence),
 - (b) section 15A (Damages for loss of superannuation entitlements),
 - (c) section 17A (Tariffs for damages for non-economic loss),
 - (d) Division 7 (Structured settlements) of Part 2,
 - (e) Part 3 (Mental harm),
 - (f) section 49 (Effect of intoxication on duty and standard of care),
 - (g) Part 7 (Self-defence and recovery by criminals),
 - (h) Part 8 (Good samaritans).
- (3) The regulations may exclude a specified class or classes of civil liability (and awards of damages in those proceedings) from the operation of all or any specified provisions of this Act. Any such regulation may make transitional provision with respect to claims for acts or omissions before the commencement of the regulation.

[4] Sections 4–8

Omit the sections. Insert instead:

4 Miscellaneous provisions

(1) **Act to bind Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

(2) **Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(3) **Notes**

Notes included in this Act do not form part of this Act.

(4) **Savings and transitional provisions**

Schedule 1 has effect.

[5] Sections 9–11

Omit the sections. Insert instead:

11 Definitions

In this Part:

injury means personal injury and includes the following:

- (a) pre-natal injury,
- (b) impairment of a person's physical or mental condition,
- (c) disease.

personal injury damages means damages that relate to the death of or injury to a person.

11A Application of Part

- (1) This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part by section 3B.
- (2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.
- (3) A court cannot award damages, or interest on damages, contrary to this Part.

[6] Section 14 Damages for future economic loss—discount rate

Omit “economic loss that is referable to the future” from section 14 (1).
Insert instead “future economic loss of any kind”.

[7] Section 16 Determination of damages for non-economic loss

Omit “to a claimant” and “of the claimant” wherever occurring.

[8] Section 17 Indexation of maximum amount relating to non-economic loss

Insert after section 17 (5):

- (6) A declaration made or published in the Gazette after 1 October in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

[9] Part 2, Division 4, heading

Omit the heading. Insert instead:

Division 4 Interest on damages

[10] Part 2, Division 5, heading

Insert before section 19:

Division 5 Third party contributions

[11] Section 20 Contributory negligence—claims under the Compensation to Relatives Act 1897

Omit the section.

[12] Part 2, Division 6

Omit section 21. Insert instead:

Division 6 Exemplary and similar damages

21 Limitation on exemplary, punitive and aggravated damages

In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.

[13] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Civil Liability Amendment (Personal Responsibility) Act 2002

[14] Schedule 1

Insert at the end of the Schedule:

**Part 3 Provisions consequent on enactment of
Civil Liability Amendment (Personal
Responsibility) Act 2002**

5 Definition

In this Part:

2002 amending Act means the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

6 Application of amendments

- (1) The amendments to this Act made by the 2002 amending Act extend to civil liability arising before the commencement of the amendments, but do not apply to or in respect of proceedings commenced in a court before that commencement.
- (2) Despite subclause (1), the following provisions of this Act (as inserted by the 2002 amending Act) apply to and in respect of proceedings commenced in a court on or after 3 September 2002 (except in respect of a decision of the court made before the commencement of this clause):
 - (a) Part 7 (Self-defence and recovery by criminals),
 - (b) section 30 (Limitation on recovery for pure mental harm arising from shock).

7 Motor accident amendments

- (1) Section 77 of the *Motor Accidents Act 1988* and section 141 of the *Motor Accidents Compensation Act 1999* apply to and in respect of proceedings commenced in a court before 3 September 2002 as if they had not been repealed.

- (2) Section 75 of the *Motor Accidents Act 1988* and section 139 of the *Motor Accidents Compensation Act 1999* apply to and in respect of proceedings commenced in a court before the commencement of section 5T as if they had not been repealed.

8 Repeal of section 109ZJ Environmental Planning and Assessment Act 1979

- (1) Section 109ZJ of the *Environmental Planning and Assessment Act 1979* continues to apply (despite its repeal by the 2002 amending Act) to and in respect of an award of damages in a building action or subdivision action commenced before that repeal.
- (2) Part 4 (Proportionate liability) of this Act does not apply to or in respect of:
- (a) a claim in a building action or subdivision action referred to in subclause (1), or
 - (b) any development that is excluded from the operation of Part 4C of the *Environmental Planning and Assessment Act 1979* by the operation of clause 34 of the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998*.

9 Repeal of Part 4 of Health Care Liability Act 2001

The repeal of Part 4 of the *Health Care Liability Act 2001* by the 2002 amending Act does not affect proceedings commenced in a court before the repeal of that Part.

10 Operation of amendment to section 14

The amendment of section 14 (Damages for future economic loss—discount rate) by the 2002 amending Act is taken to have commenced on 20 March 2002.

11 Law Reform (Miscellaneous Provisions) Act 1944

Part 3 of the *Law Reform (Miscellaneous Provisions) Act 1944* continues to apply despite its repeal to and in respect of civil liability that is excluded from the operation of Part 3 of this Act by section 3B.

[15] Schedule 2 Amendment of Acts

Omit the Schedule.

Civil Liability Amendment (Personal Responsibility) Act 2002 No 92

Repeals

Schedule 3

Schedule 3 Repeals

(Section 4 (1))

Part 3 of the *Law Reform (Miscellaneous Provisions) Act 1944*
section 7 of the *Law Reform (Miscellaneous Provisions) Act 1965*
section 9 of the *Law Reform (Vicarious Liability) Act 1983*
Statutory Duties (Contributory Negligence) Act 1945

Schedule 4 Amendment of other Acts

(Section 4 (2))

4.1 Dust Diseases Tribunal Act 1989 No 63

Section 12A No limitation period

Omit section 12A (3) (a). Insert instead:

- (a) sections 14, 18A, 60C and 60G of, Division 6 of Part 2 of, and Schedule 5 to, the *Limitation Act 1969* do not prevent the bringing or maintenance of any such proceedings before the Tribunal, and

4.2 Environmental Planning and Assessment Act 1979 No 203

Section 109ZJ Apportionment of liability

Omit the section.

4.3 Fair Trading Act 1987 No 68

[1] Section 68 Actions for damages

Insert after section 68 (1):

- (1A) A reference to loss or damage in subsection (1) does not, if the loss or damage arises from a contravention of Part 5 (section 43 excepted), include a reference to:
 - (a) the death of a person, or
 - (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).

[2] Section 72 Other orders

Insert before section 72 (1):

(1A) A reference in this section to loss or damage does not, if the loss or damage arises from a contravention of Part 5 (section 43 excepted), include a reference to:

- (a) the death of a person, or
- (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).

[3] Schedule 1 Paramount legislation

Insert in alphabetical order:

Civil Liability Act 2002

4.4 Health Care Liability Act 2001 No 42

Part 4 Provision of emergency health care—protection from liability

Omit the Part.

4.5 Legal Profession Act 1987 No 109

Section 198C Interpretation and application

Omit the definition of *personal injury damages* from section 198C (1).

Insert instead:

personal injury damages has the same meaning as in Part 2 of the *Civil Liability Act 2002*.

4.6 Limitation Act 1969 No 31

[1] Section 11A

Insert after section 11:

11A Notes

Notes included in this Act do not form part of this Act.

[2] Section 18A Personal injury

Insert at the end of section 18A (1) (b):

, or

(c) a cause of action to which Division 6 applies.

[3] Section 18A (1)

Insert after section 18A (1):

Note. Division 6 provides for the limitation period for non-motor accident actions for death or personal injury resulting from an incident that occurs on or after the commencement of that Division.

[4] Section 19 Compensation to relatives

Insert at the end of section 19:

(2) This section does not apply in respect of a cause of action to which Division 6 applies.

Note. Division 6 provides for the limitation period for causes of action for non-motor accident actions for death or personal injury resulting from an incident that occurs on or after the commencement of that Division.

[5] Part 2, Division 6

Insert after Division 5 of Part 2:

Division 6 Personal injury actions

50A Application of Division—kinds of causes of action

- (1) This Division applies to a cause of action for damages that relate to the death of or personal injury to a person, regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.
- (2) This Division applies only to causes of action where the act or omission alleged to have resulted in the injury or death with which the claim is concerned occurs on or after the commencement of this Division (as inserted by the *Civil Liability Amendment (Personal Responsibility) Act 2002*).
- (3) This Division does not apply to a cause of action on a claim under the *Motor Accidents Compensation Act 1999*.
- (4) This section extends to a cause of action that:
 - (a) is a survivor action, or
 - (b) is a compensation to relatives action.

50B Definitions

In this Division:

compensation to relatives action means a cause of action that arises under the *Compensation to Relatives Act 1897*.

survivor action means a cause of action that survives on the death of a person for the benefit of the person's estate under section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*.

50C Limitation period for personal injury actions

- (1) An action on a cause of action to which this Division applies is not maintainable if brought after the expiration of a limitation period of whichever of the following periods is the first to expire:

- (a) the **3 year post discoverability limitation period**, which is the period of 3 years running from and including the date on which the cause of action is discoverable by the plaintiff,
- (b) the **12 year long-stop limitation period**, which is the period of 12 years running from the time of the act or omission alleged to have resulted in the injury or death with which the claim is concerned.

Note. The 12 year long-stop limitation period can be extended by a court under Division 4 of Part 3.

- (2) For the purposes of the application of the 3 year post discoverability limitation period to a survivor action, the cause of action is taken to be discoverable by the plaintiff at whichever is the earliest of the following times:
 - (a) the date on which the cause of action is discoverable by the deceased if the cause of action is discoverable by the deceased more than 3 years before the death of the deceased,
 - (b) the appointment of the plaintiff as the deceased's personal representative if the cause of action is discoverable by the plaintiff at or before the time of that appointment,
 - (c) the date on which the cause of action is discoverable by the plaintiff if the cause of action is discoverable by the plaintiff after the appointment of the plaintiff as the deceased's personal representative.
- (3) For the purposes of a compensation to relatives action, the 12 year long-stop limitation period runs from the death of the deceased.

50D Date cause of action is discoverable

- (1) For the purposes of this Division, a cause of action is **discoverable** by a person on the first date that the person knows or ought to know of each of the following facts:
 - (a) the fact that the injury or death concerned has occurred,
 - (b) the fact that the injury or death was caused by the fault of the defendant,

- (c) in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.
- (2) A person *ought to know* of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact.
- (3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral or in writing, of the person.
- (4) To remove doubt, a compensation to relatives action is not discoverable before the date of death of the deceased.

50E Special limitation period for minors injured by close relatives

- (1) If a cause of action is founded on the death of or injury to a person (*the victim*) who was a minor at the time of the act or omission alleged to have resulted in that death or injury and the cause of action is against a person who at that time was a parent or guardian of the victim or a close associate of a parent or guardian of the victim:
 - (a) the cause of action is for the purposes of this Division discoverable by the victim when the victim turns 25 years of age or when the cause of action is actually discoverable by the victim, whichever is the later, and
 - (b) the 12 year long-stop limitation period for the cause of action is a period of 12 years running from when the victim turns 25 years of age.
- (2) A person is a *close associate* of a parent or guardian of the victim if the person is a person whose relationship with the parent or guardian is such that:
 - (a) the parent or guardian might be influenced by the person not to bring a claim on behalf of the victim against the person, or
 - (b) the victim might be unwilling to disclose to the parent or guardian the conduct or events in respect of which the cause of action is founded.

- (3) If the victim dies before turning 25 years of age, the limitation period applicable to a survivor action that survives on the death of the victim is to be determined as if references in this section to when the victim turns 25 years of age were references to the death of the victim.

50F Effect of disability on limitation period

- (1) If a person has a cause of action for which a limitation period has commenced to run and the person is under a disability, the running of the limitation period is suspended for the duration of the disability.
- (2) A person is *under a disability* while the person:
- (a) is a minor, but not while the minor has a capable parent or guardian, or
- (b) is an incapacitated person for a continuous period of 28 days or more, but not while the person is a protected person.
- (3) In determining when a cause of action is discoverable by a person who is a minor, or an incapacitated person, who is not under a disability, facts that are known or ought to be known by a capable parent or guardian of the minor or the guardian of the incapacitated person are taken to be facts that are known or ought to be known by the minor or incapacitated person.
- (4) In this section:

capable parent or guardian of a minor means a person who is a parent or guardian of the minor and who is not under a disability (as referred to in subsection (2)).

guardian of a minor includes a person who under a written law of the State is exercising the parental responsibilities of the Minister under the *Children and Young Persons (Care and Protection) Act 1998* for the minor.

incapacitated person means a person who is incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of:

- (a) any disease or any impairment of his or her physical or mental condition, or

-
- (b) restraint of his or her person, lawful or unlawful, including detention or custody under the *Mental Health Act 1990*, or
 - (c) war or warlike operations or circumstances arising out of war or warlike operations.

protected person means:

- (a) a person in respect of whose person another person is guardian, whether under the *Guardianship Act 1987* or any other Act or law, or
 - (b) a person in respect of whom an order is in force under the *Protected Estates Act 1983* or the *Guardianship Act 1987* that the estate (or any part of the estate) of the person be subject to management under the *Protected Estates Act 1983*.
- (5) Sections 52 (Disability) and 53 (Notice to proceed) do not apply to a cause of action to which this Division applies.

[6] Part 3, Division 3, heading

Omit the heading. Insert instead:

Division 3 Personal injury cases arising before 2002 amendments

[7] Section 60A Purpose of this Subdivision

Insert at the end of section 60A:

This Subdivision does not apply to a cause of action to which Division 6 of Part 2 applies.

[8] Section 60B Subdivision applies only to new causes of action

Insert at the end of section 60B:

This Subdivision does not apply to a cause of action to which Division 6 of Part 2 applies.

[9] Part 3, Division 4

Insert after Division 3 of Part 3:

Division 4 Personal injury cases arising after 2002 amendments

62A Extension of 12 year long-stop limitation period

- (1) A person claiming to have a cause of action to which Division 6 of Part 2 applies may apply to a court for the extension of the 12 year long-stop limitation period applicable to the cause of action under that Division.
- (2) The court is to hear such of the persons likely to be affected by the application as it sees fit and may, if it decides that it is just and reasonable to do so, order the extension of the 12 year long-stop limitation period applicable to the cause of action for such period as the court determines, but not so as to extend that period beyond the period of 3 years after the date on which the cause of action is discoverable (within the meaning of Division 6 of Part 2) by the plaintiff.
- (3) If a court orders the extension of the 12 year long-stop limitation period for a cause of action under this section, that limitation period is accordingly extended for the purposes of:
 - (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
 - (b) section 26 (1) (b) in relation to any associated action for contribution under section 5 (1) of the *Law Reform (Miscellaneous Provisions) Act 1946* brought by the person against whom that cause of action lies.
- (4) The court may, in an order under this section in relation to a cause of action arising under the *Compensation to Relatives Act 1897*, exclude any beneficiary or class of beneficiaries from the operation of the order, if it decides that it is just and reasonable to do so.
- (5) If a court excludes a beneficiary or class of beneficiaries from the operation of an order under this section, the beneficiary or beneficiaries are to be treated as not being entitled to damages

in any action on a cause of action arising under the *Compensation to Relatives Act 1897* brought as a consequence of the making of the order.

62B Matters to be considered in determining application for extension of 12 year long-stop limitation period

- (1) In exercising the powers conferred on it by section 62A, a court is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing), the court is, to the extent that they are relevant to the circumstances of the case, to have regard to the following:
 - (a) the length of and reasons for the delay,
 - (b) the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available,
 - (c) the nature and extent of the plaintiff's injury or loss,
 - (d) any conduct of the defendant that induced the plaintiff to delay bringing the action,
 - (e) the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received,
 - (f) the time when the cause of action was discoverable (within the meaning of Division 6 of Part 2) by the plaintiff.
- (2) In the application of this section in respect of a cause of action that has survived on the death of a person for the benefit of the person's estate under section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*, references in subsection (1) to the plaintiff include references to the deceased and the applicant, or any of them, as appropriate in the circumstances.
- (3) In the application of this section in respect of a cause of action arising under the *Compensation to Relatives Act 1897*, references in subsection (1) to the plaintiff include references

to the deceased, the personal representative of the deceased, and the beneficiaries, or any of them, as appropriate in the circumstances.

62C Special provisions for compensation to relatives action

- (1) If a cause of action arises under the *Compensation to Relatives Act 1897* (or would arise under that Act but for the expiration as against the deceased of a limitation period) and the cause of action of the deceased was not discoverable (within the meaning of Division 6 of Part 2) by the deceased before the death of the deceased, the court may (in addition to an order under section 62A) order that the expiration as against the deceased of a limitation period for the cause of action by the deceased has no effect in relation to an action brought by the applicant in that court on the cause of action claimed by the applicant.
- (2) If such an order is made and the person against whom the claimed cause of action lies brings an action for contribution under section 5 (1) of the *Law Reform (Miscellaneous Provisions) Act 1946*, the expiration as against the deceased of a limitation period for the deceased's action has no effect in relation to the action for contribution.

62D Extension of limitation period where irrational failure to bring action for minor

- (1) A person claiming to have a cause of action to which Division 6 of Part 2 applies who was a minor at the time of the act or omission alleged to have resulted in the injury or death with which the cause of action is concerned may apply to a court for the extension of a limitation period applicable to the cause of action on the basis that the failure to bring an action founded on the cause of action within that limitation period is attributable to an irrational decision by a parent or guardian of the person made after the cause of action is discoverable (within the meaning of Division 6 of Part 2) by the parent or guardian.
- (2) If it appears to the court that:
 - (a) the limitation period applicable to the cause of action expired before or within 1 year after the applicant reached 18 years of age, and

- (b) the failure to bring an action on the cause of action within that limitation period is attributable to an irrational decision by a parent or guardian of the applicant made while the applicant was a minor, and
- (c) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after the making of the court's order.

- (3) If a court orders the extension of a limitation period for a cause of action under this section, that limitation period is accordingly extended for the purposes of:
 - (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
 - (b) section 26 (1) (b) in relation to any associated action for contribution under section 5 (1) of the *Law Reform (Miscellaneous Provisions) Act 1946* brought by the person against whom that cause of action lies.

62E Costs

Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under this Division may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

62F Effect of expiry of limitation period prior to extension

- (1) Applications and orders may be made under this Division as if Division 1 of Part 4 had never been in force.
- (2) An order under this Division in respect of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.
- (3) If a limitation period that has expired is extended by order under this Division, that expiration of the limitation period has no effect for the purposes of this Act.

4.7 Motor Accidents Act 1988 No 102

[1] Section 75 Contributory negligence—claims under the Compensation to Relatives Act 1897

Omit the section.

[2] Section 77 Damages for psychological or psychiatric injury

Omit the section.

4.8 Motor Accidents Compensation Act 1999 No 41

[1] Section 139 Contributory negligence—claims under the Compensation to Relatives Act 1897

Omit the section.

[2] Section 141 Damages for psychological or psychiatric injury

Omit the section.

4.9 State Emergency and Rescue Management Act 1989 No 165

Section 59

Omit the section. Insert instead:

59 Liability for actions of members of rescue units and volunteers

- (1) Anything done or omitted to be done by an accredited rescue unit or by a person as a member of an accredited rescue unit or authorised volunteer does not, if done or omitted in good faith in connection with a rescue operation or otherwise in response to an emergency, subject the accredited rescue unit, the person or any other person to any action, liability, claim or demand.

(2) Anything done or omitted to be done by a casual volunteer does not, if done or omitted in good faith in connection with a rescue operation or otherwise in response to an emergency, subject the volunteer personally to any action, liability, claim or demand.

(3) In this section:

accredited rescue unit includes:

- (a) a rescue unit (within the meaning of Division 4) engaged in surf life-saving, and
- (b) any organisation or agency (other than a government agency) that manages or controls an accredited rescue unit.

authorised volunteer means a person who assists an accredited rescue unit in carrying out a rescue operation with the consent of the person in charge of the rescue operation.

casual volunteer means a person who assists, on his or her own initiative, in a rescue operation or otherwise in response to an emergency in circumstances in which the assistance was reasonably given.

[Second reading speech made in—
Legislative Assembly on 23 October 2002
Legislative Council on 19 November 2002]