

[Act 2002 No 22]



New South Wales

Civil Liability Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to make the following changes to the law in respect of civil actions for damages. The Bill provides for the proposed Act to commence retrospectively on 20 March 2002.

Personal injury damages claims

The following restrictions are imposed on the awarding of personal injury damages (damages that relate to the death of or injury to a person caused by the fault of another person) other than damages covered by other laws such as the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*:

- (a) the maximum amount of damages for non-economic loss (general damages) that may be awarded will be fixed at the same indexed maximum as applies under the *Health Care Liability Act 2001* (currently \$350,000),

* Amended in committee—see table at end of volume.

- (b) there will be a 15% threshold for non-economic loss damages so that no damages will be able to be awarded unless the severity of the non-economic loss is at least 15% of a most extreme case and claims above 15% will be determined according to a sliding scale as currently set out in the *Health Care Liability Act 2001* and the *Motor Accidents Act 1988*,
- (c) the maximum amount of damages for economic loss due to loss of earnings, deprivation or impairment of earning capacity or loss of expectation of financial support is fixed at a rate that is 3 times average weekly earnings in New South Wales,
- (d) a claimant will have to satisfy the court that assumptions, such as assumptions about future earning capacity, on which an award of damages for future economic loss is based accord with the claimant's most likely future circumstances but for the injury,
- (e) lump sum damages for future economic loss will be required to be discounted by 5% or some other amount prescribed by the regulations,
- (f) interest will not be able to be awarded on damages for non-economic loss or gratuitous attendant care services, and interest on other damages will be calculated from the time the loss to which the damage relates was first incurred until the date of determination,
- (g) the rate of interest on damages will be a rate determined by the regulations or (if no rate is determined) the Commonwealth Government 10-year benchmark bond rate,
- (h) damages in a claim under the *Compensation to Relatives Act 1897* will be able to be reduced on the basis of the contributory negligence of the deceased person,
- (i) exemplary, punitive and aggravated damages will not be able to be awarded in negligence cases,
- (j) the awarding of damages for gratuitous attendant care services will be restricted in a manner that is consistent with aspects of the treatment of those damages under the *Health Care Liability Act 2001* and the *Motor Accidents Compensation Act 1999*.

Solicitors' and barristers' costs—personal injury damages claims

The *Legal Profession Act 1987* is amended to provide that if the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs recoverable for legal services provided to the plaintiff or defendant is 20% of the amount recovered or claimed or \$10,000, whichever is greater (with provision for the regulations to vary these amounts and percentage).

The amendments provide for the following exceptions:

- (a) maximum costs as between solicitor or barrister and client are not fixed to the extent that they are provided for by a costs agreement,
- (b) if a party refuses an offer of compromise on a claim where the eventual outcome is no less favourable than the terms of the offer, the party can be ordered to pay the other party's costs assessed on an indemnity basis for legal services provided after the offer is made,
- (c) a court can order that costs are not to be fixed if the court is satisfied that the costs are for legal services provided in response to any action on the claim by or on behalf of the other party to the claim that was not reasonably necessary for the advancement of that party's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim.

Responsibilities of solicitors and barristers—claims and defences lacking merit

The *Legal Profession Act 1987* is amended to enact the following provisions with respect to the responsibilities of solicitors and barristers in connection with all claims for damages (not just personal injury damages) where there are no reasonable grounds for believing a claim or defence has reasonable prospects of success:

- (a) a solicitor or barrister must not provide a legal service on a claim or defence unless the solicitor or barrister has reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success (with a contravention of this prohibition capable of being unsatisfactory professional conduct or professional misconduct),
- (b) if a solicitor or barrister provides legal services in contravention of that prohibition, the solicitor or barrister can be ordered to repay costs that the client has been ordered to pay to another party and can be ordered to indemnify another party against costs payable by that other party,
- (c) if a court finds that the facts established by the evidence on a claim do not support a reasonable belief that the claim or defence has reasonable prospects of success, there is to be a presumption (rebuttable by the solicitor or barrister concerned) that legal services provided on the claim or defence were provided without reasonable prospects of success.

The *Legal Profession Act 1987* is further amended to extend to costs in civil damages matters an existing provision that authorises the making of regulations fixing the costs payable for legal services.

Consequential amendments

Consequential amendments are made to the *Health Care Liability Act 2001* (on the basis that the restrictions on the awarding of personal injury damages will apply to claims for personal injury damages currently covered by that Act).

Transitional provisions

Transitional provisions are enacted as follows:

- (a) the restrictions on the awarding of personal injury damages extend to injuries and deaths occurring before 20 March 2002 but do not apply to an award of damages in proceedings commenced before 20 March 2002 or to an award, settlement or consent order for damages made before the date of assent,
- (b) the restrictions on the awarding of personal injury damages do not apply to claims against the Crown (other than health care claims) notified before 20 March 2002 so long as the damages are awarded before 1 September 2002 or are settled or become the subject of court proceedings commenced before 1 September 2002, or proceedings cannot be commenced before that date because an injury has not stabilised,
- (c) the *Health Care Liability Act 2001* continues to apply in respect of a health care claim in proceedings commenced before 20 March 2002,
- (d) the amendments to the *Legal Profession Act 1987* with respect to barristers' and solicitors' costs for legal services provided to the claimant on a claim for personal injury damages do not apply in respect of legal services provided before 7 May 2002 but otherwise extend to legal services provided in connection with a claim no matter when the claim arose,
- (e) the amendments to the *Legal Profession Act 1987* with respect to the responsibilities of solicitors and barristers in connection with claims and defences that do not have reasonable prospects of success extend to legal services provided on or after 20 March 2002 no matter when the claim concerned arose.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act is taken to have commenced on 20 March 2002.

Clause 3 defines certain words and expressions used in the proposed Act. The term *personal injury damages* means damages that relate to the death of or injury to a person caused by the fault of another person.

Clause 4 provides that the proposed Act binds the Crown.

Clause 5 is a general regulation-making power.

Clause 6 provides that notes in the proposed Act do not form part of it.

Clause 7 gives effect to Schedule 1, the Schedule of savings and transitional provisions.

Clause 8 gives effect to Schedule 2, which contains amendments to the *Health Care Liability Act 2001* and the *Legal Profession Act 1987*.

Part 2 Personal injury damages

Division 1 Preliminary

Clause 9 provides that Part 2 applies to and in respect of an award of personal injury damages, subject to certain exclusions.

An important exclusion is the exclusion of damages for an intentional act done with intent to cause injury or death, or that is sexual assault or other sexual misconduct. Medical treatment provided in good faith is not excluded.

Also excluded are damages covered by workers compensation or motor accidents compensation legislation.

Clause 10 provides that a court cannot award damages, or interest on damages, contrary to Part 2.

Clause 11 makes it clear that Part 2 does not give rise to any cause of action to recover damages.

Division 2 Fixing damages for economic loss

Clause 12 limits the amount of damages that may be awarded for economic loss due to loss of earnings, deprivation or impairment of earning capacity and loss of expectation of financial support.

Clause 13 provides for damages for future economic loss to be determined in accordance with the claimant's most likely future circumstances.

Clause 14 requires the application of a discount rate in assessing lump sum damages for future economic loss.

Clause 15 provides for the damages that may be awarded for attendant care services (such as domestic help or nursing) that are provided on a gratuitous basis.

Division 3 Fixing damages for non-economic loss (general damages)

Clause 16 provides for the determination of damages for non-economic loss (ie pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement). No such damages are to be awarded unless the severity of the non-economic loss is at least 15% of a most extreme case. A limit on the amount of damages for non-economic loss is imposed (\$350,000), but that maximum amount is to be awarded only in a most extreme case. Once the 15% threshold is passed, damages for non-economic loss are to be assessed in accordance with the Table to the proposed section as a percentage of the maximum amount.

Clause 17 provides for the indexation, by order of the Minister published in the Gazette, of the maximum amount that may be awarded as damages for non-economic loss.

Division 4 Other matters

Clause 18 makes provision with respect to the interest payable on damages. No interest is payable on damages awarded for non-economic loss or gratuitous attendant care services.

Clause 19 provides for the determination of the amount of the contribution that may be recovered by a third party from a defendant where both the defendant and the third party are at fault but the claim against the third party is not covered by

Part 2. The proposed section also provides for the reduction of damages recoverable by the claimant against the third party, commensurate with the reduction in contribution recoverable from the defendant.

Clause 20 deals with contributory negligence in claims that are brought under the *Compensation to Relatives Act 1897*.

Clause 21 prohibits the awarding of punitive, exemplary or aggravated damages in negligence cases.

Clause 22 enables a court to make consent orders for structured settlements.

Schedules

Schedule 1 contains a savings and transitional regulation-making power and the transitional provisions referred to in the Overview.

Schedule 2 contains the amendments to the *Health Care Liability Act 2001* and the *Legal Profession Act 1987* referred to in the Overview.