



New South Wales

Civil Liability Amendment Bill 2003

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to amend the *Civil Liability Act 2002*:
 - (i) to preclude a person from recovering damages for non-economic loss and certain kinds of economic loss if the person's losses result from conduct of the person that would have constituted a serious offence if the person had not been suffering from a mental illness at the time of the conduct, and
 - (ii) to preclude the recovery of damages for the costs of rearing or maintaining a child, or for lost earnings while rearing or maintaining a child, in proceedings where there is civil liability for the birth of a child, and
 - (iii) to confine further the circumstances in which a public or other authority or a public official is liable for damages in respect of the exercise of public functions, and

- (iv) to exclude the civil liability of a person who acts in self-defence if it is in response to conduct of another person that would have been unlawful if that other person had not been suffering from a mental illness, and
 - (v) to confirm that any provision of the Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort, and
 - (vi) to make further provision with respect to proportionate liability, and
- (b) to amend the *Mental Health Act 1990* to provide that a police officer or health care professional who, in good faith, exercises a function that is conferred or imposed on that person by or under that Act is excluded from personal civil liability for the exercise of that function.

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Civil Liability Act 2002* set out in Schedules 1–3.

Clause 4 is a formal provision that gives effect to the amendment to the *Mental Health Act 1990* set out in Schedule 4.

Schedule 1 Amendments to Civil Liability Act 2002 concerning public authorities, criminals, mentally ill persons and childbirth

Schedule 1 [1] amends the definition of *public or other authority* in Part 5 (Liability of public and other authorities) of the *Civil Liability Act 2002* to include any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions. The amended definition will include, for example, a medical practitioner who is authorised to detain mentally ill persons under the *Mental Health Act 1990*.

Schedule 1 [2] inserts a new section 43A in the Act to provide that the exercise of, or the failure to exercise, a special statutory power by a public or other authority does not give rise to civil liability unless the conduct was in the circumstances so unreasonable that no authority having the special statutory powers of the authority in question could properly consider the conduct to be a

reasonable exercise of its powers. A *special statutory power* is a power that is conferred by or under a statute and that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

Schedule 1 [3] amends section 52 of the Act to provide that self-defence in response to the conduct of another person that would have been unlawful if that other person had not been suffering from a mental illness at the time may operate as a defence to a civil action.

Schedule 1 [4] amends section 54 of the Act to clarify the circumstances in which the conduct of a criminal will preclude the criminal from recovering damages for that conduct.

Currently, section 54 provides that a court cannot award damages if 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 that conduct contributed materially to the risk of death, injury or damage.

Section 54 (as amended) will preclude a court from awarding damages if:

- (a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and
- (b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

Schedule 1 [5] inserts a new section 54A in the Act to limit the damages that may be awarded in respect of civil liability that arises out of the death of, or injury or damage to, a person where:

- (a) that death, injury or damage occurred at the time of, or following, conduct of the person that, on the balance of probabilities, would have constituted a serious offence if the person had not been suffering from a mental illness at the time of the conduct, and
- (b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

The new section generally precludes such a person from recovering damages for non-economic loss. It also generally precludes such a person from recovering damages for economic loss for loss of earnings.

Schedule 1 [6] inserts a new Part 11 in the Act to prevent, in cases where there is civil liability for the birth of a child, the recovery of damages for the costs associated with rearing or maintaining the child or for loss of earnings while rearing or maintaining the child. The new Part abrogates the right to recover damages for rearing and maintaining a child that was recently confirmed by the

High Court of Australia in *Cattanach v Melchior* [2003] HCA 38 (16 July 2003). However, the new provisions will not affect civil liability for any personal injury sustained by a child pre-natally or during birth as a result of the conduct of another person. Also, the new provisions will not preclude the recovery of any additional costs associated with rearing or maintaining a child with a disability that arise because of the disability.

Schedule 2 Amendments to Civil Liability Act 2002 concerning proportionate liability

Schedule 1 [5] to the *Civil Liability Amendment (Personal Responsibility) Act 2002* is to insert a new Part 4 (Proportionate liability) in the *Civil Liability Act 2002*. Schedule 1 [5] has not been commenced to the extent that it inserts Part 4. **Schedule 2** makes amendments to proposed Part 4 as part of the process of refining the operation of the proportionate liability provisions currently being undertaken by the States, the Territories and the Commonwealth.

Schedule 2 [1] amends proposed section 34 of the *Civil Liability Act 2002* to redefine the concept of an apportionable claim for the purposes of proposed Part 4. The new rules for determining the proportionate liability of concurrent wrongdoers will only apply to apportionable claims. An ***apportionable claim*** will be:

- (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, or
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

Schedule 2 [3] makes a consequential amendment to proposed section 34.

Schedule 2 [2] amends proposed section 34 of the Act to provide that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action.

Schedule 2 [4] makes a minor amendment to the definition of ***concurrent wrongdoer*** in proposed section 34 of the Act to confirm that persons may be concurrent wrongdoers even if they acted in concert to cause the damage or loss that is the subject of an apportionable claim.

Schedule 2 [6] inserts a new section 34A to make it clear that certain concurrent wrongdoers in proceedings involving an apportionable claim will not have their liability limited by the new apportionment provisions. The concurrent wrongdoers who will be excluded are:

- (a) concurrent wrongdoers who intended to cause the economic loss or damage to property that is the subject of the claim, and
- (b) concurrent wrongdoers who fraudulently caused the economic loss or damage to property that is the subject of the claim, and
- (c) concurrent wrongdoers whose civil liability was otherwise of a kind excluded from the operation of proposed Part 4 by section 3B.

The new section will ensure that such excluded concurrent wrongdoers will have their liability determined in accordance with any relevant legal rules (apart from those in proposed Part 4). However, the liability of any other non-excluded concurrent wrongdoer will continue to be limited by the apportionment provisions. **Schedule 2 [5]** makes a consequential amendment to proposed section 34.

Schedule 2 [7] inserts a new section 35A in the Act to enable a court to award costs against a defendant in proceedings involving proportionate liability if the defendant fails to notify the plaintiff of the identity of any other concurrent wrongdoers of which the defendant ought to be aware and as a result causes the plaintiff to incur unnecessary costs.

Schedule 3 Other amendments to Civil Liability Act 2002

Schedule 3 [1] inserts a new section 3C in the *Civil Liability Act 2002* to confirm that any provision of the Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.

Schedule 3 [2]–[4] make consequential amendments to Part 5 of the Act to maintain consistency of terminology with proposed section 43A to be inserted by Schedule 1 to the proposed Act.

Schedule 3 [5] amends Schedule 1 to the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.

Schedule 3 [6] inserts transitional provisions in Schedule 1 to the Act consequential on the enactment of the amendments made by Schedules 1 and 2 to the proposed Act.

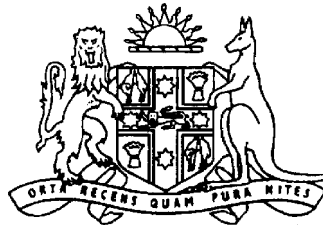
In particular, the amendments made by Schedule 2 to the proposed Act relating to proportionate liability will extend to liability arising before the commencement of proposed Part 4 of the *Civil Liability Act 2002* (as amended by the proposed Act), but not to any proceedings commenced before that commencement.

Parts 5 (Liability of public and other authorities) and 7 (Self-defence and recovery by criminals), as amended by the proposed Act, will apply to civil liability whether arising before or after 13 November 2003. The amended Parts will also apply to proceedings commenced before that date. However, those amended Parts will not apply in respect of any decision made by a court before the commencement of the amendments or to any proceedings to which Parts 5 and 7 did not apply immediately before the commencement of those amendments.

Part 11 (as inserted by the proposed Act), which deals with damages for the birth of a child, will apply to civil liability whether arising before or after 13 November 2003, but not to any proceedings commenced before that date.

Schedule 4 Amendment of Mental Health Act 1990

Schedule 4 substitutes section 294 of the *Mental Health Act 1990* to provide that any police officer or health care professional who, in good faith, exercises a function that is conferred or imposed on that person by or under the Act is not personally liable for any injury or damage caused by the exercise of that function.



New South Wales

Civil Liability Amendment Bill 2003

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Civil Liability Act 2002 No 22	2
4 Amendment of Mental Health Act 1990 No 9	2
Schedule 1 Amendments to Civil Liability Act 2002 concerning public authorities, criminals, mentally ill persons and childbirth	3
Schedule 2 Amendments to Civil Liability Act 2002 concerning proportionate liability	7
Schedule 3 Other amendments to Civil Liability Act 2002	10
Schedule 4 Amendment of Mental Health Act 1990	12

Civil Liability Amendment Bill 2003

Contents

Page

Contents page 2



New South Wales

Civil Liability Amendment Bill 2003

No. , 2003

A Bill for

An Act to amend the *Civil Liability Act 2002* with respect to the civil liability of public authorities and officials and for the birth of a child, the recovery of damages by criminals and mentally ill persons, self-defence and proportionate liability; to amend the *Mental Health Act 1990* to exclude civil liability for certain functions exercised under that Act; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment Act 2003*.

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 1–3.

4 Amendment of Mental Health Act 1990 No 9

The *Mental Health Act 1990* is amended as set out in Schedule 4.

Schedule 1 Amendments to Civil Liability Act 2002 concerning public authorities, criminals, mentally ill persons and childbirth 1
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(Section 3)

[1] Section 41 Definitions 5

Insert after paragraph (e) of the definition of *public or other authority*: 6

- (e1) any person having public official functions or acting in 7
a public official capacity (whether or not employed as a 8
public official), but only in relation to the exercise of 9
the person's public official functions, or 10

[2] Section 43A 11

Insert after section 43: 12

**43A Proceedings against public or other authorities for the 13
exercise of special statutory powers** 14

- (1) This section applies to proceedings for civil liability to which 15
this Part applies to the extent that the liability is based on a 16
public or other authority's exercise of, or failure to exercise, a 17
special statutory power conferred on the authority. 18
- (2) A *special statutory power* is a power: 19
- (a) that is conferred by or under a statute, and 20
- (b) that is of a kind that persons generally are not 21
authorised to exercise without specific statutory 22
authority. 23
- (3) For the purposes of any such proceedings, any act or omission 24
involving an exercise of, or failure to exercise, a special 25
statutory power does not give rise to civil liability unless the 26
act or omission was in the circumstances so unreasonable that 27
no authority having the special statutory power in question 28
could properly consider the act or omission to be a reasonable 29
exercise of, or failure to exercise, its power. 30
- (4) In the case of a special statutory power of a public or other 31
authority to prohibit or regulate an activity, this section 32
applies in addition to section 44. 33

[3] Section 52 No civil liability for acts in self-defence	1
Omit “, but only if the conduct to which the person was responding was unlawful.” from section 52 (1).	2 3
Insert instead:	4
, but only if the conduct to which the person was responding:	5
(a) was unlawful, or	6
(b) would have been unlawful if the other person carrying out the conduct to which the person responds had not been suffering from a mental illness at the time of the conduct.	7 8 9 10
[4] Section 54 Criminals not to be awarded damages	11
Omit section 54 (1) (a) and (b). Insert instead:	12
(a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and	13 14 15 16
(b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.	17 18
[5] Section 54A	19
Insert after section 54:	20
54A Damages limitations if loss results from serious offence committed by mentally ill person	21 22
(1) This section applies to a liability to which this Part applies in circumstances where:	23 24
(a) the liability arises out of the death of, or injury or damage to, a person, and	25 26
(b) that death, injury or damage occurred at the time of, or following, conduct of the person that, on the balance of probabilities, would have constituted a serious offence if the person had not been suffering from a mental illness at the time of the conduct, and	27 28 29 30 31
(c) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.	32 33

- (2) If a court awards damages in respect of a liability to which this section applies, the following limitations apply to that award:
 - (a) no damages may be awarded for non-economic loss, and
 - (b) no damages for economic loss may be awarded for loss of earnings.
- (3) A *serious offence* is an offence punishable by imprisonment for 6 months or more.
- (4) 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:
 - (a) constitutes an offence (whether or not a serious offence), or
 - (b) would have constituted an offence (whether or not a serious offence) if the defendant had not been suffering from a mental illness at the time of the conduct.
- (5) This section operates whether or not a person whose conduct is in issue was acquitted of an offence concerning that conduct by reason of mental illness or was found by a court not to be fit to be tried for an offence concerning that conduct by reason of such an illness.

[6] Part 11

Insert after Part 10:

Part 11 Damages for the birth of a child

70 Application of Part

- (1) This Part applies to any claim for damages in civil proceedings for the birth of a child, regardless of whether that claim is made in tort, in contract, under statute or otherwise.
- (2) This Part does not apply to any claim for damages by a child in civil proceedings for personal injury (within the meaning of Part 1A) sustained by the child pre-natally or during birth.
- (3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B but, despite that section, does apply to liability of the kind referred to in section 3B (1) (a).

71 Limitation of the award of damages for the birth of a child

- (1) In any proceedings involving a claim for the birth of a child to which this Part applies, the court cannot award damages for economic loss for:
- (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or
 - (b) any loss of earnings by the claimant while the claimant rears or maintains the child.
- (2) Subsection (1) (a) does not preclude the recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability that arise by reason of the disability.

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**Schedule 2 Amendments to Civil Liability Act 2002
concerning proportionate liability**

(Section 3)

**[1] Section 34 Application of Part (as inserted by Schedule 1 [5] to the
Civil Liability Amendment (Personal Responsibility) Act 2002
No 92)**

Omit section 34 (1). Insert instead:

(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 a failure to take reasonable care,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

[2] Section 34 (1A)

Insert after section 34 (1) (as inserted by Schedule 1 [5] to the *Civil Liability Amendment (Personal Responsibility) Act 2002*):

(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

**[3] Section 34 (2) (as inserted by Schedule 1 [5] to the Civil Liability
Amendment (Personal Responsibility) Act 2002 No 92)**

Omit “A”. Insert instead “In this Part, a”.

**[4] Section 34 (2) (as inserted by Schedule 1 [5] to the Civil Liability
Amendment (Personal Responsibility) Act 2002 No 92)**

Insert “(or act or omission)” after “acts or omissions”.

**[5] Section 34 (5) (as inserted by Schedule 1 [5] to the Civil Liability
Amendment (Personal Responsibility) Act 2002 No 92)**

Omit the subsection.

[6] Section 34A	1
Insert after section 34 (as inserted by Schedule 1 [5] to the <i>Civil Liability Amendment (Personal Responsibility) Act 2002</i>):	2 3
34A Certain concurrent wrongdoers not to have benefit of apportionment	4 5
(1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an <i>excluded concurrent wrongdoer</i>) in proceedings involving an apportionable claim if:	6 7 8
(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or	9 10 11
(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or	12 13 14
(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.	15 16 17
(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.	18 19 20
(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.	21 22 23
[7] Section 35A	24
Insert after section 35 (as inserted by Schedule 1 [5] to the <i>Civil Liability Amendment (Personal Responsibility) Act 2002</i>):	25 26
35A Duty of defendant to inform plaintiff about concurrent wrongdoers	27 28
(1) If:	29
(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the <i>other person</i>) may be a concurrent wrongdoer in relation to the claim, and	30 31 32 33

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- (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
- (i) the identity of the other person, and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and
- (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,
- the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.
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Schedule 3 Other amendments to Civil Liability Act 2002

(Section 3)

[1] Section 3C

Insert after section 3B:

3C Act operates to exclude or limit vicarious liability

Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.

[2] Sections 42, 44 (1) and 45 (1)

Insert “for civil liability” before “to which this Part applies” wherever occurring.

[3] Section 43 Proceedings against public or other authorities based on breach of statutory duty

Omit “to which this Part applies that are based on an alleged” in section 43 (1).

Insert instead “for civil liability to which this Part applies to the extent that the liability is based on a”.

[4] Section 44 When public or other authority not liable for failure to exercise regulatory functions

Omit “claim” and “claimant” from section 44 (1).

Insert instead “liability” and “plaintiff” respectively.

[5] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Civil Liability Amendment Act 2003

[6] Schedule 1, Part 4	1
Insert after Part 3:	2
Part 4 Provisions consequent on enactment of Civil Liability Amendment Act 2003	3
	4
12 Definition	5
In this Part:	6
<i>amending Act</i> means the <i>Civil Liability Amendment Act 2003</i> .	7
13 Application of amendments concerning proportionate liability	8
Clause 6 (1) extends to Part 4 (as inserted by the <i>Civil Liability Amendment (Personal Responsibility) Act 2002</i> and amended by the amending Act).	9
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14 Application of amendments relating to damages for birth of child	12
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(1) Part 11 (as inserted by Schedule 1 [6] to the amending Act) applies in relation to civil liability whether arising before or after 13 November 2003.	14
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(2) However, Part 11 does not apply to proceedings commenced in a court before 13 November 2003.	17
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15 Application of amendments concerning public and other authorities, criminals and mentally ill persons	19
	20
(1) Parts 5 and 7 (as amended by the amending Act) apply in relation to civil liability whether arising before or after 13 November 2003.	21
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(2) Parts 5 and 7 (as so amended) also extend to proceedings commenced before 13 November 2003.	24
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(3) However, subclause (2) does not operate:	26
(a) to apply Part 5 or 7 (as so amended) in respect of any decision of a court made before the commencement of this clause, or	27
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(b) to apply Part 5 or 7 in relation to any proceedings to which the Part did not apply immediately before the commencement of this clause.	30
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Schedule 4 Amendment of Mental Health Act 1990 1
(Section 4) 2

Section 294 3

Omit the section. Insert instead: 4

294 Liability of police officers and health care professionals exercising functions under this Act 5
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- (1) Any police officer or health care professional who, in good faith, exercises a function that is conferred or imposed on that person by or under this Act is not personally liable for any injury or damage caused by the exercise of that function. 7
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- (2) Nothing in this section affects any exclusion from liability provided by another provision of this Act or any other Act. 11
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- (3) In this section, *health care professional* means a person registered under a health registration Act within the meaning of the *Health Care Complaints Act 1993*. 13
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