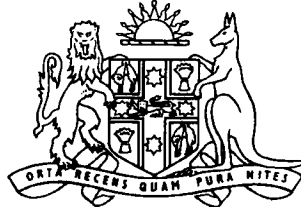


[Act 2002 No 92]



New South Wales

Civil Liability Amendment (Personal Responsibility) 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 amend the *Civil Liability Act 2002* (*the Principal Act*) as follows:

Negligence

- (a) Proposed Part 1A (see **Schedule 1 [1]**) deals with principles of the law of negligence in relation to all claims for damages for harm resulting from negligence. The new Part contains the following provisions:
 - (i) Division 1 (Preliminary) contains definitions of *harm*, *negligence* and *personal injury*, and provides for the Part to apply to all claims for damages for harm resulting from negligence. The Part extends to harm

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

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of any kind, including personal injury or death, damage to property and economic loss.

- (ii) Division 2 (Duty of care) states certain general principles and other principles relating to liability in negligence resulting from a failure to take precautions against a risk of harm. A person will not be liable for harm unless the person knew or ought to have known of the risk, the risk was not insignificant and in the circumstances a reasonable person in that person's position would have taken the precautions. Principles are stated for determining whether a reasonable person would have taken precautions against the risk.
- (iii) Division 3 (Causation) establishes the elements of a determination that negligence caused particular harm (namely factual causation and scope of liability) and deals with the matters that are relevant to a determination of those elements. The Division also provides that the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.
- (iv) Division 4 (Assumption of risk) deals with obvious risk (being a risk that in the circumstances would have been obvious to a reasonable person in the position of the person injured) and inherent risk. An injured person will be presumed to have been aware of an obvious risk unless the person can prove they were not aware of it. There will be no duty of care to warn of an obvious risk (with exceptions where the injured person requested information about the risk, a risk warning is required by law or the risk is a risk of injury or death resulting from the provision of a professional service). There will be no liability in negligence for harm suffered as a result of the materialisation of an inherent risk (a risk that cannot be avoided by the exercise of reasonable care and skill).
- (v) Division 5 (Recreational activities) deals with liability for harm resulting from a recreational activity. There will be no liability for harm resulting from an obvious risk of a dangerous recreational activity. There will be no liability for harm resulting from a risk of a recreational activity that was the subject of a risk warning. A contract for the supply of recreational services will be able to exclude, restrict or modify liability for harm resulting from failure to exercise reasonable care and skill.

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- (vi) Division 6 (Professional negligence) deals with the standard of care for professionals. A professional will not be liable in negligence if the professional acts in a manner that is widely accepted in Australia by peer professional opinion as competent professional practice. The Division does not apply to any duty to warn of the risk of personal injury or death associated with the provision of a professional service.
- (vii) Division 7 (Non-delegable duties and vicarious liability) provides that the existence and extent of liability in tort for breach of a non-delegable duty is to be determined on the basis of the principles applicable to vicarious liability.
- (viii) Division 8 (Contributory negligence) provides that the principles applicable to a determination of negligence also apply to the determination of contributory negligence, and that a court can determine a 100% reduction in damages due to contributory negligence. The Division also re-enacts section 20 of the Principal Act dealing with the application of contributory negligence in compensation to relatives actions.

Superannuation entitlements

- (b) Proposed section 15A (see **Schedule 1 [2]**) provides that the maximum amount of damages that may be awarded for economic loss due to the loss of employer superannuation contributions is the minimum employer superannuation contribution percentage of the damages payable for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based.

Non-economic loss damages tariffs

- (c) Proposed section 17A (see **Schedule 1 [3]**) provides that 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.

Structured settlements

- (d) Proposed Division 7 of Part 2 (see **Schedule 1 [4]**) contains provisions to encourage and facilitate structured settlements in personal injury damages cases, including provisions for the court to notify the parties of the terms of any proposed award so as to give the parties a reasonable opportunity to negotiate a structured settlement.

Mental harm

- (e) Proposed Part 3 (see **Schedule 1 [5]**) deals with claims for damages for mental harm resulting from negligence and provides for the following:
- (i) In an action for personal injury, the plaintiff is not prevented from recovering for personal injury due to mental or nervous shock. This re-enacts a provision of the *Law Reform (Miscellaneous Provisions) Act 1944*.
 - (ii) A plaintiff will not be able to recover for pure mental harm (ie mental harm that is not a consequence of any other kind of harm) arising from another person being killed, injured or put in peril unless the plaintiff witnesses at the scene the victim being killed, injured or put in peril or the plaintiff is a close member of the family of the victim.
 - (iii) There will be no liability for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.
 - (iv) There will be no duty of care to avoid causing mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness.
 - (v) A court will not be able to award damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

Proportionate liability

- (f) Proposed Part 4 (see **Schedule 1 [5]**) introduces proportionate liability for claims involving economic loss or property damage in non-personal injury matters or a contravention of section 42 (Misleading or deceptive conduct) of the *Fair Trading Act 1987*, so that a person who is jointly responsible with some other person or persons will only be liable to the extent of their responsibility.

Liability of public and other authorities

- (g) Proposed Part 5 (see **Schedule 1 [5]**) deals with civil liability in tort of a public or other authority as follows:
- (i) general principles are established for determining liability, including a requirement to consider the financial and other resources that are reasonably available to an authority, resource allocation decisions by an authority, consideration of the broad range of an authority's activities, and evidence of compliance with general procedures and applicable standards,

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- (ii) a public or other authority will not be liable for breach of statutory duty (but without affecting liability in negligence) unless it has acted in a way that no reasonable public authority could act,
- (iii) a public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been compelled to exercise the function,
- (iv) a roads authority will not be liable to the extent that a claim is based on the failure of the authority to carry out or consider carrying out road work (including inspection) unless the authority had actual knowledge of the particular risk at the time of the alleged failure,
- (v) the fact that a public or other authority exercises or decides to exercise a function will 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.

Intoxication

- (h) Proposed Part 6 (see **Schedule 1 [5]**) provides that an intoxicated person will not be able to recover damages for personal injury or property damage unless the court is satisfied that the accident is likely to have occurred even if the person had not been intoxicated. If the court is satisfied that the accident is likely to have occurred anyway, the intoxicated person's damages will nevertheless be reduced on the basis of a statutory presumption of contributory negligence of 25% (or a greater percentage determined to be appropriate by the court in the particular case). There is no presumption of contributory negligence if the court is satisfied that the person's intoxication did not contribute in any way to the accident. Various principles are also established generally to the effect that no increased duty of care is owed to persons simply because they are or might be intoxicated.

Self-defence and recovery by criminals

- (i) Proposed Part 7 (see **Schedule 1 [5]**) limits liability for injury or death or damage to property resulting from self-defence or arising from criminal conduct as follows:
 - (i) there will be no civil liability for injury or death or damage to property arising from conduct that is in self-defence in response to unlawful conduct,

- (ii) in a case where the defendant believes he or she is acting in self-defence but the defendant's actions are not a reasonable response in the circumstances (and so do not qualify as self-defence), there will be no civil liability unless the court considers the case exceptional and that damages should be awarded to avoid harshness or injustice (in which case the limits that apply to the recovery of damages under Part 2 of the Principal Act will apply, and there will be no recovery for non-economic loss),
- (iii) no damages will be recoverable against a defendant in respect of the death of or injury to a person or damage to a person's property in the course of the commission of a serious criminal offence by the person unless the defendant's conduct itself constituted an offence.

Good samaritans

- (j) Proposed Part 8 (see **Schedule 1 [5]**) provides that a good samaritan who comes to the assistance of a person in danger will be protected from all civil liability for acts or omissions in good faith.

Volunteers

- (k) Proposed Part 9 (see **Schedule 1 [5]**) confers protection on volunteers doing work for community organisations from civil liability for acts or omissions in good faith.

Apologies

- (l) Proposed Part 10 (see **Schedule 1 [5]**) provides that an apology by or on behalf of a person will not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind.

Limitation periods

- (m) Schedule 4.6 amends the *Limitation Act 1969* to make the following changes to the limitation provisions applicable to actions for the recovery of damages for personal injury or death caused by the fault of a person:
 - (i) the new limitation period will be 3 years starting from when the cause of action is **discoverable** (ie when the plaintiff first knew or ought to have known that there is an actionable cause of action against the defendant) or 12 years starting from the occurrence that gives rise to the claim, whichever expires first,

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- (ii) the 12 year period will be able to be extended at the discretion of the court but not beyond 3 years after the cause of action is discoverable,
- (iii) the suspension of a limitation period during incapacity will not apply to a child who has a capable parent or guardian and discoverability of a cause of action by a minor will be assessed according to the knowledge of the parent or guardian,
- (iv) a court will be able to extend a limitation period by up to 1 year if satisfied that the failure to bring an action on behalf of a minor was due to an irrational decision by a parent or guardian of the minor,
- (v) for actions by minors injured by a parent or guardian or a close associate of their parent or guardian, the applicable limitation period will not start running until the person turns 25 years of age,
- (vi) the new provisions do not apply to motor accident claims (the limitation period for which is provided for by the *Motor Accidents Compensation Act 1999*).

Consequential and other amendments

- (n) Schedule 2 makes the following consequential and other amendments to the Principal Act:
 - (i) Schedule 2 [1], [2], [4], [5] and [9]–[12] make minor amendments to reorganise the structure of the Principal Act.
 - (ii) Schedule 2 [3] inserts proposed sections 3A and 3B in the Principal Act. Proposed section 3A re-enacts an existing provision and also provides that the Principal 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. Proposed section 3B deals with how the Principal Act is to apply to intentional criminal acts, dust diseases claims, motor accident claims and workers compensation.
 - (iii) Schedule 2 [6]–[8] make minor clarifying amendments.
 - (iv) Schedule 2 [13] and [14] enact savings and transitional provisions.
 - (v) Schedule 2 [15] repeals spent amendments.

Repeals

- (o) Schedule 3 repeals the following provisions of other Acts that are superseded by the provisions proposed to be inserted in the Principal Act by the Bill:
 - (i) Part 3 of the *Law Reform (Miscellaneous Provisions) Act 1944*,

- (ii) section 7 of the *Law Reform (Miscellaneous Provisions) Act 1965*,
- (iii) section 9 of the *Law Reform (Vicarious Liability) Act 1983*,
- (iv) *Statutory Duties (Contributory Negligence) Act 1945*.

Amendments to other Acts

- (p) Schedule 4 makes amendments to other Acts as follows:
- (i) Schedule 4.1 amends the *Dust Diseases Tribunal Act 1989* as a consequence of the amendments to the *Limitation Act 1969*,
 - (ii) Schedule 4.2 repeals provisions of the *Environmental Planning and Assessment Act 1979* that are superseded by the provisions proposed to be inserted in the Principal Act with respect to proportionate liability,
 - (iii) Schedule 4.3 amends the *Fair Trading Act 1987* to prevent the recovery of damages under that Act for death or personal injury resulting from a contravention of section 42 (Misleading or deceptive conduct) of that Act,
 - (iv) Schedule 4.4 repeals a superseded provision of the *Health Care Liability Act 2001*,
 - (v) Schedule 4.5 makes a consequential amendment to the *Legal Profession Act 1987*,
 - (vi) Schedule 4.6 makes the amendments to the *Limitation Act 1969* referred to in paragraph (m) above,
 - (vii) Schedule 4.7 and 4.8 make consequential amendments to motor accident claims legislation,
 - (viii) Schedule 4.9 amends the *State Emergency and Rescue Management Act 1989* to extend an existing provision that protects members of accredited rescue units and certain volunteers engaged in a rescue operation or other emergency work from personal liability so that there will be no liability for acts and omissions in good faith by them or by accredited rescue units.

Application of amendments to pending claims

- (q) The amendments to the Principal Act extend to civil liability arising before the commencement of the amendments but do not apply to proceedings already commenced. Proposed Part 7 (Self-defence and recovery by criminals) and section 30 (Limitation on recovery for pure mental harm arising from shock)

of the Principal Act apply to proceedings commenced on or after 3 September 2002. See **Schedule 2 [14]**.

Application of amendments to intentional acts, dust diseases claims, motor accidents and workers compensation

- (r) The amendments will not apply to civil liability in respect of intentional criminal acts, dust diseases claims, motor accidents and workers compensation, subject to the following exceptions:
- (i) Part 7 (Self-defence and recovery by criminals) will apply in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death,
 - (ii) Divisions 1–4 and 8 of Part 1A (Negligence), Division 7 (Structured settlements) of Part 2, section 15A (Damages for loss of superannuation entitlements), section 17A (Tariffs for damages for non-economic loss), Part 3 (Mental harm), section 49 (Effect of intoxication on duty and standard of care), Part 7 (Self-defence and recovery by criminals) and Part 8 (Good samaritans) will apply to motor accidents. See **Schedule 2 [3]**.

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 giving effect to the amendments to the *Civil Liability Act 2002* set out in Schedules 1 and 2.

Clause 4 is a formal provision giving effect to the repeals in Schedule 3 and the amendments to other Acts set out in Schedule 4.

Schedules 1 and 2 contain the amendments to the *Civil Liability Act 2002* outlined above.

Schedule 3 contains the repeals outlined above.

Schedule 4 contains the amendments to other Acts outlined above.