

Civil Liability Act 2002 No 22

[2002-22]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Does not include amendments by**
 - [Civil Liability Amendment \(Personal Responsibility\) Act 2002 No 92](#), Sch 1 [5] to the extent that it inserts Part 4 (not commenced)
 - [Civil Liability Amendment Act 2003 No 94](#), Sch 2 (not commenced)
- **See also**
 - [Civil Liability Amendment \(Mental Illness\) Bill 2003](#) [Non-government Bill: Mr A A Tink, MP]

Authorisation

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New South Wales

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Civil Liability Act 2002 No 22



New South Wales

An Act to make provision in relation to the recovery of damages for death or personal injury caused by the fault of a person; to amend the *Legal Profession Act 1987* in relation to costs in civil claims; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Civil Liability Act 2002*.

2 Commencement

This Act is taken to have commenced on 20 March 2002.

3 Definitions

In this Act:

court includes tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

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.

non-economic loss means any one or more of the following:

- (a) pain and suffering,
- (b) loss of amenities of life,
- (c) loss of expectation of life,
- (d) disfigurement.

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.

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.

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.

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).
- (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 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](#).

6-8 (Repealed)

Part 2 Personal injury damages

Division 1 Preliminary

9, 10 (Repealed)

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.
- (4) In the case of an award of damages to which Part 2A (Special provisions for offenders in custody) applies, this Part applies subject to Part 2A.

Division 2 Fixing damages for economic loss

12 Damages for past or future economic loss—maximum for loss of earnings etc

- (1) This section applies to an award of damages:
 - (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
 - (b) for future economic loss due to the deprivation or impairment of earning capacity, or
 - (c) for the loss of expectation of financial support.
- (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.
- (3) For the purposes of this section, the amount of average weekly earnings at the date of an award is:
 - (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award, or
 - (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

13 Future economic loss—claimant's prospects and adjustments

- (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
- (2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss

that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.

- (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.

14 Damages for future economic loss—discount rate

- (1) If an award of damages is to include any component, assessed as a lump sum, for future economic loss of any kind, the present value of that future economic loss is to be determined by adopting the prescribed discount rate.
- (2) The **prescribed discount rate** is:
- (a) a discount rate of the percentage prescribed by the regulations, or
 - (b) if no percentage is so prescribed—a discount rate of 5%.
- (3) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages.

15 Damages for gratuitous attendant care services

- (1) In this section:

attendant care services means any of the following:

- (a) services of a domestic nature,
- (b) services relating to nursing,
- (c) services that aim to alleviate the consequences of an injury.

gratuitous attendant care services means attendant care services:

- (a) that have been or are to be provided by another person to a claimant, and
- (b) for which the claimant has not paid or is not liable to pay.

- (2) No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:
- (a) there is (or was) a reasonable need for the services to be provided, and
 - (b) the need has arisen (or arose) solely because of the injury to which the damages relate, and
 - (c) the services would not be (or would not have been) provided to the claimant but for the injury.

- (3) Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided:
- (a) for less than 6 hours per week, and
 - (b) for less than 6 months.
- (4) If the services are provided or are to be provided for not less than 40 hours per week, the amount of damages that may be awarded for gratuitous attendant care services must not exceed:
- (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:
 - (i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award—that quarter, or
 - (ii) in respect of the whole or any part of any other quarter—the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award, or
 - (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.
- (5) If the services are provided or are to be provided for less than 40 hours per week, the amount of those damages must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (4) (a) or (b), as the case requires.
- (6) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.

Note—

Section 18 provides that a court cannot order the payment of interest on damages awarded for gratuitous attendant care services.

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.

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

16 Determination of damages for non-economic loss

- (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
- (2) The maximum amount of damages that may be awarded for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case.
- (3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table:

Table

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%

31%	26%
32%	30%
33%	33%
34%-100%	34%-100% respectively

- (4) An amount determined in accordance with subsection (3) is to be rounded to the nearest \$500.

Note—

The following are the steps required in the assessment of non-economic loss in accordance with this section:

Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.

Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in a most extreme case. This amount is indexed each year under section 17.

Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the Table.

Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.

17 Indexation of maximum amount relating to non-economic loss

- (1) The Minister is, on or before 1 October 2002 and on or before 1 October in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of section 16 (2).

Editorial note—

For orders under this section, see Gazettes No 160 of 1.10.2002, p 8495; No 132 of 29.8.2003, p 9005; No 137 of 5.9.2003, p 9202 and No 143 of 10.9.2004, p 7509.

- (2) The amount declared is to be the amount applicable under section 16 (2) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in New South Wales over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (3) An amount declared for the time being under this section applies to the exclusion of the amount under section 16 (2).
- (4) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (2), the amount declared is to be determined in accordance with the regulations.
- (5) In adjusting an amount to be declared for the purposes of section 16 (2), the amount

determined in accordance with subsection (2) is to be rounded to the nearest \$500.

- (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.

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.

Division 4 Interest on damages

18 Interest on damages

- (1) A court cannot order the payment of interest on damages awarded for non-economic loss or gratuitous attendant care services (as defined in section 15).
- (2) If a court is satisfied that interest is payable on damages (other than damages for non-economic loss or gratuitous attendant care services), the amount of interest is to be calculated:
 - (a) for the period from when the loss to which the damages relate was first incurred until the date on which the court determines the damages, and
 - (b) in accordance with the principles ordinarily applied by the court for that purpose, subject to subsection (3).
- (3) The rate of interest to be used in any such calculation is:
 - (a) such interest rate as may be determined by the regulations, or
 - (b) if no such rate is determined by the regulations—the relevant interest rate as at the date of determination of the damages.
- (4) For the purposes of subsection (3), the **relevant interest rate** is the rate representing the Commonwealth Government 10-year benchmark bond rate as published by the Reserve Bank of Australia in the *Reserve Bank of Australia Bulletin* (however described) and as applying:
 - (a) on the first business day of January of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 March until 31 August of that

year), or

(b) on the first business day of July of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 September of that year until the last day of February of the following year).

(5) Nothing in this section affects the payment of interest on a debt under a judgment or order of a court.

Division 5 Third party contributions

19 Third party contributions

(1) This section applies when a person (***the claimant***) is entitled to an award of damages in respect of death or injury against a person (***the defendant***) and also against another person (***the third party***), and the award against the defendant is an award to which this Part applies but the award against the third party is not an award to which this Part applies.

(2) A court determining the amount of the contribution (***the defendant's contribution***) to be recovered by the third party from the defendant must:

(a) determine the defendant's contribution as a percentage, being such percentage as the court thinks just and equitable (having regard to the extent of the responsibility of the defendant and the third party, respectively, for the claimant's damages), and

(b) determine the amount of damages to which the claimant is, or would be, entitled in accordance with this Part (as if the award of damages against the third party were not excluded from the operation of this Part), and

(c) fix the amount of the defendant's contribution by applying the percentage determined under paragraph (a) to the amount of damages determined under paragraph (b).

(3) The amount of damages that may be recovered by the claimant from the third party is to be reduced by the difference between:

(a) the amount of the contribution to which the third party would have been entitled (but for this section) from the defendant, and

(b) the amount of the defendant's contribution calculated under subsection (2).

(4) Subsection (3) does not limit any greater reduction (applicable under any other law, including any other Part of this Act) in the amount of damages that may be recovered by the claimant from the third party.

20 (Repealed)

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.

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.

Part 2A Special provisions for offenders in custody

Division 1 Preliminary

26A Definitions

- (1) In this Part:

CAS Act means the *Crimes (Administration of Sentences) Act 1999*.

offender in custody or **offender** means each of the following:

- (a) an inmate within the meaning of the CAS Act, namely a person to whom Part 2 (Imprisonment by way of full-time detention) of that Act applies,
- (b) an offender within the meaning of Part 3 (Imprisonment by way of periodic detention) of the CAS Act,
- (c) an offender within the meaning of Part 4 (Imprisonment by way of home detention) of the CAS Act,
- (d) a detainee under the *Children (Detention Centres) Act 1987*,
- (e) a person performing community service work under a community service order or children's community service order, as provided by the CAS Act or the *Children (Community Service Orders) Act 1987*, whether or not the person is an offender in custody under any other paragraph of this definition,
- (f) a person in custody who is in the keeping of a correctional officer, as provided by Part 13 (Custody of persons during proceedings) of the CAS Act.

protected defendant means each of the following:

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*) and its servants,

- (b) a Government department and members of staff of a Government department,
- (c) a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff of a public health organisation,
- (d) 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,
- (e) a management company or submanagement company (within the meaning of the CAS Act) and members of staff of such a company.

(2) Other expressions used in this Part have the same meanings as in Part 2.

26B Application of Part

- (1) This Part applies to and in respect of an award of personal injury damages against a protected defendant in respect of:
 - (a) an injury to a person received while the person was an offender in custody, or
 - (b) the death of a person resulting from or caused by an injury to the person received while the person was an offender in custody,being an injury caused by the negligence (that is, the failure to exercise reasonable care and skill) of a protected defendant.
- (2) This Part does not apply to:
 - (a) an award of damages pursuant to an action under the *Compensation to Relatives Act 1897*, or
 - (b) an award of damages for mental harm (within the meaning of Part 3) to a person who was not an offender in custody at the time of the incident that resulted in the mental harm.
- (3) Part 2 is subject to this Part.
- (4) Section 19 (Third party contributions) extends to an award of damages to which this Part applies as if that section were a provision of this Part.
- (5) A reference in Divisions 2-5 to an offender includes a reference to a person who, subsequent to the injury concerned, ceases to be an offender.

Division 2 Damages subject to 15% permanent impairment threshold

26C No damages unless permanent impairment of at least 15%

No damages may be awarded (whether for economic or non-economic loss) unless the

injury results in the death of the offender or in a degree of permanent impairment of the offender that is at least 15%.

26D Assessment of permanent impairment using WorkCover Guidelines

- (1) The degree of permanent impairment that results from an injury is to be assessed as provided by this Part and Part 7 (Medical assessment) of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 WC Act**).
- (2) Part 7 of Chapter 7 of the 1998 WC Act extends to an assessment of degree of permanent impairment for the purposes of this Part and for that purpose applies as if:
 - (a) an assessment under this Part were an assessment under and for the purposes of that Part of the 1998 WC Act, and
 - (b) a reference in that Part of the 1998 WC Act to a worker were a reference to an offender, and
 - (c) a reference in that Part of the 1998 WC Act to a worker's employer were a reference to the Crown.
- (3) If there is a dispute about the degree of permanent impairment of an injured offender, a court may not award damages unless the degree of permanent impairment has been assessed by an approved medical specialist in accordance with the 1998 WC Act.
- (4) A court may, at any stage in proceedings on a claim for damages, refer the matter for assessment of the degree of permanent impairment by an approved medical specialist in accordance with the 1998 WC Act.
- (5) Section 151H (No damages unless permanent impairment of at least 15%) of the *Workers Compensation Act 1987* applies for the purposes of an assessment under this Part of whether the degree of permanent impairment resulting from an injury is at least 15%.

Division 3 Damages for economic loss

26E Damages for past or future loss of earnings

- (1) This section applies to an award of damages:
 - (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
 - (b) for future economic loss due to the deprivation or impairment of earning capacity.
- (2) In awarding damages, the court is to disregard the amount (if any) by which the injured or deceased offender's net weekly earnings would (but for the injury or death) have exceeded the amount that is the maximum amount of weekly payments of

compensation under section 35 of the *Workers Compensation Act 1987* (even though that maximum amount under that section is a maximum gross earnings amount).

- (3) The maximum amount of weekly payments of compensation under section 35 of the *Workers Compensation Act 1987* for a future period is to be the amount that the court considers is likely to be the amount for that period having regard to the operation of Division 6 (Indexation of amounts of benefits) of Part 3 of that Act.

26F Retirement age

In awarding damages for future economic loss due to deprivation or impairment of earning capacity, the court is to disregard any earning capacity of the injured offender after age 65.

26G Future economic loss—assumption about release on parole

In making an assessment for the purposes of an award for future economic loss about future earning capacity or other events on which an award is to be based in respect of an offender eligible for release on parole, a court is to assume that the offender is likely to be released when the offender becomes eligible for release on parole.

Division 4 Damages for non-economic loss

26H Restriction on damages for non-economic loss

A court is not to award damages for non-economic loss except as permitted by this Division.

26I Non-economic loss damages limited to workers compensation amount

- (1) A court may award damages for non-economic loss up to a maximum of the total amount to which a worker would be entitled as compensation under Division 4 (Compensation for non-economic loss) of Part 3 of the *Workers Compensation Act 1987* if the worker had received an injury that entitled the worker to compensation under that Act and that resulted in a degree of permanent impairment that is the same as the offender's degree of permanent impairment.
- (2) When determining the amount to which a worker would be entitled as compensation under a provision of the *Workers Compensation Act 1987*, the amount is to be determined under the provision as it was in force when the injury to the offender was received.

Division 5 Victims support payments owed by offender

26J Authority for deduction from damages

- (1) A protected defendant who is liable to pay damages to an offender pursuant to an award to which this Part applies is entitled to deduct from those damages the amount

of any victim support payment required to be paid by the offender.

- (2) A **victim support payment** is an amount ordered to be paid by the offender by an order for restitution under Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996*.
- (3) In the case of an amount ordered to be paid by the offender pursuant to a provisional order for restitution under Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996*, the protected defendant may (while the provisional order is pending) withhold that amount from the damages payable to the offender.
- (4) The protected defendant is to pay an amount deducted under this section to the person to whom the order for restitution requires payment be made.
- (5) Payment made by a protected defendant pursuant to this section is, to the extent of the amount paid, taken to be a payment to the offender in satisfaction of the obligation to pay the damages concerned.

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 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
- (e1) 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, 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 for civil liability 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 for civil liability to which this Part applies to the extent that the liability is based on a 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.

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

- (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.
- (2) A **special statutory power** is a power:
 - (a) that is conferred by or under a statute, and
 - (b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.
- (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.
- (4) In the case of a special statutory power 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 for civil liability to which this Part applies to the extent that the liability 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 plaintiff.

- (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 for civil liability 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:
- (a) was unlawful, or
 - (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.
- (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 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.
- (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.

54A Damages limitations if loss results from serious offence committed by mentally ill

person

- (1) This section applies to a liability to which this Part applies in circumstances where:
 - (a) the liability arises out of the death of, or injury or damage to, a person, and
 - (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
 - (c) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.
- (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.

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.

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.

Schedule 1 Savings and transitional provisions

(Section 7)

Part 1 Preliminary

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

Civil Liability Amendment (Personal Responsibility) Act 2002

Civil Liability Amendment Act 2003

Civil Liability Amendment (Offender Damages) Act 2004

- (2) Any such provision may, if the regulations so provide, take effect from:

- (a) 20 March 2002 or a later date where this Act is the Act concerned, or
- (b) where some other Act is the Act concerned, the date of assent to that Act or a later date.

Part 2 Provisions consequent on enactment of this Act

2 Application of Act to existing injuries and pending claims

- (1) Part 2 of this Act extends to an award of personal injury damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the commencement of this Act.

- (2) However, Part 2 of this Act does not apply to or in respect of:

- (a) an award of damages in proceedings commenced in a court before the commencement of this Act, or
- (b) an award of damages, or settlement or consent order in respect of damages, made before the date of assent to this Act.

3 Application of Act to health care claims

Despite the amendments made by this Act to the *Health Care Liability Act 2001*, that Act continues to apply (as if it had not been amended by this Act) to an award in respect of a health care claim (as defined in that Act) in proceedings commenced in a court before the commencement of this Act.

4 Application of Act to claims against the Crown notified before 20 March 2002

- (1) Part 2 of this Act does not apply to or in respect of an award of damages on a claim against the Crown if the Crown has been notified in writing of the claim before 20 March 2002 and:
 - (a) the damages are awarded (or are the subject of a settlement or consent order made) before 1 September 2002, or
 - (b) proceedings on the claim are commenced in a court before 1 September 2002, or
 - (c) proceedings on the claim cannot be commenced before 1 September 2002 because the injury concerned has not stabilised.
- (2) This clause does not apply to an award in respect of a health care claim as defined in the *Health Care Liability Act 2001*.
- (3) In this clause:

Crown means the Crown within the meaning of the *Crown Proceedings Act 1988* and includes a State owned corporation within the meaning of the *State Owned Corporations Act 1989*.

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.

Part 4 Provisions consequent on enactment of Civil Liability Amendment Act 2003

12 Definition

In this Part:

amending Act means the *Civil Liability Amendment Act 2003*.

13 Application of amendments concerning proportionate liability

Clause 6 (1) extends to Part 4 (as inserted by the *Civil Liability Amendment (Personal Responsibility) Act 2002* and amended by the amending Act).

14 Application of amendments relating to damages for birth of child

- (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.
- (2) However, Part 11 does not apply to proceedings commenced in a court before 13 November 2003.

15 Application of amendments concerning public and other authorities, criminals and mentally ill persons

- (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.
- (2) Parts 5 and 7 (as so amended) also extend to proceedings commenced before 13 November 2003.
- (3) However, subclause (2) does not operate:
 - (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
 - (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.

Part 5 Provisions consequent on enactment of *Civil Liability Amendment (Offender Damages) Act 2004*

16 Application of offender damages provisions to existing injuries and pending claims

- (1) Part 2A of this Act extends to an award of personal injury damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the commencement of that Part.
- (2) However, Part 2A of this Act does not apply to or in respect of:
 - (a) an award of damages in proceedings commenced in a court before 15 January 2004, or

Note—

15 January 2004 is the date of the Minister's announcement of the proposal to enact Part 2A.

- (b) an award of damages in proceedings commenced in a court before the date of introduction into Parliament of the Bill for the *Civil Liability Amendment (Offender Damages) Act 2004* if the award is in respect of an injury (or death resulting from

an injury) to a person received while the person was a detainee under the *Children (Detention Centres) Act 1987* or while performing community service work under a children's community service order as provided by the *Children (Community Service Orders) Act 1987*, or

- (c) an award of damages, or settlement or consent order in respect of damages, made before the date of assent to the *Civil Liability Amendment (Offender Damages) Act 2004*.

Schedule 2 (Repealed)