

Civil Liability Act 2002 No 22

[2002-22]



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 of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except:
 - (i) section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)), and
 - (ii) 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, and
 - (iii) Part 2A (Special provisions for offenders in custody),
 - (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 except sections 15A and 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),
 - (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 except section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),
 - (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),
 - (a1) section 15B (Damages for loss of capacity to provide domestic services),
 - (b) section 15C (Damages for loss of superannuation entitlements),
 - (c) section 17A (Tariffs for damages for non-economic loss),
 - (c1) section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),
- (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

50 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: general

(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 unless the services are provided (or to be provided):

- (a) for at least 6 hours per week, and
- (b) for a period of at least 6 consecutive 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—

By reason of the operation of section 3B (1) (b), this section does not apply to the determination of 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](#).

Section 15A makes provision with respect to the determination of damages for gratuitous attendant care services in proceedings of the kind referred to in section 11 of the [Dust Diseases Tribunal Act 1989](#).

15A Damages for gratuitous attendant care services: dust-related conditions

(1) This section applies to the determination of civil liability for damages for gratuitous attendant care services 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](#).

(2) The amount of damages that may be awarded for gratuitous attendant care services in proceedings referred to in subsection (1) must not exceed the amount calculated at the same hourly rate as that provided by section 15 (5) regardless of the number of hours involved.

(3) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.

(4) In this section, **attendant care services** and **gratuitous attendant care services** have the same meanings as they have in section 15.

15B Damages for loss of capacity to provide domestic services

(1) **Definitions** In this section:

assisted care, in relation to a dependant of a claimant, means any of the following kinds of care (whether or not the care is provided gratuitously):

- (a) any respite care (being care that includes accommodation that is provided by a person other than the claimant to a dependant who is aged or frail, or who suffers from a physical or mental disability, with the primary purpose of giving the dependant or claimant, or both, a break from their usual care arrangements),
- (b) if the dependant is a minor (but without limiting paragraph (a))—any care that is provided to the dependant by a person other than the claimant where:
 - (i) the person is a parent of the dependant (whether derived through paragraph (a) (i) or (ii) of the definition of **dependants** in this subsection, adoption or otherwise), and
 - (ii) the care includes the provision of accommodation to the dependant.

dependants, in relation to a claimant, means:

- (a) such of the following persons as are wholly or partly dependent on the claimant at the time that the liability in respect of which the claim is made arises:
 - (i) the husband or wife of the claimant,
 - (ii) a de facto partner of the claimant,

Note—

“De facto partner” is defined in section 21C of the [Interpretation Act 1987](#).

- (iii) a child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent of the claimant (whether derived through subparagraph (i) or (ii), adoption or otherwise),
 - (iv) any other person who is a member of the claimant’s household, and
- (b) any unborn child of the claimant (whether derived through paragraph (a) (i) or (ii), adoption or otherwise) at the time that the liability in respect of which the claim is made arises and who is born after that time.

gratuitous domestic services means services of a domestic nature for which the person providing the service has not been paid or is not liable to be paid.

- (2) **When damages may be awarded** Damages may be awarded to a claimant for any loss of the claimant’s capacity to provide gratuitous domestic services to the claimant’s dependants, but only if the court is satisfied that:
 - (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of **dependants** in subsection (1)—the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and
 - (b) the claimant’s dependants were not (or will not be) capable of performing the

- services themselves by reason of their age or physical or mental incapacity, and
- (c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependants:
 - (i) for at least 6 hours per week, and
 - (ii) for a period of at least 6 consecutive months, and
 - (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

Note—

Section 18 provides that a court cannot order the payment of interest on damages awarded for any loss of capacity of a claimant to provide gratuitous domestic services to the claimant's dependants.

- (3) If a dependant of the claimant received (or will receive) assisted care during the 6-month period referred to in subsection (2) (c) (ii) and the court is satisfied that the periods of that care were (or will be) short-term and occasional, the court may:
 - (a) in determining whether the claimant would have provided gratuitous domestic services to the dependant during a particular week for at least the 6 hours referred to in subsection (2) (c) (i), disregard the week if assisted care was (or will be) provided during that week, and
 - (b) in determining whether the claimant would have provided gratuitous domestic services to the dependant during the 6-month period referred to in subsection (2) (c) (ii), disregard any periods during which the assisted care was (or will be) provided in that 6-month period,but only if the total number of weeks in which the care was (or will be) provided during the 6-month period does not exceed 4 weeks in total.
- (4) **Determination of amount of damages** The amount of damages that may be awarded for any loss of the claimant's capacity to provide gratuitous domestic services must not exceed the amount calculated at the same hourly rate as that provided by section 15 (5) regardless of the number of hours involved.
- (5) In determining the amount of damages (if any) to be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, a court:
 - (a) may only award damages for that loss in accordance with the provisions of this section, and
 - (b) must not include in any damages awarded to the claimant for non-economic loss a

component that compensates the claimant for the loss of that capacity.

- (6) **Circumstances when damages may not be awarded** The claimant (or the legal personal representative of a deceased claimant) may not be awarded damages for any loss of the claimant's capacity to provide gratuitous domestic services to any dependant of the claimant if the dependant has previously recovered damages in respect of that loss of capacity.
- (7) A person (including a dependant of a claimant) may not be awarded damages for a loss sustained by the person by reason of the claimant's loss of capacity to provide gratuitous domestic services if the claimant (or the legal personal representative of a deceased claimant) has previously recovered damages in respect of that loss of capacity.
- (8) If a claimant is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, damages may not be awarded to the claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants while the claimant is a participant in the Scheme if (and to the extent that):
- (a) the loss resulted from the motor accident injury (within the meaning of that Act) in respect of which the claimant is a participant in that Scheme, and
 - (b) the treatment and care needs (within the meaning of that Act) of the claimant that are provided for or are to be provided under the Scheme include the provision of such domestic services to the claimant's dependants.
- (9) Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):
- (a) the loss resulted from an injury caused by a motor accident (within the meaning of the *Motor Accidents Compensation Act 1999*), and
 - (b) an insurer has made, or is liable to make, payments to or on behalf of the claimant for such services under section 83 (Duty of insurer to make hospital, medical and other payments) of that Act.
- (10) **Damages may not be awarded if they can be recovered as damages for attendant care services** Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):
- (a) the claimant could recover damages for gratuitous attendant care services (within the meaning of section 15) in respect of the same injury that caused the loss, and
 - (b) the provision of such attendant care services to the claimant also resulted (or

would also result) in the claimant's dependants being provided with the domestic services that the claimant has lost the capacity to provide.

- (11) **Determining value of gratuitous domestic services** In determining the value of any gratuitous domestic services that a claimant has lost the capacity to provide, the court must take into account:
- (a) the extent of the claimant's capacity to provide the services before the claimant sustained the injury that is the subject of the claim, and
 - (b) the extent to which provision of the services would, but for the injury sustained by the claimant, have also benefited persons in respect of whom damages could not be awarded under subsection (2), and
 - (c) the vicissitudes or contingencies of life for which allowance is ordinarily made in the assessment of damages.

15C 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 (with the amounts of \$250 and \$750 being rounded up).

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 on the NSW legislation website, the amount that is to apply, as from the date specified in the order, for the purposes of section 16 (2).
- (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 (with the amounts of \$250 and \$750 being rounded up).
- (6) A declaration made or published on the NSW legislation website 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 Australian legal practitioner 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 any of the following:

- (a) non-economic loss,
 - (b) gratuitous attendant care services as defined in section 15 (other than gratuitous attendant care services to which section 15A applies),
 - (c) loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants (as provided by section 15B).
- (2) If a court is satisfied that interest is payable on damages (other than damages in respect of which a court cannot order the payment of interest under subsection (1)), 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 NSW Trustee and Guardian 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 [NSW Trustee and Guardian Act 2009](#) 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 Australian legal practitioners to provide advice

An Australian 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 340 of the [Legal Profession Act 2004](#) 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*.

injury means personal injury and includes the following:

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

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 intensive correction in the community) 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, or attending a place in compliance with the requirements of, 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.

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

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) (Repealed)

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 the protected defendant or caused by the tort (whether or not negligence) of another person for whose tort the protected defendant is vicariously liable.

(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 1A Duties of claimant for offender damages

26BA Protected defendant must be given notice of incident giving rise to claim

(1) A person (referred to in this Division as a **claimant**) who makes or is entitled to make a claim against a protected defendant for an award of personal injury damages to which this Part applies must give the protected defendant notice of the incident that gives rise to the claim within 6 months after the relevant date for the claim.

- (2) The relevant date for the claim is the date of the incident that gives rise to the claim unless the claim is made in respect of the death of a person, in which case the relevant date is the date of the person's death.
- (3) Notice of an incident must be in writing and must:
 - (a) specify the date of the incident, and
 - (b) describe the incident (in ordinary language), and
 - (c) state that the incident may give rise to a claim against the protected defendant.
- (4) Notice given to an officer or employee of a protected defendant is taken to have been given to the protected defendant.
- (5) Time does not run for the purposes of this section while the claimant is a vulnerable offender under section 26BC.

26BB Claimant must comply with requests for information

- (1) A claimant must comply with any reasonable request by the protected defendant to furnish specified information, or to produce specified documents or records, for the purpose of providing the protected defendant with sufficient information:
 - (a) to be satisfied as to the validity of the claim and, in particular, to assess whether the claim or any part of the claim may be fraudulent, and
 - (b) to be able to make an early assessment of liability, and
 - (c) to be able to make an informed offer of settlement.
- (2) The reasonableness of a request under this section may be assessed having regard to criteria including the following:
 - (a) the amount of time the claimant needs to comply with the request,
 - (b) whether the information sought is cogent and relevant to a determination of liability or quantum of loss, having regard to the nature of the claim,
 - (c) the amount of information that has already been supplied to or is available to the protected defendant to enable liability and quantum of loss to be assessed and an offer of settlement made,
 - (d) how onerous it will be for the claimant to comply with the request,
 - (e) whether the information is privileged,
 - (f) whether the information sought is sufficiently specified,
 - (g) the time of the request and whether the claimant will be delayed in commencing

proceedings by complying with the request.

- (3) A claimant is not required to comply with a requirement under this section while the claimant is a vulnerable offender under section 26BC.
- (4) The duty under this section applies only until court proceedings are commenced.

26BC Vulnerable offenders

- (1) An offender in custody is considered to be a vulnerable offender for the purposes of this Division if:
 - (a) the offender has a reasonable apprehension that the offender's safety will be put at risk if the offender gives notice as required by section 26BA or complies with a request of the protected defendant under section 26BB, and
 - (b) the offender has (as a result of that reasonable apprehension) applied to be placed in protective custody or transferred to another correctional facility.
- (2) The offender ceases to be a vulnerable offender when any of the following happens:
 - (a) the offender is transferred to another correctional facility or placed in protective custody in response to the offender's application,
 - (b) the offender declines an offer to be transferred to another correctional facility or be placed in protective custody in response to the offender's application,
 - (c) the offender's application is rejected on the ground that the offender has failed to establish that the application is made on reasonable grounds.

26BD Dismissal of court proceedings for failure to give notice or co-operate on claim

- (1) A protected defendant against whom court proceedings for an award of damages to which this Part applies are commenced may apply to the court to have the proceedings dismissed on the grounds of a failure to comply with section 26BA or 26BB in connection with the claim concerned.
- (2) An application under this section cannot be made more than 2 months after the statement of claim is served on the protected defendant.
- (3) On an application under this section, the court must dismiss the proceedings unless the court is satisfied that:
 - (a) section 26BA has been complied with in respect of the claim or the claimant has a full and satisfactory explanation for non-compliance with that section and the required notice of the incident was given to the protected defendant within a reasonable period in the circumstances, and
 - (b) the claimant has complied with section 26BB in respect of the claim or has a

reasonable excuse for any non-compliance with that section.

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

- (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, and
 - (d) section 330 (Costs of medical assessment) of the 1998 WC Act were omitted from that Part, and
 - (e) a reference in that Part to the WorkCover Guidelines were a reference to guidelines issued under subsection (2A), and
 - (f) the provisions of that Part applied with such other modifications as may be prescribed by the regulations.
- (2A) The Minister administering the CAS Act may, by order published in the Gazette, issue guidelines for the purposes of the application of Part 7 of Chapter 7 of the 1998 WC Act to offenders in respect of the same kinds of matters for which the WorkCover Guidelines may make provision for the purposes of that Part.

Note—

The Minister may amend or repeal an order made under this subsection. See section 43 of the *Interpretation Act 1987*.

- (2B) Without limiting subsection (2A), an order made under that subsection may apply, adopt or incorporate (whether wholly or in part or with or without modifications) the provisions of the WorkCover Guidelines, either as published or as in force from time to

time.

- (2C) Sections 40 (Notice of statutory rules to be tabled) and 41 (Disallowance of statutory rules) of the *Interpretation Act 1987* apply to an order made under subsection (2A) in the same way as they apply to a statutory rule.
- (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.
- (3A) A dispute about the degree of permanent impairment of an injured offender cannot be referred for assessment unless the offender has provided the protected defendant with a medical report by a medical practitioner that assesses that the degree of permanent impairment of the injured offender is at least 15% and sets out the medical practitioner's reasons for that assessment.
- (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%.

- (6) In this section:

modification includes an addition, omission or substitution.

WorkCover Guidelines has the same meaning as it has in the 1998 WC Act.

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 total amount to which a worker would be entitled as compensation under a provision of the *Workers Compensation Act 1987*:
- (a) the amount is to be determined under the provision as it was in force when the injury to the offender was received, and
 - (b) if the provision is section 67 of that Act—the section applies as if the reference to the Commission in subsection (4) of that section were a reference to the court.

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.
- (3A) A protected defendant who withholds an amount under subsection (3) may require the NSW Trustee and Guardian to hold the amount on its behalf. However, the protected defendant must require the NSW Trustee and Guardian to hold the amount if the offender requests it.
- (3B) Interest is payable on an amount that is withheld under subsection (3). The amount of interest payable on the withheld amount is:
- (a) if the protected defendant has retained the withheld amount—the amount of interest determined in accordance with the provisions relating to interest payable under a judgment of the same amount of the Local Court in proceedings on a statement of claim under the *Civil Procedure Act 2005*, or
 - (b) if the NSW Trustee and Guardian holds the withheld amount for the protected defendant—the amount of interest received by the NSW Trustee and Guardian in respect of the investment of the amount as provided by the *NSW Trustee and Guardian Act 2009*.
- (3C) If the provisional order for restitution on the basis of which an amount was withheld under subsection (3) is confirmed under the *Victims Support and Rehabilitation Act 1996*, any interest payable on the withheld amount under this section must be paid as follows:
- (a) if the NSW Trustee and Guardian holds the withheld amount for the protected defendant—the reasonable costs of the NSW Trustee and Guardian in connection with that holding are to be paid out of the interest,
 - (b) if the amount ordered for restitution is not reduced on the confirmation—all of the interest (or remaining interest after payment of the NSW Trustee and Guardian's costs) must be paid to the person (**payee**) to whom the order for restitution requires payment to be made or, if there is more than one payee, to each payee in the same proportion as corresponds to the payee's proportion of the total amount of restitution,
 - (c) if the amount ordered for restitution is reduced on the confirmation:

- (i) the offender must be paid the proportion of the interest (or remaining interest after payment of the NSW Trustee and Guardian's costs) that corresponds to the proportion by which the withheld amount was reduced, and
 - (ii) the rest of the interest must be paid to the payee or, if there is more than one payee, to each payee in the same proportion as corresponds to the payee's proportion of the reduced amount.
- (4) The protected defendant or the NSW Trustee and Guardian (as the case may be) 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 or the NSW Trustee and Guardian (as the case may be) 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.

Division 6 Offender damages trust funds

26K Interpretation

- (1) In this Division:

award of damages means an award of damages by a court (including such an award pursuant to judgment entered in accordance with an agreement between the parties to a claim for damages).

offender means a person to whom an award of offender damages is made.

offender damages means personal injury damages awarded pursuant to an award to which this Part applies.

Note—

For the purposes of this Division, this Part has an extended application. See Part 7 of Schedule 1.

victim claim means a claim for personal injury damages in respect of:

- (a) an injury to a person caused by conduct of an offender that, on the balance of probabilities, constitutes an offence, or
- (b) the death of a person caused by or resulting from an injury to the person caused by conduct of an offender that, on the balance of probabilities, constitutes an offence.

victim trust fund means offender damages awarded to an offender that are held on trust under this Division.

- (2) The definition of **victim claim** in this section:

- (a) 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, and
- (b) extends to conduct of a person that would have constituted an offence if the person had not been suffering from a mental illness at the time of the conduct (whether or not the person 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).

26L Offender damages to be held in trust as victim trust fund

- (1) The protected defendant liable to pay offender damages awarded to an offender is to pay those damages to the NSW Trustee and Guardian to be held in trust for the offender and paid out only as authorised by this Division.
- (2) Offender damages held in trust for an offender under this Division comprise a **victim trust fund** for victims of the offender. The protected defendant liable to pay those damages is **responsible** for the fund.
- (3) This section does not affect (and is subject to) any obligation imposed on the protected defendant by or under an enactment of the State or the Commonwealth to pay to some other person money owed or due to or held on account of the offender.

Note—

Section 26T also provides an exception to this section for legal costs.

- (4) An amount deducted or withheld from offender damages under Division 5 (Victims support payments owed by offender) is not required to be held in trust under this section.
- (5) An amount held in a victim trust fund for victims of an offender is:
 - (a) not available for the payment of a creditor of the offender, and
 - (b) not liable to be attached or taken in execution at the instance of a creditor of the offender.
- (6) While offender damages are held in a victim trust fund, the liability of a protected defendant to pay those damages is suspended.

26M Victim trust fund available to satisfy eligible victim claims

- (1) A victim trust fund is available to satisfy victim claims against the offender concerned as provided by this Division but only if the claim is **eligible** to be satisfied from the victim trust fund as provided by this section.
- (2) A victim claim is **eligible** to be satisfied from a victim trust fund only if within the **eligibility period** for the victim trust fund:

- (a) the person commences proceedings on the claim in a court (or proceedings by the person on the claim are pending in a court at the beginning of the eligibility period), and
 - (b) the person gives the protected defendant responsible for the victim trust fund notice in writing of those proceedings together with such details of those proceedings as the protected defendant may request, and
 - (c) the person certifies to the court before which those proceedings are taken that the person is making the claim as a claim that is eligible to be satisfied from the victim trust fund.
- (3) The **eligibility period** for a victim trust fund comprising offender damages awarded to an offender is the period of 12 months following the date (the **award date** for those damages) on which the claim for those damages is finally determined by a court award of those damages.
- (4) A claim is not finally determined if:
- (a) any period for bringing an appeal as of right in respect of the claim has not expired (ignoring any period that may be available by way of extension of time to appeal), or
 - (b) any appeal in respect of the claim is pending (whether or not it is an appeal brought as of right).
- (5) The protected defendant responsible for a victim trust fund must give the registrar of each court in which a victim claim may be brought notice of each victim claim of which the protected defendant is given notice under this section.

26N Notice to persons entitled to make victim claim

- (1) The protected defendant responsible for a victim trust fund must send to each person who appears (from any information reasonably available to the protected defendant) to have a victim claim against the offender a notice in writing:
- (a) naming the offender and stating that there is a victim trust fund for victims of the offender, and
 - (b) specifying the eligibility period for that victim trust fund, and
 - (c) stating that a victim claim made within the eligibility period for the victim trust fund may be eligible to be satisfied from the victim trust fund.
- (1A) The notice must be sent as far as practicable within 28 days after the award date for the damages concerned (but this subsection does not prevent the notice from being sent more than 28 days after the award).

- (2) The notice is to be sent to a person at the address of the person last known to the protected defendant or as disclosed by any information reasonably available to the protected defendant.
- (3) The protected defendant may also publish such a notice in the Gazette.
- (4) To remove doubt, **victim claim** in this section includes a victim claim that can be made as a result of section 26P (Commencement of victim claims proceedings despite expiry of limitation period).
- (5) The Commissioner of Police is authorised to provide a protected defendant with any information in the Commissioner's possession that the protected defendant may reasonably require for:
 - (a) identifying and contacting persons who may have a victim claim against the offender, or
 - (b) determining whether a person appears to have a victim claim against the offender.

260 Provision of information to persons entitled to claim

- (1) A protected defendant must, in response to a request made during or within 1 month after the eligibility period for a victim trust fund by or on behalf of a person who appears to the protected defendant to be entitled to make a victim claim against the offender, provide such information as the protected defendant is reasonably able to provide concerning:
 - (a) the award of damages to the offender and the amount of the victim trust fund, and
 - (b) any other victim claim against the offender that may be eligible to be satisfied from the victim trust fund and of which the protected defendant has been given notice under this Division.
- (2) The provision of information by a protected defendant under this section:
 - (a) is authorised despite any agreement to which the protected defendant is a party that would otherwise prohibit or restrict the disclosure of information concerning an award of offender damages, and
 - (b) does not constitute a contravention of any such agreement.
- (3) A person to whom information is provided under this section must not disclose that information to any other person except for the purposes of or in connection with the taking and determination of proceedings on a victim claim against the offender concerned.

Maximum penalty: 50 penalty units.

- (4) Proceedings for an offence under this section may be dealt with summarily before the Local Court.

26P Commencement of victim claims proceedings despite expiry of limitation period

- (1) If there is a victim trust fund for victims of an offender, an action on a cause of action to recover damages pursuant to a victim claim against the offender is (despite any provision of the *Limitation Act 1969*) maintainable by proceedings on the cause of action commenced during the eligibility period for the victim trust fund.
- (2) The right and title to damages of a person formerly having such a cause of action that has been extinguished by the expiration of a limitation period fixed by or under the *Limitation Act 1969* is reinstated for the purposes of proceedings on the cause of action that are commenced during the eligibility period for the victim trust fund.
- (3) However, an award of damages in proceedings commenced under this section (that could not otherwise be commenced):
- (a) has effect only for the purpose of enabling an order to be made under this Division for the payment of the whole or a specified part of those damages out of money held in the victim trust fund concerned, and
 - (b) cannot otherwise be enforced against the offender concerned or any property of the offender.

26Q Orders for payment of damages out of money held in trust for victims of offender

- (1) A court that awards damages to a person on a victim claim against an offender may, if satisfied that the claim is eligible to be satisfied from a victim trust fund for victims of the offender, order that the whole or a specified part of those damages is to be paid out of money held in the victim trust fund.
- (2) Before the court orders the payment of damages out of money held in the victim trust fund, the court must consider:
- (a) whether there are or are likely to be other victim claims eligible to be satisfied from the victim trust fund that may be ordered to be wholly or partly satisfied by payment from the victim trust fund, and
 - (b) the amount of the damages likely to be awarded in respect of those claims.
- (3) In determining the amount of any damages to be ordered to be paid out of a victim trust fund, a court must ensure that the amount ordered to be paid:
- (a) is fair and reasonable having regard to the existence of other claims that are eligible to be satisfied from the fund and that may be ordered to be wholly or

partly satisfied by payment from the fund, and the amounts likely to be awarded in respect of those claims, and

- (b) does not, as a proportion of the amount of the victim trust fund, exceed the proportion that the damages awarded represents as a proportion of the total damages likely to be awarded in respect of all claims eligible to be satisfied from the fund.
- (4) A court may defer making an order for the payment of damages out of a victim trust fund until the court is satisfied that it is able to make a reasonable assessment of the extent of claims eligible to be satisfied from the fund.
- (5) The payment of an amount out of a victim trust fund in accordance with an order of a court under this section is taken to be a payment made at the direction of the offender and operates as a discharge, to the extent of the payment, of:
 - (a) the liability of the protected defendant to pay the amount to the offender concerned as offender damages, and
 - (b) the obligation of the NSW Trustee and Guardian to hold the amount in trust for the offender concerned.
- (6) An order of a court under this section is not subject to appeal except on a question of law.

26QA Court may deal with victim claim on the papers

A court is to determine a victim claim made to it without conducting a hearing unless it is satisfied that the interests of justice require that a hearing be held in the presence of the parties.

26R Payment to offender of trust fund surplus

- (1) When the protected defendant responsible for a victim trust fund is satisfied that all claims eligible to be satisfied from the fund have been finally determined, the protected defendant is to make a determination of the surplus (if any) in the fund.
 - (1A) A claim is not finally determined if:
 - (a) any period for bringing an appeal as of right in respect of the claim has not expired (ignoring any period that may be available by way of extension of time to appeal), or
 - (b) any appeal in respect of the claim is pending (whether or not it is an appeal brought as of right).
- (2) A court that awards damages to a person on a victim claim against an offender may give directions to the protected defendant concerned in respect of the determination

by the protected defendant of the surplus (if any) in the victim trust fund concerned.

- (3) If a protected defendant responsible for a victim trust fund determines and certifies to the NSW Trustee and Guardian that there is a surplus in the fund, the NSW Trustee and Guardian must pay the certified surplus to or at the direction of the offender concerned.
- (4) The **surplus** in a victim trust fund is the amount that will remain in the fund after payment out of the fund of the following amounts:
 - (a) the amount of all claims eligible to be satisfied from the fund that are ordered by a court under this Division to be paid out of the fund,
 - (b) all amounts payable to the NSW Trustee and Guardian out of the fund.

26S Functions of the NSW Trustee and Guardian

- (1) (Repealed)
- (2) Interest received by the NSW Trustee and Guardian in respect of the investment of an amount held by the NSW Trustee and Guardian under this Division is payable to and forms part of the victim trust fund of which the amount forms part.
- (3), (4) (Repealed)
- (5) The fees and expenses payable to the NSW Trustee and Guardian in connection with the exercise of functions by the NSW Trustee and Guardian under this Division are payable out of the victim trust fund in connection with which those functions are exercised.
- (6) The certificate of the NSW Trustee and Guardian as to the fees and expenses payable to the NSW Trustee and Guardian in connection with the exercise of functions by the NSW Trustee and Guardian under this Division is sufficient authority for the payment of the relevant amounts out of the victim trust fund concerned.

26T Exception for legal costs

- (1) This Division does not require any amount to be held in trust that is payable by the protected defendant as legal costs under an order for costs made against the protected defendant or (in the case of an award of damages that is inclusive of costs) that is reasonably attributable to the offender's legal costs.
- (2) The amount reasonably attributable to the offender's legal costs in the case of an award of damages that is inclusive of costs is the amount determined by the protected defendant on the basis of a bill for those costs provided to the protected defendant by the legal practitioner concerned.
- (3) If the amount determined by the protected defendant as the amount reasonably

attributable to the offender's legal costs is disputed, the protected defendant is to apply for the assessment of those costs under the *Legal Profession Act 1987* or the *Legal Profession Act 2004* (as if the protected defendant were liable to pay those costs as a result of an order for the payment of an unspecified amount of costs made by a court).

- (4) The costs of a costs assessment for the purposes of this section are payable:
- (a) by the offender (by deduction from the offender damages concerned), unless paragraph (b) applies, or
 - (b) by the protected defendant if the amount of the costs as determined by the costs assessor is at least 10% more than the amount determined by the protected defendant.

26U Maximum legal costs of eligible claims

- (1) The maximum costs for legal services provided to the plaintiff in connection with a victim claim that is eligible to be satisfied from a victim trust fund are fixed as follows:
- (a) if the amount recovered on the claim does not exceed \$100,000—maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,
 - (b) if the amount recovered on the claim exceeds \$100,000 but does not exceed \$250,000—maximum costs are fixed at 18% of the amount recovered or \$20,000, whichever is greater,
 - (c) if the amount recovered on the claim exceeds \$250,000 but does not exceed \$500,000—maximum costs are fixed at 16% of the amount recovered or \$45,000, whichever is greater,
 - (d) if the amount recovered on the claim exceeds \$500,000—maximum costs are fixed at 15% of the amount recovered or \$80,000, whichever is greater.
- (2) The regulations may prescribe an amount or percentage to replace any amount or percentage in subsection (1). When such a replacement amount or percentage is prescribed, it applies for the purposes of subsection (1) in place of the amount or percentage that it replaces.
- (3) Before the commencement of the *Legal Profession Act 2004*, Division 5B (Maximum costs in personal injury damages matters) of Part 11 of the *Legal Profession Act 1987* applies in respect of the maximum costs for legal services provided to a plaintiff in connection with a victim claim that is eligible to be satisfied from a victim trust fund as if subsections (1) and (2) of this section were substituted for subsections (1) and (2) of section 198D of that Act.
- (4) After the commencement of the *Legal Profession Act 2004*, Division 9 (Maximum costs in personal injury damages matters) of Part 3.2 of the *Legal Profession Act 2004*

applies in respect of the maximum costs for legal services provided to a plaintiff in connection with a victim claim that is eligible to be satisfied from a victim trust fund as if subsections (1) and (2) of this section were substituted for subsections (1) and (2) of section 338 of that Act.

- (5) The **amount recovered** on a claim is the full amount of the damages awarded (not just the amount ordered to be paid from a victim trust fund).

26V Protection from liability

- (1) An act or omission by a person as a public official does not subject the person personally to any action, liability, claim or demand if the act or omission was done or omitted to be done in good faith in the administration or execution of this Division.

- (2) In this section:

public official means:

- (a) a member of staff of or agent of a protected defendant, or
- (b) the NSW Trustee and Guardian, or a member of staff or agent of the NSW Trustee and Guardian, when the NSW Trustee and Guardian is acting under this Division.

26W Division overrides Part 7 Division 2

Division 2 (Supervision of damages arising out of criminal conduct by persons suffering from mental illness) of Part 7 does not apply to damages required to be held in trust under this Division.

Division 7 Miscellaneous

26X Limitation on exemplary, punitive and aggravated damages against protected defendant in cases of vicarious liability

- (1) In an action against a protected defendant for the award of personal injury damages where the act or omission that caused the injury or death was a tort (whether or not negligence) of a person for whose tort the protected defendant is vicariously liable, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.
- (2) Subsection (1) does not limit the application of section 21 to actions for the award of personal injury damages to which this Part applies.

Note—

Section 21 provides that a court cannot award exemplary or punitive damages or damages in the nature of 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.

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) a de facto partner,

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

31 Pure mental harm—liability only for recognised psychiatric illness

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

32 Mental harm—duty of care

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

in peril,

(c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,

(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

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

33 Liability for economic loss for consequential mental harm

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

Part 4 Proportionate liability

34 Application of Part

(1) This Part applies to the following claims (**apportionable claims**):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian Consumer Law (NSW)* for a contravention of section 18 of that Law.

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

(2) In this Part, a **concurrent wrongdoer**, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

(5) (Repealed)

34A Certain concurrent wrongdoers not to have benefit of apportionment

(1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or

(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

35 Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which

the plaintiff is contributorily negligent under any relevant law, and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

35A Duty of defendant to inform plaintiff about concurrent wrongdoers

(1) If:

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the **other person**) may be a concurrent wrongdoer in relation to the claim, and

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:

(i) the identity of the other person, and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

36 Contribution not recoverable from defendant

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

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

(b) cannot be required to indemnify any such wrongdoer.

37 Subsequent actions

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

38 Joining non-party concurrent wrongdoer in the action

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

39 Application of Part

Nothing in this Part:

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Part 5 Liability of public and other authorities

40 Application of Part

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

41 Definitions

In this Part:

exercise a function includes perform a duty.

function includes a power, authority or duty.

public or other authority means:

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*), or
- (b) a Government department, or
- (c) a public health organisation within the meaning of the *Health Services Act 1997*, or
- (d) a local council, or
- (e) any public or local authority constituted by or under an Act, or
- (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

Division 1 Limitations on damages

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.

Division 2 Supervision of damages arising out of criminal conduct by persons suffering from mental illness

54B Definitions

In this Division:

award of damages means an award of damages by a court (including such an award pursuant to judgment entered in accordance with an agreement between the parties to a claim for damages).

damages supervision order means an order granted under section 54D.

serious offence means an offence punishable by imprisonment for 6 months or more.

54C Application of Division

- (1) This Division applies to an award of damages to which this Part applies if:
 - (a) the award is made in respect of a civil liability that arises out of injury or damage to the person, and
 - (b) the 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) the conduct contributed materially to the injury or damage or to the risk of injury or damage.
- (2) This Division does not apply to offender damages within the meaning of Division 6 of Part 2A.
- (3) This Division 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.
- (4) This Division does not apply to an award of damages made before the commencement of this Division.

54D Damages supervision orders

- (1) A court that makes an award of damages must make an order directing the NSW Trustee and Guardian to take control of the amount of damages if it is satisfied, on the balance of probabilities, that the amount of damages is an amount to which this Division applies and that it is in the best interests of the person to whom the damages were awarded to make the order.
- (2) The NSW Trustee and Guardian must ensure that an amount of damages subject to a damages supervision order is used to cover the costs of past, present and future medical or other therapeutic treatment, rehabilitation costs and care costs of the person awarded the damages, subject to the terms of the order.
- (3) A damages supervision order may not take effect before the later of the final determination of any appeal relating to the award of damages or the end of the period during which any such appeal may be made.
- (4) A damages supervision order may be made whether or not the person awarded the damages is a mentally ill person (within the meaning of the [Mental Health Act 2007](#))

or a mentally incapacitated person when the order is made.

- (5) Any part of an award payable or paid for properly payable legal expenses incurred in connection with proceedings for damages may not be made subject to a damages supervision order.
- (6) The NSW Trustee and Guardian holds the amount of damages in trust for the person awarded the damages.

54E Additional matters relating to damages supervision orders

- (1) A damages supervision order may:
 - (a) require an amount of damages to be paid to the NSW Trustee and Guardian instead of, or by or on behalf of, the person awarded the damages, and
 - (b) regulate the manner in which the NSW Trustee and Guardian may exercise his or her functions under the order, and
 - (c) determine any matter relating to the payment of amounts of the damages, including:
 - (i) the purposes for which amounts may be disbursed, and
 - (ii) the obligations of the NSW Trustee and Guardian and the person awarded the damages, and
 - (d) make such other provision as the court thinks fit in the circumstances of the case.
- (2) A damages supervision order ceases to have effect:
 - (a) if it is revoked by a court, or
 - (b) on the death of the person awarded the damages.
- (3) If a damages supervision order ceases to have effect, any remaining amount of damages, or the proceeds of an amount of damages, is (subject to any order of a court and to payment of any fees or other expenses of the NSW Trustee and Guardian) to be paid to the person awarded the damages or the legal personal representative of the person.

54F Estates under supervision of Protective Commissioner

- (1) A damages supervision order may be made in relation to a person even though the estate of the person is subject to management under the [NSW Trustee and Guardian Act 2009](#).
- (2) The [NSW Trustee and Guardian Act 2009](#) does not apply to or in respect of property of a person whose estate is subject to management under that Act to the extent that the

property is the subject of a damages supervision order.

54G Hindering or obstructing NSW Trustee and Guardian

- (1) A person must not hinder or obstruct the NSW Trustee and Guardian in the performance of the NSW Trustee and Guardian's obligations under a damages supervision order.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

- (2) In this section:

NSW Trustee and Guardian includes members of staff and agents of the NSW Trustee and Guardian.

54H Evidence of NSW Trustee and Guardian's right to act

If a damages supervision order is made directing the NSW Trustee and Guardian to take control of property, a certificate under the hand of the NSW Trustee and Guardian or an officer authorised by the Chief Executive Officer of the NSW Trustee and Guardian and sealed with the NSW Trustee and Guardian's seal:

- (a) certifying that the damages supervision order has been made and is in force, and
- (b) stating the terms of the order,

is to be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and stated and of the NSW Trustee and Guardian's right to act under the damages supervision order, without production of any other proof.

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 8A Food donors

58A Interpretation

In this Part:

donate food includes distribute, without payment or other reward, food donated by others.

food, handling and **unsafe food** have the same meanings as they have in the [Food Act 2003](#).

personal injury includes:

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

58B 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.

58C Protection of food donors

- (1) A person who donates food (the **food donor**) does not incur any civil liability in respect of any death or personal injury that results from the consumption of the food if:
 - (a) the food donor donated the food:
 - (i) in good faith for a charitable or benevolent purpose, and
 - (ii) with the intention that the consumer of the food would not have to pay for the food, and
 - (b) the food was safe to consume at the time it left the possession or control of the food donor, and
 - (c) where the food was of a nature that required it to be handled in a particular way to ensure that it remained safe to consume after it left the possession or control of the food donor—the food donor informed the person to whom the food donor gave the food of those handling requirements, and
 - (d) where the food would only have remained safe to consume for a particular period of time after it left the possession or control of the food donor—the food donor informed the person to whom the food donor gave the food of that time limit.
- (2) For the purposes of this section, food is safe to consume if it is not unsafe food.

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 or civil liability for defamation.

Note—

Section 20 of the [Defamation Act 2005](#) makes similar provision to this Part about the effect of apologies in defamation proceedings.

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

Civil Liability Amendment (Offender Damages) Act 2005

Civil Liability Amendment (Food Donations) Act 2005

Confiscation of Proceeds of Crime Amendment Act 2005 (but only to the extent that it amends this Act)

Civil Liability Amendment (Offender Damages Trust Fund) Act 2005

Civil Liability Amendment Act 2006

Civil Liability Amendment (Offender Damages) Act 2007

Civil Liability Legislation Amendment Act 2008

- (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.

1A Final determination of proceedings

For the purposes of this Schedule, proceedings are not finally determined if:

- (a) any period for bringing an appeal as of right in respect of the proceedings has not expired (ignoring any period that may be available by way of extension of time to appeal), or
- (b) any appeal in respect of the proceedings is pending (whether or not it is an appeal brought as of right).

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 4A Provisions consequent on enactment of [Civil Liability Amendment \(Food Donations\) Act 2005](#)

15A Application of amendments

- (1) Part 8A applies in relation to civil liability whether arising before or after the commencement of that Part.
- (2) However, Part 8A does not apply to proceedings commenced in a court before the commencement of that Part.

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 19 November 2004 (being the day on which Part 2A commenced).

Part 6 Provisions consequent on enactment of **Civil Liability Amendment (Offender Damages) Act 2005**

17 Definitions

In this Part:

amending Act means the *Civil Liability Amendment (Offender Damages) Act 2005*.

commencement day means the day on which the amending Act commences.

18 Application of amendments made by amending Act

- (1) Part 2A (as amended by the amending Act) applies to any civil liability whether arising before, on or after the commencement day.
- (2) Part 2A (as so amended) also extends to proceedings commenced before the commencement day.
- (3) However, subclause (1) or (2) does not operate:
 - (a) to apply Part 2A in respect of any decision of a court made before the commencement day, or
 - (b) to apply Part 2A in relation to any civil liability or proceedings to which the Part did not apply immediately before the commencement day.

19 WorkCover Guidelines

- (1) A reference to the WorkCover Guidelines in a provision of Part 7 of Chapter 7 of the 1998 WC Act that is extended to an assessment of degree of permanent impairment for the purposes of Part 2A of this Act by section 26D is to continue to be read as a reference to the WorkCover Guidelines until guidelines are issued under section 26D (2A) (as inserted by the amending Act).
- (2) Subclause (1) applies despite section 26D (2) (e) (as inserted by Schedule 1 [2] to the amending Act).
- (3) In this clause, **1998 WC Act** and **WorkCover Guidelines** have the same meanings as they have in section 26D (as amended by the amending Act).

Part 7 Provisions consequent on enactment of **Civil Liability Amendment (Offender Damages Trust Fund) Act 2005**

20 Extended operation of Part 2A Division 6

For the purposes of the operation of Division 6 (Offender damages trust funds) of Part 2A:

- (a) that Part extends to an award of personal injury damages in proceedings commenced

before the commencement of that Part, and

(b) Parts 5 and 6 of this Schedule do not limit the operation of that Part.

Note—

This clause has the effect of extending the operation of Division 6 of Part 2A beyond the operation of the other provisions of that Part.

21 Amendments extend to existing claims and damages awards

A provision of Division 6 (Offender damages trust funds) of Part 2A extends to:

- (a) an award of offender damages made before the commencement of the provision that has not been satisfied by the protected defendant concerned as at that commencement, and
- (b) an award of offender damages made after the commencement of the provision in respect of a claim for damages that arose before that commencement, and
- (c) a victim claim made in respect of a cause of action that arose before the commencement of the provision.

Part 8 Provisions consequent on enactment of [Civil Liability Amendment Act 2006](#)

22 Definition

In this Part:

amending Act means the [Civil Liability Amendment Act 2006](#).

23 Application of amendments made by amending Act

- (1) Section 15A (as inserted by the amending Act) extends to civil liability arising before the commencement of section 15A, but does not apply to any proceedings that were finally determined before that commencement.
- (2) Section 15B (as inserted by the amending Act) and section 18 (1) (as amended by the amending Act) extend to civil liability arising before the commencement of section 15B, but do not apply to any proceedings that were finally determined before that commencement.
- (3) For the purposes of subclauses (1) and (2), section 3B (1) (a)–(c) and (2) (a1) and (c1) (as inserted or amended by the amending Act) also extend to the civil liability referred to in those subclauses.

Part 9 Provisions consequent on enactment of [Crimes and Courts](#)

Legislation Amendment Act 2006

24 Definition

In this Part, **amending Act** means the *Crimes and Courts Legislation Amendment Act 2006*.

25 Deemed commencement of, and application of, amendments to section 3B (1) (a)

- (1) The amendment to section 3B (1) (a) made by the amending Act extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of that amendment.
- (2) For the avoidance of doubt, any reference to “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” in section 3B (1) (a) before the commencement of this clause is taken to read (and always to have read) “civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person”.
- (3) The provisions of this Schedule that apply to section 3B (1) (a) apply to that paragraph as if it read (and always had read) as provided by subclause (2).
- (4) This clause does not affect any final determination of legal proceedings made by a court or tribunal before the commencement of this clause.
- (5) Despite subclause (4), this clause does apply for the purpose of the application of Division 6 of Part 2A to an award of damages made against a protected defendant before the commencement of this clause (even if any proceedings resulting in or in respect of that award were finally determined before that commencement). This clause does not apply for that purpose if the award has been wholly or partly satisfied (before or after the commencement of this clause) by payment to or at the direction of the person to whom the damages were awarded.

26 Definition of “offender in custody” in section 26A

- (1) The definition of **offender in custody** or **offender** in section 26A (1) includes, and is taken to have always included, the following:
 - (a) an inmate within the meaning of the *Correctional Centres Act 1952*,
 - (b) a prisoner within the meaning of the *Prisons Act 1952*,
 - (c) a periodic detainee within the meaning of the *Periodic Detention of Prisoners Act 1981*,
 - (d) an offender for whom a home detention order was made under the *Home Detention Act 1996*,

- (e) a person performing community service work under, or attending a place in compliance with the requirements of, a community service order as provided by the *Community Service Orders Act 1979*, whether or not the person is an offender in custody under any other paragraph of this definition.
- (2) This clause extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of this clause.
- (3) This clause does not affect any final determination of legal proceedings made by a court or tribunal before the commencement of this clause.
- (4) Despite subclause (3), this clause does apply for the purpose of the application of Division 6 of Part 2A to an award of damages made against a protected defendant before the commencement of this clause (even if any proceedings resulting in or in respect of that award were finally determined before that commencement). This clause does not apply for that purpose if the award has been wholly or partly satisfied (before or after the commencement of this clause) by payment to or at the direction of the person to whom the damages were awarded.

Part 10 Provisions consequent on enactment of *Civil Liability Amendment (Offender Damages) Act 2007*

27 Definition

In this Part, **2007 amending Act** means the *Civil Liability Amendment (Offender Damages) Act 2007*.

28 Definition of “personal injury damages”

- (1) The amendments made by the 2007 amending Act to section 26A (**the 26A amendments**) extend to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of those amendments.
- (2) The 26A amendments do not affect any final determination of legal proceedings made by a court or tribunal before the commencement of those amendments.
- (3) Despite subclause (2), the 26A amendments do apply for the purpose of the application of Division 6 of Part 2A to an award of damages made against a protected defendant before the commencement of those amendments (even if any proceedings resulting in or in respect of that award were finally determined before that commencement). The 26A amendments do not apply for that purpose if the award has been wholly or partly satisfied (before or after commencement of the amendments) by payment to or at the direction of the person to whom the damages were awarded.

29 Final determination of proceedings

Clause 1A of this Schedule does not affect any decision of a court made before the

commencement of that clause (as inserted by the 2007 amending Act).

30 Assessment of medical disputes

The amendment made by the 2007 amending Act to section 26D extends to a dispute in connection with civil liability arising before the commencement of that amendment (whether or not proceedings had been commenced before that commencement), but does not extend to a dispute referred for assessment pursuant to that section before that commencement.

Part 11 Provisions consequent on enactment of [Civil Liability Legislation Amendment Act 2008](#)

31 Definition

In this Part:

2008 amending Act means the [Civil Liability Legislation Amendment Act 2008](#).

32 Restrictions on damages for gratuitous attendant care services

An amendment made to section 15 by the 2008 amending Act extends to civil liability arising, and to proceedings commenced, before the commencement of the amendment but does not apply to any proceedings determined before that commencement.

33 Indexation of non-economic loss damages

The amendments made by the 2008 amending Act to sections 16 and 17 are taken to have had effect on and from the commencement of those sections.

34 Vicarious liability of protected defendant

The amendment made by the 2008 amending Act to section 26B extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the amendment, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the amendment.

35 Duties of claimant for offender damages

Division 1A of Part 2A does not apply in relation to an award of damages if the incident giving rise to the claim occurred before the commencement of that Division.

36 Operation of Part 2A in respect of intentional torts

The amendment made by the 2008 amending Act to section 3B extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the amendment, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the amendment.

37 Eligibility period for victim claims

The amendment made by the 2008 amending Act to section 26M extends to an eligibility period under that section that had commenced to run, but that had not expired, before the commencement of the amendment.

38 Notification of persons entitled to make victim claim

An amendment made by the 2008 amending Act to section 26N extends to a victim claim that arose before the commencement of the amendment.

39 Offender damages held on trust by Public Trustee

- (1) An amendment made by the 2008 amending Act to section 26L, 26Q, 26R or 26S extends to a victim claim that arose before the commencement of the amendment.
- (2) Offender damages held on trust by a protected defendant under section 26L immediately before the commencement of the amendments to that section by the 2008 amending Act are, on and from that commencement, taken to be held on trust under that section by the Public Trustee.

Part 12 Provision consequent on enactment of [Courts Legislation Amendment Act 2010](#)

40 Application of section 26X

Section 26X (as inserted by the [Courts Legislation Amendment Act 2010](#)) extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the section, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the section.

Schedule 2 (Repealed)