

New South Wales

Civil Liability Amendment (Personal Responsibility) Bill 2002

Explanatory note

The object of this Bill is to amend the *Civil Liability Act 2002* (*the Principal Act*) as follows:

- (a) Various principles are stated relevant to the determination of what is reasonably foreseeable and to the standard of care for risk avoidance, so as to limit the range of consequences that will be considered to be reasonably foreseeable. In particular, there will be provision to the effect that a possibility does not have to be far-fetched or fanciful before it can be considered not reasonably foreseeable, and the use of the benefit of hindsight will also be limited. The stated principles will apply to liability in tort and contract. *See proposed Part 3 (Foreseeability and risk avoidance) of the Principal Act*
- (b) There will be no civil liability for a failure to take reasonable care in respect of a risk, or to warn of a risk, that a reasonable person would consider to be an inherent or obvious risk. *See proposed Part 4 (Inherent or obvious risk) of the Principal Act*

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Explanatory note

- (c) Liability for damages for personal injury or damage to property arising from recreational activities will be limited as follows:
 - (i) there will be no liability resulting from a risk of an activity in respect of which a risk warning has been given (with warnings to parents and others in charge of young children or accompanying incapable persons also extending to those children or incapable persons),
 - (ii) a participant in a recreational activity will be able to waive the requirement that services be provided with due care and skill. *See proposed Part 5 (Recreational activities) of the Principal Act*
- (d) Proportionate liability will be introduced for claims involving economic loss or property damage in non-personal injury matters, so that a person who is jointly responsible with some other person or persons will only be liable to the extent of their responsibility. *See proposed Part 6 (Proportionate liability) of the Principal Act*
- (e) A peer acceptance defence will be introduced in connection with the civil liability of professionals in tort or contract. Under the defence, a professional will not incur liability for professional services rendered in accordance with a practice that is widely accepted in Australia by peer professional opinion as competent professional practice. The peer acceptance defence will not extend to any duty to advise and warn of risks associated with the provision of a service that can constitute a trespass to the person. *See proposed Part 7 (Professional negligence) of the Principal Act*
- (f) Liability in tort (including breach of statutory duty) of a public or other authority will be limited as follows:
 - (i) the court will be required to take into account a number of principles relating to the financial and other resources available to the authority and the general responsibilities of the authority,
 - (ii) a public or other authority will not be liable for breach of statutory duty (but without affecting liability in negligence) unless it has acted in a way that no reasonable public authority could act and it is clear from the express provisions of the Act that damages are payable,
 - (iii) a public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been compelled to exercise the function. *See proposed Part 8 (Liability of public or other authorities) of the Principal Act*

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Explanatory note

- (g) An intoxicated person will not be able to recover damages for personal injury or property damage unless the court is satisfied that the accident is likely to have occurred even if the person had not been intoxicated. If the court is satisfied that the accident is likely to have occurred anyway, the intoxicated person's damages will nevertheless be reduced on the basis of a statutory presumption of contributory negligence of 25% (or a greater percentage determined to be appropriate by the court in the particular case). There is no presumption of contributory negligence if the court is satisfied that the person's intoxication did not contribute in any way to the accident. Various principles are also established generally to the effect that no increased duty of care is owed to persons who are or might be intoxicated. *See proposed Part 9 (Intoxication) of the Principal Act*
- (h) Liability for injury or death or damage to property resulting from self-defence or arising from criminal conduct will be limited as follows:
 - (i) there will be no civil liability for injury or death or damage to property arising from conduct that is in self-defence,
 - (ii) in a case where the defendant believes he or she is acting in self-defence but the defendant's actions are not a reasonable response in the circumstances (and so do not qualify as self-defence), there will be no civil liability unless the court considers the case exceptional and that damages should be awarded to avoid harshness or injustice (in which case the limits that apply to the recovery of damages under Part 2 of the Principal Act will apply, and there will be no recovery for non-economic loss),
 - (iii) no damages will be recoverable against a defendant in respect of the death of or injury to a person or damage to a person's property in the course of the commission of a serious criminal offence by the person unless the defendant's conduct itself constituted an offence. *See proposed Part 10 (Self-defence and recovery by criminals) of the Principal Act*
- (i) Good samaritans who come to the assistance of a person in danger will be protected from liability for acts or omissions in good faith. *See proposed Part 11 (Good samaritans) of the Principal Act*
- (j) Volunteers doing work for community organisations will be protected from liability for acts or omissions in good faith. *See proposed Part 12 (Volunteers) of the Principal Act*

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Explanatory note

- (k) The availability of damages for nervous shock will be limited to those persons who are victims of or present at an accident, or a family member of a victim where the family member has suffered a demonstrable psychological or psychiatric injury and not merely a normal emotional or cultural grief reaction. There will be no recovery for nervous shock suffered in connection with the injury or death of another person (*the victim*) if there would be no liability to the victim because of another provision of the Bill. If Part 9 (Intoxication) reduces liability to the victim, liability for nervous shock will be reduced also. *See proposed Part 13 (Nervous shock) of the Principal Act*
- (l) An apology (including an expression of sympathy or regret) by or on behalf of a person will not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability in tort or contract. *See proposed Part 14 (Apologies) of the Principal Act*
- (m) Provisions to encourage and facilitate structured settlements in personal injury damages cases are introduced, including provisions for the court to notify the parties of the terms of any proposed award so as to give the parties a reasonable opportunity to negotiate a structured settlement. *See proposed Part 15 (Structured settlements) of the Principal Act*
- (n) Consequential amendments are made and consequential savings and transitional provisions are enacted. *See Schedules 2 and 3*

The amendments will not apply to civil liability in respect of intentional criminal acts, dust diseases claims, motor accidents and workers compensation, subject to the following exceptions:

- (a) the amendments with respect to foreseeability and risk avoidance, self-defence and recovery by criminals, good samaritans and the effect of intoxication on duty and standard of care will apply to motor accident matters,
- (b) the amendments with respect to foreseeability and risk avoidance will apply to workers compensation matters.

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act generally on a day or days to be appointed by proclamation. However, proposed Part 10 (Self-defence and recovery by criminals) and Part 13 (Nervous shock) of the Principal Act, as inserted by the Bill will commence on the date on which the Bill was publicly released, namely 3 September 2002.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Explanatory note

Clause 3 is a formal provision giving effect to the amendments to the *Civil Liability Act 2002* set out in Schedules 1 and 2.

Clause 4 is a formal provision giving effect to the consequential amendment to the *Health Care Liability Act 2001* set out in Schedule 3.

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

Schedule 3 contains the consequential amendment to the *Health Care Liability Act 2001*.

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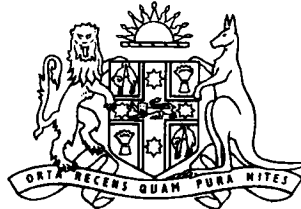
New South Wales

Civil Liability Amendment (Personal Responsibility) Bill 2002

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Civil Liability Act 2002 No 22	2
4 Consequential amendment of Health Care Liability Act 2001 No 42	2
Schedules	
1 Principal amendments	3
2 Consequential and other amendments	26
3 Consequential amendment of Health Care Liability Act 2001	31

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New South Wales

Civil Liability Amendment (Personal Responsibility) Bill 2002

No , 2002

A Bill for

An Act to amend the *Civil Liability Act 2002* to effect further civil liability reforms; and for other purposes.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) So much of Schedule 1 as inserts Parts 10 (Self-defence and recovery by criminals) and 13 (Nervous shock) into the *Civil Liability Act 2002* (and section 3 of this Act in its application to those provisions) are taken to have commenced on 3 September 2002.

3 Amendment of Civil Liability Act 2002 No 22

The *Civil Liability Act 2002* is amended as set out in Schedules 1 and 2.

4 Consequential amendment of Health Care Liability Act 2001 No 42

The *Health Care Liability Act 2001* is amended as set out in that Schedule.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Schedule 1 Principal amendments

(Section 3)

Parts 3–15

Insert before Schedule 1:

Part 3 Foreseeability and risk avoidance

23 Application of Part

- (1) This Part applies to civil liability in tort or contract.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

24 Reasonable foreseeability generally

In determining whether the consequences of an act or omission are reasonably foreseeable in civil liability proceedings to which this Part applies, a possibility does not have to be far-fetched or fanciful before it can be considered not reasonably foreseeable.

25 Other general principles

In determining liability in civil liability proceedings to which this Part applies:

- (a) the fact that a risk 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
- (b) the fact that a risk could have been avoided with little or no difficulty, disadvantage or expense does not of itself give rise to or affect liability for a failure to avoid the risk, and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk does not of itself give rise to or affect liability in respect of the

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Civil Liability Amendment (Personal Responsibility) Bill 2002

risk and does not of itself constitute an admission of liability in connection with the risk.

Part 4 Inherent or obvious risk

26 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.

27 No duty of care for inherent or obvious risks

- (1) A person (*the injured person*) is not owed a duty of care by another person (*the defendant*) to take reasonable care in respect of a risk, or to warn of a risk, that a reasonable person would consider to be an inherent or obvious risk.
- (2) There is an inherent risk of something occurring only if the exercise of reasonable care by the defendant could not have prevented it occurring.
- (3) A risk is an obvious risk if in the circumstances the risk would have been obvious to a reasonable person in the injured person's position. A risk of something that is patent or a matter of common knowledge is an obvious risk. A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) However, a risk of something occurring is not an obvious risk unless the injured person could by exercising reasonable care have avoided it.
- (5) A risk can be an inherent or obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
- (6) To establish that a risk is an inherent or obvious risk, it is not necessary to establish that the injured person was aware of or understood the nature or extent of the risk or voluntarily consented to the risk, or that the injured person was capable of doing any of those things.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

28 Part does not apply to breaches of safety standards

This Part does not apply in respect of a failure by a person to take reasonable care in respect of a risk, or to warn of a risk, if it is established (on the balance of probabilities) that the failure constitutes 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.

Part 5 Recreational activities

29 Part applies to civil liability for death, injury or property damage in connection with recreational activity

- (1) This Part applies to civil liability for personal injury damages or damage to property.
- (2) This Part applies only in respect of civil liability for damages that relate to the death of or injury to a person (*the plaintiff*), or damage to property of the plaintiff, caused by the fault of another person in connection with a recreational activity engaged in by the plaintiff.
- (3) This Part extends to any such liability even if the damages are sought in an action for breach of contract or any other action.
- (4) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.
- (5) This Part does not limit the operation of Part 4 in respect of a recreational activity.

30 Definition of “recreational activity”

In this Part:

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

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (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.

31 No duty of care for recreational activity where risk warning

- (1) A person who engages in a recreational activity is not owed a duty of care by another person (*the defendant*) to take reasonable care in respect of a risk, or to warn of a risk, of the recreational activity if the risk was the subject of a risk warning to the person.
- (2) If the injured person 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) A risk warning 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 concerned 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 if it is established (on the balance of probabilities) that the death, injury or damage to property concerned resulted from a contravention of a provision of a written law of the State or

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Commonwealth that establishes specific practices or procedures for the protection of personal safety.

- (7) 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.
- (8) The fact that a risk is the subject of a risk warning does not of itself mean:
 - (a) that the risk is not an inherent or obvious risk of an activity, or
 - (b) that a person who engages in an activity is owed a duty of care by the person who gives the risk warning to take reasonable care to avoid the risk.
- (9) 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.
- (10) 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.

injured person means the person whose death or injury, or the damage to whose property, is the death, injury or damage to which the claim relates.

parent of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

32 Waiver of contractual duty of care for recreational activities

- (1) Despite any other law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Part applies that results from breach of an express or implied warranty that the services will be rendered with due 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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (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 Part applies that results from breach of an express or implied warranty that the services will be rendered with due 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 death, injury or damage to property 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.

Part 6 Proportionate liability

33 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 the failure of two or more concurrent wrongdoers to exercise reasonable care (but not including any claim arising out of personal injury),
 - (b) a claim for damages for a contravention of section 42 of the *Fair Trading Act 1987* arising from the acts or omissions of two or more concurrent wrongdoers.
- (2) A *concurrent wrongdoer*, in relation to a claim, is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (4) For the purposes of the operation 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) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

34 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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

35 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 the damages recovered from another concurrent wrongdoer in the same proceedings for an apportionable claim, and
- (b) cannot be required to indemnify any such wrongdoer.

36 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.

37 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.

38 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

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (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 7 Professional negligence

39 Application of Part

- (1) This Part applies to civil liability in tort or contract.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

40 Standard of care for professionals

- (1) A person practising a profession (*a professional*) does not incur a liability to which this Part applies 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) 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.
- (3) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

41 Special provision for duty to warn of risk

- (1) This Part does not apply in respect of that aspect of the provision of a professional service that involves the giving of a warning, advice or other information in connection with the risks associated with the provision by the professional of a professional service that would (if provided without lawful consent or other lawful authority) constitute a trespass to the person.
- (2) Part 4 (Inherent or obvious risk) does not apply to a duty to warn of such a risk.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Part 8 Liability of public and other authorities

42 Application of Part

- (1) This Part applies to civil liability in tort.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

43 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
- (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.

44 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 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,

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (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.

45 Proceedings against public or other authorities based on breach of statutory duty

- (1) This section applies to proceedings to which this Part applies that are based on an alleged 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:
 - (a) 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, and
 - (b) there is no right to damages for injury or loss caused by an act or omission of the authority unless it is clear from the provisions of the statute that damages are payable for any such injury or loss.
- (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 46.

46 When public or other authority not liable for failure to exercise regulatory functions

- (1) A public or other authority is not liable in proceedings to which this Part applies to the extent that the claim 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

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Civil Liability Amendment (Personal Responsibility) Bill 2002

authority could not have been required to exercise the function in proceedings instituted by the claimant.

- (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.

47 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 9 Intoxication

48 Part applies to civil liability for death, injury or property damage

- (1) This Part applies to civil liability for personal injury damages 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.

49 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).

50 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

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Civil Liability Amendment (Personal Responsibility) Bill 2002

the person's capacity to exercise due 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.

51 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 due 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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (5) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.

Part 10 Self-defence and recovery by criminals

52 Part applies to civil liability for death, injury or property damage

- (1) This Part applies to civil liability for personal injury damages 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.

53 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 was unlawful.
- (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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

54 Damages limitations apply even if self-defence not a reasonable response

- (1) If section 53 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 is not a reasonable response in the circumstances as he or she perceives 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.

55 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 person whose death, injury or damage is the subject of the proceedings was, at the time of the incident that resulted in death, injury or damage, engaged in conduct that (on the balance of probabilities) constitutes a serious offence, and
 - (b) that conduct contributed materially 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 53 and 54 can apply to prevent or limit recovery of damages even though the defendant's conduct constitutes an offence.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (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.

Part 11 Good samaritans

56 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.

57 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.

58 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.

59 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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (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 due 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 due 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 12 Volunteers

60 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.

61 Definitions

- (1) In this Part:

community organisation means a body corporate or authority of the State that organises the doing of community work by volunteers.

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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

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.

62 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.

63 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.

64 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:

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (a) the ability of the volunteer to exercise due 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 due care and skill when doing the work.

65 Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions

This Part does not confer protection on a volunteer from personal liability 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.

66 Liability not excluded if insurance required

This Part does not confer protection from 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.

67 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 13 Nervous shock

68 Application of Part

- (1) This Part applies to civil liability for personal injury damages.
- (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.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

69 Limitation on damages for nervous shock

- (1) No damages for psychological or psychiatric injury are to be awarded in respect of the death of or injury to a person (*the victim*) caused by an incident that is the fault of another person (*the defendant*), except in favour of:
- (a) the victim, or
 - (b) a bystander, or
 - (c) a close relative of the victim who, as a consequence of the death of or injury to the victim, has suffered a demonstrable psychological or psychiatric injury and not merely a normal emotional or cultural grief reaction.
- (2) No damages for psychological or psychiatric injury are to be awarded against the defendant to a bystander or close relative of the victim if the recovery of damages from the defendant in respect of the death of or injury to the victim would be prevented by any provision of Parts 3–12.
- (3) Any damages for psychological or psychiatric injury to be awarded against the defendant to a bystander or close relative of the victim are to be reduced in the same proportion as any reduction under Part 9 in the damages that may be recovered from the defendant in respect of the death of or injury to the victim.
- (4) In this section:

bystander means a person (other than the victim) who was present at the scene of the incident giving rise to a claim when the incident occurred.

close relative of the victim means a parent, spouse, brother, sister or child of the victim.

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Part 14 Apologies

70 Application of Part

- (1) This Part applies to civil liability in tort or contract.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

71 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.

72 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 fault of 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 fault of 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 15 Structured settlements

73 Application of Part

This Part applies to an award of personal injury damages to which Part 2 applies.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

74 What is a structured settlement

For the purposes of this Part, 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.

75 Court required to inform parties of proposed award

- (1) The purpose of this section is to give the parties to proceedings a reasonable opportunity to negotiate a structured settlement.
- (2) A court that decides to make an award of personal injury damages in respect of future loss (not including interest) exceeding \$100,000 must first notify all the parties to the proceedings of the terms of the award it proposes to make.
- (3) In addition, if the court considers that the person may be a person in need of protection, the court is to notify the Protective Commissioner under the *Protected Estates Act 1983* of the terms of the award it proposes to make.
- (4) The notification must set out the amount of each component part of the proposed award in accordance with the requirements of the regulations and rules of court.
- (5) In this section:

person in need of protection means a person who is liable to be subject to an order that the estate of the person be subject to management under the *Protected Estates Act 1983* because the person is not capable of managing his or her own affairs.

76 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.

77 Obligation of legal practitioners to provide advice

- (1) A legal practitioner must advise, in writing, a plaintiff who proposes to negotiate a settlement of a claim for personal injury damages about the following:
 - (a) the availability of structured settlements,

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Civil Liability Amendment (Personal Responsibility) Bill 2002

- (b) the desirability of the plaintiff obtaining independent financial advice about structured settlements and lump sum settlements of the claim.
- (2) A court is not to make an order approving of or in the terms of a structured settlement in respect of a claim for personal injury damages unless the application for the order states that such advice has been given to the plaintiff in the proceedings.

78 Offer of structured settlement—legal costs

- (1) Section 198F of the *Legal Profession Act 1987* extends to an offer of compromise by way of a structured settlement on a claim for personal injury damages.
- (2) In that case, the court is to have regard to the following when determining whether a reasonable offer of compromise has been made:
 - (a) the cost to the defendant of the proposed structured settlement as compared to the lump sum payment of damages,
 - (b) the value of the proposed structured settlement to the plaintiff taking into account any tax exemption that might have applied.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Schedule 2 Consequential and other amendments

(Section 3)

[1] Section 3 Definitions

Omit the definition of *damages*. Insert instead:

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.

[2] Sections 3A and 3B

Insert after section 3:

3A Provisions relating to operation of Act

- (1) This Act does not create or confer any cause of civil action for the recovery of damages.
- (2) 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.
- (3) 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.
- (4) Subsection (3) extends to any provision of this Act even if the provision applies to liability in contract.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

3B Civil liability excluded from Act

- (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
- (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct—the whole Act, except Part 10 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death,
 - (b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*—the whole Act,
 - (c) civil liability relating to an award to which Part 6 of the *Motor Accidents Act 1988* applies—the whole Act except Parts 3 (Foreseeability and risk avoidance), 10 (Self-defence and recovery by criminals) and 11 (Good samaritans) and section 50 (Effect of intoxication on duty and standard of care),
 - (d) 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 Parts 3 (Foreseeability and risk avoidance), 10 (Self-defence and recovery by criminals) and 11 (Good samaritans) and section 50 (Effect of intoxication on duty and standard of care),
 - (e) civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies—the whole Act except Part 3 (Foreseeability and risk avoidance),
 - (f) 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*,

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Civil Liability Amendment (Personal Responsibility) Bill 2002

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 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.

[3] Section 8 Amendment of Acts

Omit the section.

[4] Section 9 Application of Part

Omit section 9 (1) and (2). Insert instead:

- (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.

[5] Section 11 Act does not give rise to any cause of action

Omit the section.

[6] Section 22 Court may make consent order for structured settlement

Omit the section.

[7] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Civil Liability Amendment (Personal Responsibility) Act 2002

Note. This amendment authorises the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

[8] Schedule 1

Insert at the end of the Schedule:

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 provisions of Parts 3–15 (as inserted by the 2002 amending Act) extend to civil liability that relates to an injury received (or to a death resulting from an injury received) or damage suffered, before the commencement of the Part.
- (2) However, any such Part does not apply to or in respect of:
 - (a) proceedings commenced in a court before the commencement of the Part, or
 - (b) an award of damages, or settlement or consent order in respect of damages, made before the commencement of the Part.
- (3) Further, Parts 10 (Self-defence and recovery by criminals) and 13 (Nervous shock) do not apply to or in respect of an award of damages, or settlement or consent order in respect of damages, made before the date of assent to the 2002 amending Act.
- (4) An amendment made by Schedule 2 [1] or [2] to the 2002 amending Act applies to and in respect of a provision of Part 10 or 13 as if the amendment had commenced on the commencement of the provision.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

7 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.

[9] Schedule 2 Amendment of Acts

Omit the Schedule.

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Civil Liability Amendment (Personal Responsibility) Bill 2002

Schedule 3 Consequential amendment of Health Care Liability Act 2001

(Section 4)

Part 4 Provision of emergency health care—protection from liability

Omit the Part.