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# A GUIDE TO THE CIVIL LIABILITY ACT 2002 (NSW)

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## THE CIVIL LIABILITY ACT 2002 (NSW)

### Including amendments made by the Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW)

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## INTRODUCTION

In 2001 the NSW government introduced the Health Care Liability Act. It was the first major attempt to regulate damages and litigation practices for personal injury claims outside the main statutory schemes, CTP and workers compensation.

The Civil Liability Act casts a much wider net. Virtually all personal injury litigation in NSW is now covered, except for some existing statutory schemes. It has retrospective effect on existing claims as well as new ones.

The Civil Liability Amendment (Personal Responsibility) Act 2002 (the Personal Responsibility Act) has significantly extended the provisions of the Civil Liability Act. Focusing mostly on liability issues, it seeks to enforce the view that people should be responsible for their own actions in certain circumstances. Many of the new provisions are likely to have far-reaching consequences.

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## APPLICATION

### What types of claims are affected?

All personal injury damages claims, including medical negligence, contract and tort liabilities, except:

- Workers Compensation Act awards
- Dust Diseases Tribunal awards
- victims compensation
- Anti-Discrimination Act damages awards
- Sporting Injuries Insurance Act awards
- payments made pursuant to the Industrial Relations Act
- life, superannuation and personal insurance claims.

### When are these claims affected?

In most cases the Act applies to injuries occurring both before and after 20 March 2002. Exceptions are for:

- proceedings that were commenced before 20 March 2002;

- judgments, settlements or consent orders entered before 20 March 2002; and
- claims against the Crown and State owned corporations notified in writing before 20 March 2002 - damages must be awarded or proceedings commenced by 20 September 2002 except in unstable cases.

The amendments provided in the *Civil Liability Amendment (Personal Responsibility) Act* apply to injuries before and after 20 March 2002, except for proceedings commenced on or before 6 December 2002. Also, provisions regarding self defence, recovery by criminals and mental harm apply to proceedings commenced on or after 3 September 2002.

Some amendments discussed in this paper are yet to come into force. These are:

- Section 5N: waiver of contractual duties
- Sections 22 – 26: structured settlements
- Sections 34 – 39: proportionate liability

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## CHANGES TO CIVIL LIABILITY

### Duty of Care - Sections 5B and 5C

The meaning of reasonable foreseeability has been to a large extent codified from the common law. A risk is foreseeable if the person knew of it or ought to have known of it. It also has to be not an insignificant risk and furthermore, that a reasonable person would have taken precautions to prevent that risk. The Act then provides a further list of criteria to ascertain whether a reasonable person would have taken precautions. These factors include:

- the probability that the harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions; and
- the social utility of the activity which creates the risk of harm.

This last provision will no doubt be a source of considerable interpretation by the court.

The issue of the “burden” of taking precautions is further clarified in the Act where it is confirmed that such precautions also would include the burden of taking precautions to avoid similar risks of harm to the one under consideration.

Liability is not affected by:

- the fact that a risk could have been avoided by doing something in a different way;
- the subsequent taking of action that would have avoided a risk (had the action been taken earlier). This is obviously intended to avoid the “wisdom of hindsight”.

### Causation - Sections 5D – 5E

These sections were not included in the original consultation bill and appear to be clumsily drafted. They appear to do little more than codify the common law in relation to causation and remoteness. They however use terms such as factual causation and scope of liability which appear to be entirely novel. Once again, these sections will no doubt provide considerable scope for interpretation by the court.

### Assumption of Risk – Sections 5F – 5I

No duty of care to warn another person of a risk that is obvious unless:

- the plaintiff requested information about the risk;
- there is a requirement in the written law to warn; or
- there is a risk of death or injury from professional services.

‘Obvious risk’ means:

- a risk that is obvious to a reasonable person in the injured person’s position;
- matters of common knowledge.

Risks can be obvious even though there is a low probability of occurrence. They can also be obvious even though they are not prominent, conspicuous or physically observable.

A person is presumed to be aware of an obvious risk unless they can prove that they were not aware of it. For these purposes, the person does not need to be aware of the precise risk but merely the type or kind of risk.

‘Inherent risk’ is a risk of something occurring that cannot be avoided by reasonable care and skill. There is no liability in respect of an inherent risk but it does not excuse defendants who still have a duty to warn people of them.

### Recreational Activities – Sections 5J – 5N

Recreational activity includes any sport (whether or not organised) and any pursuit or activity engaged in for enjoyment, relaxation or leisure. Accordingly, the definition is very broad and could include going to the movies. A dangerous recreational activity involves a significant risk of physical harm.

A defendant is not negligent as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff, whether or not the plaintiff was aware of the risk.

There is no duty of care owed to a person engaging in a recreational activity if that person has been warned of the risk. The warning can be oral or in writing. There are a number of qualifications:

- for incapable persons, the risk warning has to be given either to an accompanying person or a parent of the incapable person.
- the warning must be given prior to engagement in recreational activity. No requirement to establish receipt or understanding of the warning.

- the risk warning does not need to be specific – it can be a general warning of risks that include the particular risk.
- defendants have no entitlement to rely on a risk warning where there is a breach of safety standards.
- warnings can be negated by contradictory representations by or on behalf of the defendant.
- the fact of a risk warning does not, of itself, mean that the risk is not an inherent or obvious risk or that a duty of care is owed in relation to the risk.

The parties can use contractual waivers exclude, restrict or modify any liability; such terms cannot be voided or read down by the courts. Participation at one's own risk will be an effective exclusion.

The waiver amendments (Section 5N) are not yet in force. They will not operate where there is a breach of safety standards.

### Professional Negligence – Sections 5O – 5P

The standard of care for professionals has been changed to the so-called *Bolam* principle – no liability where professional acted in a manner that was widely accepted in Australia by peers' professional opinion as competent professional practice unless the court determines that this opinion is irrational. This provision will give the courts considerable scope for interpretation. However there is no definition of "profession".

- there can be one or more widely accepted peer professional opinions
- peer professional opinion does not have to be universally accepted to be considered widely accepted
- any duty to warn of risks is not affected.

### Non-Delegable Duties and Vicarious Liability - Section 5Q

Once again, this appears to be a poorly drafted re-statement of the common law. A person with a non-delegable duty is vicariously liable for the negligence of the person to whom he has delegated a certain performance or task.

### Contributory Negligence – Sections 5R - 5T

This now applies to *Compensation to Relatives Act* claims for deaths covered by the *Civil Liability Act*.

The new sections now also specifically provide that contributory negligence can be a complete (100%) defence.

### Economic loss - Sections 12 – 14

The maximum weekly rate is capped at 3 times average gross weekly earnings (currently \$2,184.90), and applied to:

- past and future loss of earnings;
- loss of earning capacity; and

➤ *Compensation to Relatives Act* financial support.

Courts must award future loss based on what a Plaintiff establishes would have been his/her “most likely circumstances but for the injury”, and give reasons. A percentage adjustment applies to the possibility of the circumstances proving true.

A 5% discount rate applies for future economic loss damages. Formerly the discount was lower (3%). The difference can be seen in the example where a 30 year old Plaintiff is awarded \$250 per week until retirement at age 65 – on the 3% tables he would be given \$284,500, while the 5% tables now allow only \$218,900.

Section 14 was amended by the *Civil Liability Amendment (Personal Responsibility) Act* to apply the 5% rule to ‘future economic loss of any kind’. Despite that change, it may still leave open the question of whether other future damages (treatment expenses, attendant care etc) may be assessed on the 3% tables.

### Gratuitous Care - Section 15

This applies to domestic, nursing and other services that aim to alleviate the consequences of injury. Section 15 regulates the damages awarded under the *Griffiths -v- Kerkemeyer* approach. The restrictions are:

- the care must arise from reasonable needs caused solely by the injury;
- threshold - no damages if the care is provided for less than 6 hours per week and for less than 6 months; and
- capped at a maximum of 40 hours per week using average weekly earnings for the period when care was provided - currently \$18.20 per hour.

### Damages for Loss of Superannuation Entitlements - Section 15A

This new section inserted by the *Personal Responsibility Act* overturns the Supreme Court decision of *Roads and Traffic Authority –ats- Cremona* in relation to the assessment of damages for loss of superannuation. It confirms the prior rule of thumb that only the percentage of earnings paid as contributions by an employer may be claimed rather than any income generated by the investment of those contributions.

### Non-Economic Loss - Sections 16 & 17

The concept of general damages assessed at large has been converted into ‘non-economic loss’ that consists of:

- pain and suffering;
- loss of amenities of life;
- loss of expectation of life; and
- disfigurement.

The system is borrowed from the now-obsolete Motor Accidents Act 1988. Each award is expressed as a percentage of a 'most extreme case'. The scale has the following features:

- *no damages for claims below 15%* - this is designed to eliminate minor claims but in practice courts reach figures of 20% quite easily for soft tissue injuries.
- *sliding scale up to 32%*. Above 15%, the 'penalty' on each percentage assessment reduces with every additional point, so that by 33% a plaintiff is really awarded 33% of the maximum. Unfortunately this produces wide differences between points. Between 27% and 32% there is a difference of \$73,000, with an average of \$14,600 between each point. As Motor Accidents Act specialists are well aware, both estimating and negotiating in this range are very difficult.
- *maximum of \$350,000*, indexed 1 October 2002 and then yearly, based on wage rate rises. The current maximum is now \$365,000. The Act is silent on whether courts should apply the scale as at the date of accident or the date of hearing, but authorities on the same point under the Motor Accidents Act make it clear that the assessment takes place at the date of hearing.
- Section 17A inserted by the *Personal Responsibility Act* also provides that the court may have regard to earlier cases (presumably under *Motor Accidents Act* 1988) when assessing non-economic loss.

### Interest - Section 18

No interest may be awarded on:

- non-economic loss (general damages); and
- gratuitous care.

The interest rate is based on 10 year benchmark bond rate published by Reserve Bank – currently 6.01%. Interest on late payment of judgments (at court-prescribed rates) still applies as normal.

### Third Party Contributions – Section 19

Section 19 makes specific arrangements for when two different damage assessment methods could apply in a claim. It has effect when a claimant is suing under another system (eg CTP) and a party covered by the *Civil Liability Act* is joined as a cross-defendant for contribution.

Courts must:

- assess the percentage liability contribution of the defendant covered by Civil Liability Act;
- assess damages as though they were all payable under the Civil Liability Act;
- order the defendant to pay that percentage of the Civil Liability Act damages figure; and
- reduce the Plaintiff's claim by the difference between what is paid by a *Civil Liability Act* defendant and what otherwise would have been payable by that defendant under a common law contribution.

#### Example:

A plaintiff sues under the *Motor Accidents Act*. The insurer joins a public liability defendant. Under CTP the verdict is \$100,000, but the court determines that *Civil Liability Act* damages are only \$90,000. There is a 50/50 apportionment of liability between the CTP and public liability insurers.

Ordinarily the Defendant and Cross-Defendant would pay \$50,000 each. But because the Civil Liability damages assessment is only \$90,000, the public liability insurer will now pay only \$45,000. The CTP insurer's own verdict is also reduced by \$5,000 to \$45,000. The claimant's final verdict is now \$90,000.

#### Punitive Damages – Section 21

Section 21 prohibits exemplary, punitive and aggravated damages for damages for negligence. The recent amendments clarified the wording.

#### Structured Settlements – Sections 22 - 26

These sections are awaiting commencement, following the recent commencement of the *Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002 (Cth)* on 19 December 2002.

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.

A court is required to notify all parties to proceedings where it intends to make an award in excess of \$100,000 in respect of future loss (not including interest). The Protective Commissioner must be notified in relevant cases. The idea is to provide the parties with an opportunity to negotiate a structured settlement.

The court may make a consent order for a structured settlement and there are obligations on legal practitioners to advise their clients of the availability of structured settlements and the desirability of obtaining independent advice in relation to structured settlements when compared to lump sum settlements.

Any offer of compromise based on a structured settlement shall be assessed by a court (in relation to costs) having regard to the cost to the defendant.

#### Mental Harm – Sections 27 - 33

No damages for pure psychological or psychiatric injury are to be awarded except in favour of:

- someone who witnessed the traumatic event
- a close member of the victim's family.

There must be a demonstrable psychiatric injury and not merely a normal emotional or cultural grief reaction. This section is lifted straight out of the *Motor Accidents Act* and, in practice, has little effect upon the award of damages for nervous shock.

There is no recovery if damages are otherwise prevented by the Act (eg, intoxication, inherent or obvious risk etc) or any other written or unwritten law.

There are now deductions for contributory negligence as set out in section 51 and Sections 5R – 5T.

Close member of the family means a parent, spouse, brother, sister or child of the victim. In respect of spouse, only the latest one (whether remarried or not) qualifies.

The provisions confirm the majority decision in the High Court in *Tame/Annetts* that a defendant has to foresee that a person of normal fortitude might suffer from a psychiatric illness if reasonable care was not taken.

The provisions also detail some of the circumstances involved in a psychiatric type claim without actually specifying the status of the circumstances referred to. For example, one of the circumstances referred to is whether or not the mental harm was suffered as a result of a sudden shock. This “sudden shock” is not mentioned anywhere else in the provisions and its status must therefore be open to some question.

The provisions also make sure that the requirement that an identifiable psychiatric illness be established, not only in cases which only concern psychiatric injury but also those where there is a consequential mental harm resulting from a physical injury.

### Proportionate Liability – Sections 34 - 39

The concept of joint and several liability is to be modified to proportionate liability, only in respect of “apportionable claims”. These amendments are yet to come into force. When they do commence, they will not apply to personal injury damages. They will apply to:

- claims for economic loss or property damage where there are two or more concurrent wrongdoers.
- damages under the *Fair Trading Act 1987* where there are two or more concurrent wrongdoers.

For an apportionable claim, the court must apportion responsibility for the damage or loss to each wrongdoer and a defendant is responsible for that part of the verdict only, regardless whether the defendant has gone into liquidation, is insolvent or has died. This applies whether or not concurrent wrongdoers are parties to the proceedings. This means that defendants who are sued will not bear the responsibility of those who are not.

A defendant cannot be required to provide contribution to or indemnify another concurrent wrongdoer.

A plaintiff may bring a subsequent action against a concurrent wrongdoer for an apportionable part of any damage or loss but cannot recover more than that actual damage or loss sustained.

The court may give leave for any one or more persons to be joined as defendants.

A person can still be held vicariously liable or severally liable with another partner for a proportion of an apportionable claim.

### Liability of Public and Other Authorities – Sections 40 - 46

This section applies to the Crown, Government departments, public health organisations within the meaning of the *Health Services Act 1997*, local councils, any public or local authority constituted by an act, persons or bodies prescribed by the regulations as an authority and any persons or bodies in respect of the exercise of public or other functions of a class prescribed by the regulations.

Matters relevant in determining whether a public or other authority has a duty of care, or has breached a duty of care, include:

- limited financial resources
- allocation of financial resources cannot be challenged
- the authority's functions are to be determined by reference to the broad range of its activities
- the authority may rely on compliance with general procedures and applicable standards.

Where a breach of statutory duty is alleged, the act or omission must be so unreasonable that no authority could properly consider the act or omission to be a reasonable exercise of its functions.

An authority is not liable for failing to exercise a regulatory function unless it could be required to exercise that function by proceedings instituted by the claimant.

An additional section has been inserted to provide that roads authorities are not liable for failure to carry out roadworks.

### Intoxication – Sections 47 - 50

Note the definition of intoxication – “a person being under the influence of alcohol or a drug” – no limit prescribed.

Provisions relevant to duty and standard of care include:

- the fact of a person's intoxication is not relevant to the existence of a duty of care;
- a person is not owed a duty of care merely by reason of intoxication; and
- intoxication does not, of itself, increase or otherwise affect the standard for care owed to a person.

Provisions relevant to recovery where there is evidence of intoxication do not apply to motor accidents. Otherwise:

- the injured person's (or deceased's) capacity to exercise due care and skill must have been impaired by reason of the intoxication.
- the court is not to award damages in respect of liability unless satisfied that the accident is likely to have occurred even if the person had not been intoxicated. In practical measures, this will be very difficult to establish.
- if so satisfied, there is a presumption of contributory negligence unless the court is satisfied that the intoxication did not contribute, in any way, to the accident.
- where there is a presumption of contributory negligence, it must be 25% or greater.

- the section does not apply where the intoxication was not self-induced.

### Self-Defence and Recovery by Criminals – Sections 51 - 54

Self-defence must be in response to unlawful conduct – if so, there is no civil liability. Conduct is self-defence only if the person believes the conduct is necessary:

- in defence of himself/herself or another person;
- to prevent or terminate unlawful deprivation of liberty;
- to protect property; or
- to prevent criminal trespass and the conduct is a reasonable response in the circumstances as perceived.

In death claims, self-defence is not available in the protection of property or criminal trespass.

Even where conduct is not a reasonable response, a court can only award damages if satisfied that circumstances of the case are exceptional and a failure to award damages would be harsh and unjust. If so, damages can only be awarded in accordance with Part 2 and no damages may be awarded for non-economic loss.

The court is not to award damages if the person killed or injured was, at the time of the incident, committing a serious offence (punishable by at least 6 months imprisonment) and that conduct contributed materially to the risk of death/injury/damage. This does not apply where the defendant's conduct also constitutes an offence (whether or not a serious offence).

### Good Samaritans – Sections 55 - 58

This section is designed to exclude Good Samaritans from civil liability when coming to the assistance of a person who is apparently injured or at risk of being injured. The act of assistance must be made in good faith and without expectation of payment. Vicarious liability for the acts or omissions of good Samaritans is not affected.

Protection from civil liability is also excluded if the good Samaritan:

- was under the influence of alcohol/drugs
- caused the original injury or risk to the victim
- failed to exercise due care and skill
- impersonated a health care or emergency services worker, or a police officer.

### Volunteers – Sections 59 - 66

Volunteers are persons who conduct community work on a voluntary basis. ‘Community work’ is defined as work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose. It includes work declared by the regulations to be community work.

Volunteers are protected from personal civil liability when undertaking community work:

- organised by a community organisation; or
- as an officeholder of a community organisation.

Exclusions are:

- criminal acts;
- intoxication;
- actions outside scope of the activities or contrary to instructions;
- activities where statutory insurance is necessary; and
- motor accidents.

### Apologies – Sections 67 - 69

An apology means an expression of sympathy or regret or of a general sense of benevolence or compassion in connection with any matter.

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 does not constitute an express or implied admission of fault or liability by the person. It is not relevant to the determination of fault or liability in connection with that matter.

Evidence of an apology is not admissible in any civil proceedings as evidence of any fault or liability of that person.

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### COSTS

The *Civil Liability Act* inserts a new Division 5B of the *Legal Profession Act*. It applies to the same kind of claims as *Civil Liability Act*, but it also extends to actions for personal injury damages under:

- Industrial Relations Act
- Anti-Discrimination Act
- Sporting Injuries Insurance Act
- superannuation, life and personal insurance claims.

### Party-party costs

- where amount recovered is \$100,000 or under, a plaintiff can recover up to \$10,000 or 20% of that amount, whichever is greater
- successful defendants can recover up to \$10,000 or 20% of the amount sought to be proved by the plaintiff at the hearing, whichever is greater
- applies to professional costs and barristers' fees - other recoverable disbursements are excluded.

### Exceptions to party-party costs caps

Courts can order additional costs in favour of any party subjected to action from the other that was:

- unnecessary for advancement of their case, or
- unreasonably delayed or complicated the matter.

Offers of compromise can still result in an award of indemnity costs. Regulations may force solicitors and barristers to disclose information to their clients regarding offers of compromise:

- Courts may force lawyers to indemnify their clients who incur increased costs liability as a result of non-compliance.

### Solicitor-client costs

The basic position is that party-party costs also apply as lawyer-client costs between solicitor, barrister and client. Where a capped fee applies, counsel and solicitors must either agree an apportionment of the value or apply for a ruling from the court hearing the proceedings.

Costs agreements between clients, solicitors and barristers can 'contract out' of the Division, provided that:

- costs agreements comply with the *Legal Profession Act*; and
- solicitors and barristers comply with all regulations.

### How do new costs laws apply?

The new law applies to all legal services provided from 7 May 2002 onwards.

Claims where services have been provided both before and after 7 May 2002 trigger 'straddling' provisions. They work as follows:

- the proportion of work performed after 7 May 2002 is measured as a percentage of the whole matter; then
- the capped maximum for costs is reduced to the same percentage as the work done after 7 May 2002.

## LAWYERS' DUTIES

Lawyers are not to provide legal services in civil damages claims unless there are “reasonable prospects of success” based on provable facts and a reasonably arguable view of the law.

The duties apply to existing and new matters from 20 March 2002, but consequences for non-compliance apply only from the date of assent - 18 June 2002. It applies to **all** civil damages claims - not just Civil Liability Act matters.

Points worth noting:

- *provable* requires material to provide the basis for a belief.
- *success* is defined as prospects of recovering damages (Plaintiff) or prospects of defeating or reducing the claim (Defendant). The Act doesn't specify whether the prospects can be analysed allegation by allegation, or just for the proceedings overall.
- instructions from a client *cannot* override this obligation
- there is an exception for ‘preliminary legal work’ undertaken to investigate the prospects of success.

Consequences for failure to comply are:

- findings of unsatisfactory professional conduct
- findings of professional misconduct
- personal costs orders on lawyers to either pay costs or indemnify a client who is liable to pay costs.

Where a court finds that the evidence before it does not provide a reasonable basis for belief of prospects of success, a presumption against the lawyer is created. The onus is then on the lawyer to prove a reasonable basis for belief. Solicitor-client confidentiality can be waived by consent or by the court to determine this.

### Court pleadings

Statements of claim and defences filed in proceedings from 18 June 2002 must be certified by the lawyer as having reasonable prospects of success. Courts are not permitted to accept these documents for filing without that certification.

The District Court version of the certification reads as follows:

“I, \_\_\_\_\_, being a solicitor (or a barrister) certify that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim (or the defence) in these proceedings has reasonable prospects of success.”

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