

Western Australia

Civil Liability Amendment Act 2003

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No. 58 of 2003

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Civil Liability Amendment Act 2003

CONTENTS

1.	Short title	1
2.	Commencement	2
3.	The Act amended	2
4.	Long title replaced	2
5.	Section 3 amended	2
6.	Section 3A inserted	3
	3A. Damages excluded from Act	3
7.	Section 4A inserted	5
	4A. Limited contracting out	5
8.	Parts 1A, 1B, 1C, 1D and 1E inserted	5
	Part 1A — Liability for harm caused by the fault of a person	
	Division 1 — Preliminary	
	5A. Application of Part	5
	Division 2 — Duty of care	
	5B. General principles	6
	Division 3 — Causation	
	5C. General principles	7
	5D. Onus of proof	8
	Division 4 — Recreational activities	
	5E. Interpretation	8
	5F. Meaning of obvious risk	9
	5G. Application of Division	9
	5H. No liability for harm from obvious risks of dangerous recreational activities	10
	5I. No liability for recreational activity where risk warning	10
	5J. Waiver of contractual duty of care for recreational activities	13

	Division 5 — Contributory negligence	
	5K. Standard of contributory negligence	14
	5L. Presumption if person who suffers harm is intoxicated	15
	Division 6 — Assumption of risk	
	5M. Meaning of terms used in this Division	15
	5N. Injured person presumed to be aware of obvious risk	15
	5O. No duty to warn of obvious risk	16
	5P. No liability for harm from inherent risk	16
	Part 1B — Mental harm	
	5Q. Interpretation	17
	5R. Application of Part	17
	5S. Mental harm: duty of care	18
	5T. Liability for pecuniary loss for consequential mental harm	19
	Part 1C — Liability relating to public function	
	5U. Interpretation	19
	5V. Application of Part	20
	5W. Principles concerning resources, responsibilities etc. of a public body or officer	21
	5X. Policy defence	21
	5Y. Proceedings against public body or officer based on breach of a statutory duty	22
	5Z. Special protection for road authorities	22
	5AA. Exercise of function or decision to exercise does not create duty	23
	Part 1D — Good samaritans	
	5AB. Interpretation	23
	5AC. Application of this Part	24
	5AD. Protection of good samaritans	25
	5AE. Exclusion from protection	25
	Part 1E — Apologies	
	5AF. Interpretation	26
	5AG. Application of this Part	26
	5AH. Effect of apology on liability	27
9.	Part 1F inserted	27
	Part 1F — Proportionate liability	
	5AI. Interpretation	27
	5AJ. Application of Part	28
	5AK. Proportionate liability for apportionable claims	28
	5AL. Contribution not recoverable from defendant	30

	5AM.	Subsequent actions	30	
	5AN.	Joining non-party concurrent wrongdoers in the action	31	
	5AO.	Part does not prevent other liability or operation of other Act	31	
10.		Part 2 heading replaced		31
		Part 2 — Awards of personal injury damages		
11.		Section 6 amended		32
12.		Part 2 Division 2 heading replaced		32
		Division 2 — Damages for non-pecuniary loss (general damages)		
13.		Section 10A inserted		32
	10A.	Tariffs for damages for non-pecuniary loss	32	
14.		<i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947</i> amended		33

Western Australia

Civil Liability Amendment Act 2003

No. 58 of 2003

An Act to amend the *Civil Liability Act 2002* and to make a consequential amendment to the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*.

[Assented to 30 October 2003]

The Parliament of Western Australia enacts as follows:

1. Short title

This Act may be cited as the *Civil Liability Amendment Act 2003*.

s. 2

2. Commencement

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

3. The Act amended

The amendments in this Act are to the *Civil Liability Act 2002**, unless otherwise indicated.

[* *Act No. 35 of 2002.*]

4. Long title replaced

The long title is repealed and the following long title is inserted instead —

“

An Act relating to various aspects of civil liability, to restrict advertising legal services relating to personal injury, to restrict touting, and for related purposes.

”.

5. Section 3 amended

- (1) Section 3 is amended by inserting the following definitions before the definition of “personal injury damages” —

“

“harm” means harm of any kind, including the following —

- (a) personal injury;
- (b) damage to property;
- (c) economic loss;

“personal injury” includes —

- (a) death;

- (b) pre-natal injury;
- (c) impairment of a person’s physical or mental condition; and
- (d) disease;

”.

- (2) Section 3 is amended in the definition of “personal injury damages” by deleting “the death of, or injury to, a person” and inserting instead —

“ personal injury to a person ”.

6. Section 3A inserted

After section 3 the following section is inserted —

“

3A. Damages excluded from Act

- (1) The provisions of this Act specified in the third column of an item in the Table to this subsection do not apply to damages of a class specified in the second column of that item or to claims for, or awards of, such damages.

Table

Item	Damages	Provisions that do not apply
1.	<p>Damages relating to personal injury caused by —</p> <ul style="list-style-type: none"> (a) an unlawful intentional act that is done with an intention to cause personal injury to a person, whether or not a particular person; or (b) an intentional act the doing of which is a sexual offence as defined in the <i>Evidence Act 1906</i> section 36A or sexual conduct that is otherwise unlawful. 	<p>Parts 1A, 1C, 1D, 1E and 2 (other than section 10A).</p>

Item	Damages	Provisions that do not apply
2.	Damages to which the <i>Motor Vehicle (Third Party Insurance) Act 1943</i> applies.	Parts 1C, 1E and 2 (other than section 10A and Division 4).
3.	Damages to which the <i>Workers' Compensation and Rehabilitation Act 1981</i> Part IV Division 2 applies and the class of damages referred to in section 93B(3a) of that Act.	Parts 1A, 1B, 1C, 1D, 1E and 2 (other than section 10A and Division 4).
4.	Damages relating to personal injury that resulted from smoking or other use of tobacco products.	Parts 1A (other than sections 5A, 5B, 5C and 5D), 1B, 1D, 1E and 2 (other than section 10A and Division 4).
5.	Damages under the <i>Civil Aviation (Carriers' Liability) Act 1961</i> (including the applied provisions as defined in that Act).	Parts 1A, 1B, 1C, 1D, 1E, 1F and 2.
6.	Damages relating to personal injury that resulted from the inhalation of asbestos.	Parts 1A (other than sections 5A, 5B, 5C and 5D), 1B, 1D, 1E and 2 (other than section 10A and Division 4).

- (2) Regulations may amend the Table to subsection (1) by —
- (a) adding an item comprising —
 - (i) in the second column — a class of damages; and

(ii) in the third column — provisions of this Act;

or

(b) adding a provision of this Act to the third column of an item.

”.

7. Section 4A inserted

After section 4 the following section is inserted —

“

4A. Limited contracting out

- (1) A written agreement signed by the parties to it may contain an express provision by which a provision of Part 1A, 1B, 1C, 1D, 1E or 1F is excluded, modified or restricted and this Act does not limit or otherwise affect the operation of that express provision.
- (2) Subsection (1) applies to any provision of this Act referred to in that subsection even if the provision applies to liability in contract.

”.

8. Parts 1A, 1B, 1C, 1D and 1E inserted

After section 5 the following Parts are inserted —

“

Part 1A — Liability for harm caused by the fault of a person

Division 1 — Preliminary

5A. Application of Part

- (1) Subject to sections 3A and 4A, this Part applies to any claim for damages for harm caused by the fault of a person unless this section states otherwise.

- (2) This Part extends to a claim for damages for harm caused by the fault of a person even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) This Part does not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after the commencement day.
- (4) If in a claim for damages —
 - (a) it cannot be ascertained whether or not the incident out of which personal injury arises happened on or after the commencement day; and
 - (b) the symptoms of the injury first appeared on or after the commencement day,the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.
- (5) In this section —

“**commencement day**” means the day on which the *Civil Liability Amendment Act 2003* section 8 comes into operation.

Division 2 — Duty of care

5B. General principles

- (1) A person is not liable for harm caused by that person’s fault 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);
 - (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.

Division 3 — Causation

5C. General principles

- (1) A determination that the fault of a person (the **“tortfeasor”**) caused particular harm comprises the following elements —
- (a) that the fault was a necessary condition of the occurrence of the harm (**“factual causation”**); and
 - (b) that it is appropriate for the scope of the tortfeasor’s liability to extend to the harm so caused (**“scope of liability”**).
- (2) In determining in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) —
- (a) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor; and

- (b) whether and why the harm should be left to lie where it fell.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **“injured person”**) would have done if the tortfeasor had not been at fault —
 - (a) subject to paragraph (b), the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault; and
 - (b) evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor.

5D. Onus of proof

In determining liability for damages for harm caused by the fault of a person, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4 — Recreational activities

5E. Interpretation

In this Division —

“dangerous recreational activity” means a recreational activity that involves a significant risk of harm;

“inherent risk” means a risk of something occurring that cannot be avoided by the exercise of reasonable skill and care;

“obvious risk” has the meaning given by section 5F;

“recreational activity” includes —

- (a) any sport (whether or not the sport is an organised activity);
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- (c) any pursuit or activity engaged in for enjoyment, relaxation or leisure 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.

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. Application of Division

- (1) This Division applies only in respect of liability for harm resulting from a recreational activity.
- (2) This Division does not limit the operation of Division 6 in respect of a recreational activity.

5H. No liability for harm from obvious risks of dangerous recreational activities

- (1) A person (the “**defendant**”) is not liable for harm caused by the defendant’s fault suffered by another person (the “**plaintiff**”) while the plaintiff engaged in a dangerous recreational activity if the harm is the result of the occurrence of something that is an obvious risk of that activity.
- (2) This section applies whether or not the plaintiff was aware of the risk.
- (3) 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.
- (4) Subsection (3) 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 recreational activity where risk warning

- (1) Subject to this section, 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 a child suffers harm, the defendant may rely on a risk warning to a parent of the child if the parent is not an incompetent person —
 - (a) whether or not the child was accompanied by the parent; and

- (b) whether or not the child was under the control of the parent.
- (3) If a child suffers harm, the defendant may rely on a risk warning to another person who is not a parent of the child if —
 - (a) the other person is not an incompetent person; and
 - (b) either —
 - (i) the child was accompanied by that other person; or
 - (ii) the child was under the control of that other person.
- (4) For the purpose of subsections (1), (2) and (3), 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.
- (5) The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (6) A risk warning can be given orally or in writing (including by means of a sign or otherwise).
- (7) 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).
- (8) 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.

- (9) 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 written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety.
- (10) 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.
- (11) 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.
- (12) 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 an act done or omission made with reckless disregard, with or without consciousness, for the consequences of the act or omission.
- (13) A defendant is not entitled to rely on a risk warning to an incompetent person.
- (14) 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 risk 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 that activity.
- (15) 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.

- (16) In this section —
- “**child**” means a person who has reached 16 years but is under 18 years of age;
- “**incompetent person**” means a person who is under 18 years of age or who, because of a physical or mental disability, lacks the capacity to understand the risk warning.

5J. Waiver of contractual duty of care for recreational activities

- (1) Despite any written law or other law of the State, a term of a contract for the supply of recreational 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) No written law 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 recreational services that is to the effect that a person to whom recreational 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) 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.

- (5) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety.
- (6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from an act done or omission made with reckless disregard, with or without consciousness, for the consequences of the act or omission.
- (7) In this section —
“**recreational services**” means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of a recreational activity.

Division 5 — Contributory negligence

5K. Standard of contributory negligence

- (1) The principles that are applicable in determining whether a person is liable for harm caused by the fault of the person 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.

5L. Presumption if person who suffers harm is intoxicated

- (1) This section applies when it is established that the person whose harm is the subject of proceedings for the recovery of damages for that harm was intoxicated at the time of the act or omission that caused the harm.
- (2) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.
- (3) If this section applies, it is to be presumed that the person was contributorily negligent unless the plaintiff establishes, on the balance of probabilities, that the person's intoxication did not contribute in any way to the cause of the harm.
- (4) In this section —
“intoxicated” means affected by alcohol or a drug or other substance capable of intoxicating a person to such an extent that the person's capacity to exercise reasonable care and skill is impaired.

Division 6 — Assumption of risk

5M. Meaning of terms used in this Division

In this Division —

“obvious risk” has the meaning given by section 5E.

5N. Injured person presumed to be aware of obvious risk

- (1) In determining liability for damages for harm caused by the fault of a person, the 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 purpose 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.

50. No 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;
 - (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 harm 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.

5P. No liability for harm from inherent risk

- (1) A person (the “**defendant**”) is not liable for harm caused by the fault of that person suffered by another person if the harm is the result of the occurrence of something that cannot be avoided by the exercise of reasonable skill and care by the defendant.
- (2) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Part 1B — Mental harm

5Q. Interpretation

In this Part —

“consequential mental harm” means mental harm that is a consequence of a personal injury of any kind;

“mental harm” means impairment of a person’s mental condition;

“pure mental harm” means mental harm other than consequential mental harm.

5R. Application of Part

- (1) Subject to sections 3A and 4A, this Part applies to any claim for personal injury damages for mental harm unless this section states otherwise.
- (2) This Part extends to a claim for personal injury damages even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) This Part does not apply unless the personal injury giving rise to the claim for personal injury damages arises out of an incident happening on or after the commencement day.
- (4) If —
 - (a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
 - (b) the symptoms of the injury first appeared on or after the commencement day,

the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

- (5) In this section —
“**commencement day**” means the day on which the *Civil Liability Amendment Act 2003* section 8 comes into operation.

5S. 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 purpose 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 purpose 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.

5T. Liability for pecuniary loss for consequential mental harm

A court cannot make an award of personal injury damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness.

Part 1C — Liability relating to public function

5U. Interpretation

In this Part —

“**policy decision**” means a decision based substantially on financial, economic, political or social factors or constraints;

“**public body or officer**” means —

- (a) the Crown (within the meaning of the *Crown Suits Act 1947*);
- (b) a department of the Public Service established under the *Public Sector Management Act 1994* section 35;
- (c) an entity specified in column 2 of Schedule 1 to the *Public Sector Management Act 1994*;
- (d) an organisation specified in column 2 of Schedule 2 to the *Public Sector Management Act 1994*;
- (e) a non-SES organisation within the meaning of that term in the *Public Sector Management Act 1994* section 3(1);
- (f) a local government or a regional local government;

- (g) a body that is established or continued for a public purpose under a written law;
- (h) a body or officer prescribed (or of a class prescribed) by the regulations as a public body or officer to which this Part applies (in respect of all or specified functions); or
- (i) 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.

5V. Application of Part

- (1) Subject to sections 3A and 4A, this Part applies to any claim for damages for harm caused by the fault of a person unless this section states otherwise.
- (2) This Part extends to a claim for harm caused by the fault of a person even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) This Part does not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after the commencement day.
- (4) If in a claim for damages —
 - (a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
 - (b) the symptoms of the injury first appeared on or after the commencement day,

the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

- (5) In this section —
“**commencement day**” means the day on which
the *Civil Liability Amendment Act 2003*
section 8 comes into operation.

**5W. Principles concerning resources, responsibilities etc.
of a public body or officer**

The following principles apply in determining whether
a public body or officer has a duty of care or has
breached a duty of care in proceedings in relation to a
claim to which this Part applies —

- (a) the functions required to be exercised by the
public body or officer are limited by the
financial and other resources that are
reasonably available to the public body or
officer for the purpose of exercising those
functions;
- (b) the general allocation of those resources by the
public body or officer is not open to challenge;
- (c) the functions required to be exercised by the
public body or officer 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 public body or officer 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.

5X. Policy defence

In a claim for damages for harm caused by the fault of
a public body or officer arising out of fault in the
performance or non-performance of a public function,

a policy decision cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant's position could have made it.

5Y. Proceedings against public body or officer based on breach of a 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 body or officer in connection with the exercise of or a failure to exercise a public function of the body or officer.
- (2) For the purpose of proceedings to which this section applies, the public body or officer cannot be liable for damages for harm caused by fault in the exercise of, or a failure to exercise, the statutory duty unless the provisions and policy of the enactment in which the duty is created are compatible with the existence of that liability.

5Z. Special protection for road authorities

- (1) 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;
 - “**road**” has the meaning given to that term in the *Main Roads Act 1930* section 6;
 - “**roads authority**”, in relation to a road, means a public body or officer whose functions include carrying out road work on that road.
- (2) A roads authority is not liable in proceedings 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 failure the authority had actual knowledge of the particular risk that caused the harm.

- (3) This section does not operate —
- (a) to create a duty of care in respect of a risk merely because a road authority has actual knowledge of the risk; or
 - (b) to affect any standard of care that would otherwise be applicable in respect of the risk.

5AA. Exercise of function or decision to exercise does not create duty

In proceedings to which this Part applies, the fact that a public body or officer exercises or decides to exercise a function does not of itself indicate that the body or officer is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Part 1D — Good samaritans

5AB. Interpretation

In this Part —

“emergency assistance” means —

- (a) emergency medical assistance; or
- (b) any other form of assistance to a person whose life or safety is endangered in a situation of emergency;

“good samaritan” means a natural person who, acting without expectation of payment or other consideration, comes to the aid of a person who is apparently in need of emergency assistance;

“medical qualifications” means —

- (a) registered under the *Medical Act 1894*;
- (b) licensed, registered or authorised under a written law to practise in some field of health care; or
- (c) qualifications as an ambulance officer or other paramedic;

“medically qualified good samaritan” means a natural person with medical qualifications who, acting without expectation of payment or other consideration, gives advice by any means of communicating at a distance, including by telephone, fax, email and radio, about the treatment of a person who is apparently in need of emergency assistance.

5AC. Application of this Part

- (1) Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.
- (2) This Part extends to a claim even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) This Part does not apply unless the civil liability giving rise to the claim arises out of an incident happening on or after the commencement day.
- (4) If in a claim for damages —
 - (a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
 - (b) the symptoms of the injury first appeared on or after the commencement day,

the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

- (5) This Part does not limit the protection from liability given by another written law.
- (6) In this section —
“**commencement day**” means the day on which the *Civil Liability Amendment Act 2003* section 8 comes into operation.

5AD. Protection of good samaritans

- (1) A good samaritan does not incur any personal civil liability in respect of an act or omission done or made by the good samaritan at the scene of an emergency in good faith and without recklessness in assisting a person in apparent need of emergency assistance.
- (2) A medically qualified good samaritan does not incur any personal civil liability for advice given in good faith and without recklessness about the assistance to be given to a person in apparent need of emergency assistance.
- (3) This section does not affect the vicarious liability of any person for the acts or omissions or advice of the good samaritan or medically qualified good samaritan.

5AE. Exclusion from protection

The protection from personal civil liability conferred by this Part does not apply if the ability of the good samaritan or medically qualified good samaritan to exercise reasonable care and skill, at the relevant time, was significantly impaired by reason of the good samaritan or medically qualified good samaritan being intoxicated by alcohol or a drug or other substance

capable of intoxicating a person and the intoxication was self-induced.

Part 1E — Apologies

5AF. Interpretation

In this Part —

“**apology**” means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.

5AG. Application of this Part

- (1) Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.
- (2) This Part extends to a claim even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) This Part does not apply unless the civil liability giving rise to the claim arises out of an incident happening on or after the commencement day.
- (4) If in a claim for damages —
 - (a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
 - (b) the symptoms of the injury first appeared on or after the commencement day,

the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

- (5) In this section —
“**commencement day**” means the day on which
the *Civil Liability Amendment Act 2003*
section 8 comes into operation.

5AH. Effect of apology on liability

- (1) An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages —
- (a) does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and
 - (b) is not relevant to the determination of fault or liability in connection with that incident.
- (2) Evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

”.

9. Part 1F inserted

Before Part 2 the following Part is inserted —

“

Part 1F — Proportionate liability

5AI. Interpretation

- (1) In this Part —
“**apportionable claim**” means —
- (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 2 or more concurrent

wrongdoers to exercise reasonable care (but not including any claim arising out of personal injury); or

- (b) a claim for economic loss or damage to property caused by conduct that was done in contravention of the *Fair Trading Act 1987* section 10 arising from the acts or omissions of 2 or more concurrent wrongdoers;

“concurrent wrongdoer”, in relation to a claim, means a person who is one of 2 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.

5AJ. Application of Part

- (1) For the purpose of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.
- (2) This Part does not apply —
 - (a) to a claim for damages of a class that is excluded from the operation of this Part by section 3A; or
 - (b) to the extent that its operation is excluded, modified or restricted in accordance with section 4A.
- (3) This Part applies only to causes of action that accrue after the commencement of the *Civil Liability Amendment Act 2003* section 9.

5AK. 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 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 is to 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.

5AL. Contribution not recoverable from defendant

- (1) 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 or contribution recovered from another concurrent wrongdoer in respect of an 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.
- (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.

5AM. 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) In any proceedings in respect of any action referred to in subsection (1) 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.

5AN. Joining non-party concurrent wrongdoers 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.

5AO. Part does not prevent other liability or operation of other Act

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;
- (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 Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

”.

10. Part 2 heading replaced

The Part 2 heading is deleted and the following heading is inserted instead —

“

Part 2 — Awards of personal injury damages

”.

11. Section 6 amended

- (1) Section 6(1) is amended by deleting “This” and inserting instead —
“ Subject to section 3A, this ”.
- (2) Section 6(3) is repealed.

12. Part 2 Division 2 heading replaced

The Part 2 Division 2 heading is deleted and the following heading is inserted instead —

“

**Division 2 — Damages for non-pecuniary loss
(general damages)**

”.

13. Section 10A inserted

After section 10 the following section is inserted in Division 2 —

“

10A. Tariffs for damages for non-pecuniary loss

- (1) In determining damages for non-pecuniary loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings.
- (2) For that purpose, the parties to the proceedings or their counsel may bring the court’s attention to awards of damages for non-pecuniary loss in those earlier decisions.
- (3) This section does not alter the rules for the determination of other damages.

”.

14. *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* amended

- (1) The amendments in this section are to the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947**.

[* *Reprinted as at 2 August 2002.*]

- (2) Section 7(1) is amended by deleting “Where” and inserting instead —

“

Subject to Part 1F of the *Civil Liability Act 2002*,
where

”.

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