



Western Australia

## **Civil Liability Act 2002**

Compare between:

[20 Jun 2012, 03-h0-02] and [01 Jul 2012, 03-i0-02]



Western Australia

## **Civil Liability Act 2002**

**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.**

*[Long title inserted by No. 58 of 2003 s. 4.]*

## Part 1 — Preliminary

### 1. Short title

This Act may be cited as the *Civil Liability Act 2002*<sup>1</sup>.

### 2. Commencement

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

### 3. Terms used

In this Act, unless the contrary intention appears —

***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;

***personal injury damages*** means damages that relate to personal injury to a person caused by the fault of another person, but does not include a sum payable under a superannuation scheme or any life or other insurance policy.

*[Section 3 amended by No. 58 of 2003 s. 5.]*

**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**

<b>Item</b>	<b>Damages</b>	<b>Provisions that do not apply</b>
1.	Damages relating to personal injury caused by — (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.	Parts 1A, 1C, 1D, 1E and 2 (other than section 10A).
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 Injury Management 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).

## s. 4

Item	Damages	Provisions that do not apply
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.

[Section 3A inserted by No. 58 of 2003 s. 6; amended by No. 42 of 2004 s. 174.]

#### 4. Varying amounts to reflect award rate changes

- (1) This section applies if a provision of this Act requires the amount that is relevant for a particular financial year (in this section called *the relevant financial year*) to be obtained by varying the corresponding amount for the preceding financial year (in this section called *the preceding financial year*) according to this section.
- (2) The amount for the relevant financial year is obtained —
- (a) by varying the amount for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Labour Price Index (formerly

known as the Wage Cost Index), ordinary time hourly rates of pay (excluding bonuses) for Western Australia (in this subsection called the *LPI*) varied between the last December quarter before the preceding financial year commenced and the last December quarter before the relevant financial year commenced; or

- (b) if the calculation under paragraph (a) cannot be performed for a financial year because the LPI for a relevant quarter was not published, by varying the amount for the preceding financial year in accordance with the regulations,

and, if necessary, rounding the resulting amount off under subsection (3).

- (3) If the amount resulting under subsection (2)(a) or (b) is not a multiple of \$500 it is to be rounded off to the nearest multiple of \$500 (with an amount that is \$250 more than a multiple of \$500 being rounded off to the next highest multiple of \$500).

*[Section 4 amended by No. 8 of 2009 s. 33.]*

**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.

*[Section 4A inserted by No. 58 of 2003 s. 7.]*

**s. 5**

---

**5. Act binds Crown**

This Act binds the Crown in right of the State and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.



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

*[Heading inserted by No. 58 of 2003 s. 8.]*

### **Division 1 — Preliminary**

*[Heading inserted by No. 58 of 2003 s. 8.]*

#### **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) Divisions 2, 3, 4, 5 and 6 do not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after 1 December 2003 (being the day on which the *Civil Liability Amendment Act 2003* section 8, which inserted those Divisions, came into operation).
- (3a) Division 7 does not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after the day on which the *Civil Liability Amendment Act 2004* section 5 comes into operation<sup>1</sup>.
- (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.

**Civil Liability Act 2002**

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

**Division 2** Duty of care

**s. 5B**

---

(5) In subsection (4) —

**commencement day** means the day referred to in subsection (3) or (3a), as is relevant to the case.

*[Section 5A inserted by No. 58 of 2003 s. 8; amended by No. 43 of 2004 s. 4.]*

**Division 2 — Duty of care**

*[Heading inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5B inserted by No. 58 of 2003 s. 8.]*

### **Division 3 — Causation**

*[Heading inserted by No. 58 of 2003 s. 8.]*

#### **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

**Civil Liability Act 2002**

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

**Division 4** Recreational activities

**s. 5D**

---

responsibility for the harm should, or should not, be imposed on the tortfeasor.

*[Section 5C inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5D inserted by No. 58 of 2003 s. 8.]*

**Division 4 — Recreational activities**

*[Heading inserted by No. 58 of 2003 s. 8.]*

**5E. Terms used**

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.

*[Section 5E inserted by No. 58 of 2003 s. 8.]*

**5F. Term used: 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.

*[Section 5F inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5G inserted by No. 58 of 2003 s. 8.]*

**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.

**Civil Liability Act 2002**

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

**Division 4** Recreational activities

**s. 5I**

---

- (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.

*[Section 5H inserted by No. 58 of 2003 s. 8.]*

**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

**Civil Liability Act 2002**

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

**Division 4** Recreational activities

**s. 5J**

---

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.

*[Section 5I inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5J inserted by No. 58 of 2003 s. 8.]*

### **Division 5 — Contributory negligence**

*[Heading inserted by No. 58 of 2003 s. 8.]*

#### **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

**Civil Liability Act 2002**

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

**Division 6** Assumption of risk

**s. 5L**

---

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.

*[Section 5K inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5L inserted by No. 58 of 2003 s. 8.]*

**Division 6 — Assumption of risk**

*[Heading inserted by No. 58 of 2003 s. 8.]*

**5M. Term used: obvious risk**

In this Division —

***obvious risk*** has the meaning given by section 5E.

*[Section 5M inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5N inserted by No. 58 of 2003 s. 8.]*

**5O. 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.

**Civil Liability Act 2002**

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

**Division 7** Professional negligence

**s. 5P**

---

- (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.

*[Section 5O inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5P inserted by No. 58 of 2003 s. 8.]*

**Division 7 — Professional negligence**

*[Heading inserted by No. 43 of 2004 s. 5.]*

**5PA. Term used: health professional**

In this Division —

*health professional* means —

- (a) a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in any of the following health professions —

(i) [Aboriginal and Torres Strait Islander health practice](#);

(ii) [Chinese medicine](#);

(iii) [chiropractic](#);

(~~iv~~) [dental](#);

(~~iv~~) [medical](#);

~~(iv)~~ [\(vi\) medical radiation practice](#);

[\(vii\) nursing and midwifery](#);

[\(viii\) occupational therapy](#);

- ~~(ix)~~ optometry;
- ~~(vix)~~ osteopathy;
- ~~(viiixi)~~ pharmacy;
- ~~(viiiixii)~~ physiotherapy;
- ~~(ixxiii)~~ podiatry;
- ~~(xxiv)~~ psychology;

or

~~(b) any of the following —~~

~~(i) a medical radiation technologist as defined in the *Medical Radiation Technologists Act 2006* section 3;~~

~~(ii) an occupational therapist as defined in the *Occupational Therapists Act 2005* section 3;~~

~~(iii)~~ (b) any other person who practises a discipline or profession in the health area that involves the application of a body of learning.

*[Section 5PA inserted by No. 43 of 2004 s. 5; amended by No. 28 of 2005 Sch. 1 cl. 1; No. 29 of 2005 Sch. 1 cl. 1; No. 30 of 2005 Sch. 1 cl. 1; No. 31 of 2005 Sch. 1 cl. 1; No. 32 of 2005 Sch. 1 cl. 1; No. 33 of 2005 Sch. 1 cl. 1; No. 42 of 2005 Sch. 1 cl. 1; No. 21 of 2006 Sch. 1 cl. 1; No. 50 of 2006 Sch. 3 cl. 2; No. 22 of 2008 Sch. 3 cl. 8; No. 25 of 2008 s. 16; No. 35 of 2010 s. 41(1).]*

### **5PB. Standard of care for health professionals**

- (1) An act or omission of a health professional is not a negligent act or omission if it is in accordance with a practice that, at the time of the act or omission, is widely accepted by the health professional's peers as competent professional practice.
- (2) Subsection (1) does not apply to an act or omission of a health professional in relation to informing a person of a risk of injury or death associated with —

**Civil Liability Act 2002**

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

**Division 7** Professional negligence

**s. 5PB**

---

- (a) the treatment proposed for a patient or a foetus being carried by a pregnant patient; or
  - (b) a procedure proposed to be conducted for the purpose of diagnosing a condition of a patient or a foetus being carried by a pregnant patient.
- (3) Subsection (1) applies even if another practice that is widely accepted by the health professional's peers as competent professional practice differs from or conflicts with the practice in accordance with which the health professional acted or omitted to do something.
- (4) Nothing in subsection (1) prevents a health professional from being liable for negligence if the practice in accordance with which the health professional acted or omitted to do something is, in the circumstances of the particular case, so unreasonable that no reasonable health professional in the health professional's position could have acted or omitted to do something in accordance with that practice.
- (5) A practice does not have to be universally accepted as competent professional practice to be considered widely accepted as competent professional practice.
- (6) In determining liability for damages for harm caused by the fault of a health professional, the plaintiff always bears the onus of proving, on the balance of probabilities, that the applicable standard of care (whether under this section or any other law) was breached by the defendant.

*[Section 5PB inserted by No. 43 of 2004 s. 5.]*

## Part 1B — Mental harm

*[Heading inserted by No. 58 of 2003 s. 8.]*

### 5Q. Terms used

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.

*[Section 5Q inserted by No. 58 of 2003 s. 8.]*

### 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.

**s. 5S**

---

- (5) In this section —  
*commencement day* means the day on which the *Civil Liability Amendment Act 2003* section 8 comes into operation<sup>1</sup>.  
*[Section 5R inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5S inserted by No. 58 of 2003 s. 8.]*



**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.

*[Section 5T inserted by No. 58 of 2003 s. 8.]*

## **Part 1C — Liability relating to public function**

*[Heading inserted by No. 58 of 2003 s. 8.]*

### **5U. Terms used**

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.

*[Section 5U inserted by No. 58 of 2003 s. 8.]*

**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<sup>1</sup>.

*[Section 5V inserted by No. 58 of 2003 s. 8.]*

**5W. Principles concerning resources, responsibilities etc. of 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

**s. 5X**

---

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.

*[Section 5W inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5X inserted by No. 58 of 2003 s. 8.]*

**5Y. Proceedings against public body or officer 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 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.

*[Section 5Y inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5Z inserted by No. 58 of 2003 s. 8.]*

**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

**s. 5AA**

---

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.

*[Section 5AA inserted by No. 58 of 2003 s. 8.]*

## Part 1D — Good samaritans

[Heading inserted by No. 58 of 2003 s. 8.]

### 5AB. Terms used

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 *Health Practitioner Regulation National Law (Western Australia)* in the medical profession; or
- (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.

[Section 5AB inserted by No. 58 of 2003 s. 8; amended by No. 22 of 2008 s. 162; No. 35 of 2010 s. 42.]

### 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.

**s. 5AD**

---

- (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<sup>1</sup>.

[Section 5AC inserted by No. 58 of 2003 s. 8.]

**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.

*[Section 5AD inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5AE inserted by No. 58 of 2003 s. 8.]*

## **Part 1E — Apologies**

*[Heading inserted by No. 58 of 2003 s. 8.]*

### **5AF. Term used: apology**

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.

*[Section 5AF inserted by No. 58 of 2003 s. 8.]*

### **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<sup>1</sup>.

*[Section 5AG inserted by No. 58 of 2003 s. 8.]*

**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.

*[Section 5AH inserted by No. 58 of 2003 s. 8.]*

## **Part 1F — Proportionate liability**

*[Heading inserted by No. 58 of 2003 s. 9.]*

### **5AI. Terms used**

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 a failure to take reasonable care (but not including any claim arising out of personal injury); or
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 2010* based on misleading or deceptive conduct;

***concurrent wrongdoer***, in relation to a claim, means a person who is one of 2 or more persons whose act or omission caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

*[Section 5AI inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 6; No. 58 of 2010 s. 193.]*

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

*[Section 5AJ inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 7.]*

**5AJA. Certain concurrent wrongdoers not to have benefit of apportionment**

- (1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if —
  - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim;
  - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim; or
  - (c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3A.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

*[Section 5AJA inserted by No. 43 of 2004 s. 8.]*

**s. 5AK**

---

**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.

*[Section 5AK inserted by No. 58 of 2003 s. 9.]*

**5AKA. Duty of defendant to inform plaintiff about concurrent wrongdoers**

- (1) If —
  - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim;
  - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about —
    - (i) the identity of the other person; and
    - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim;and
  - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

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

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

*[Section 5AKA inserted by No. 43 of 2004 s. 9.]*

**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

**s. 5AM**

---

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.

*[Section 5AL inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 10.]*

**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.

*[Section 5AM inserted by No. 58 of 2003 s. 9.]*

**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.

*[Section 5AN inserted by No. 58 of 2003 s. 9.]*

**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.

*[Section 5AO inserted by No. 58 of 2003 s. 9.]*

## **Part 2 — Awards of personal injury damages**

*[Heading inserted by No. 58 of 2003 s. 10.]*

### **Division 1 — Preliminary**

#### **6. Application of this Part**

- (1) Subject to section 3A, this Part applies to the awarding of personal injury damages unless this section states otherwise.
- (2) This Part extends to an award of personal injury damages even if the damages are sought to be recovered in an action for breach of contract or any other action.

*[(3) deleted]*

- (4) This Part applies only if the personal injury arises out of an incident happening after the commencement of this Part.
- (5) If —
  - (a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened after the commencement of this Part; and
  - (b) the symptoms of the injury first appeared after the commencement of this Part,

the incident is to be taken, for the purpose of subsection (4), to have happened after the commencement of this Part.

*[Section 6 amended by No. 58 of 2003 s. 11.]*

#### **7. Court awards constrained**

A court cannot award damages contrary to Division 2 or 3.

#### **8. Act does not give rise to any cause of action**

This Act does not create or confer any cause of civil action for the recovery of damages in respect of an injury or death caused by the fault of a person.

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

*[Heading inserted by No. 58 of 2003 s. 12.]*

**9. Restrictions on damages for non-pecuniary loss (general damages)**

- (1) If the amount of non-pecuniary loss is assessed to be not more than Amount A for the year in which the amount is assessed, no damages are to be awarded for non-pecuniary loss.
- (2) If the amount of non-pecuniary loss is assessed to be more than Amount A but not more than Amount C for the year in which the amount is assessed, damages for non-pecuniary loss are not to be awarded in an amount that is more than the excess of the amount assessed over Amount A.
- (3) If the amount of non-pecuniary loss is assessed to be more than Amount C but less than the sum of Amount A and Amount C for the year in which the amount is assessed, damages for non-pecuniary loss are not to be awarded in an amount that is more than the excess of the amount assessed over the amount calculated as follows —

Amount A - (Amount assessed - Amount C)

- (4) In this section —  
*Amount A* has the meaning given by section 10;  
*Amount C* has the meaning given by section 10;  
*non-pecuniary loss* means —
  - (a) pain and suffering;
  - (b) loss of amenities of life;
  - (c) loss of enjoyment of life;
  - (d) curtailment of expectation of life; and
  - (e) bodily or mental harm.

**10. Amount A and Amount C**

- (1) For the financial year ending on 30 June 2003 —
  - (a) Amount A is \$12 000; and
  - (b) Amount C is \$36 500.
- (2) For any other financial year —
  - (a) Amount A is obtained by varying Amount A for the preceding financial year according to section 4; and
  - (b) Amount C is obtained by varying Amount C for the preceding financial year according to section 4.
- (3) On or before each 1 July after this section commences, the Minister is to publish a notice in the *Gazette* specifying the amounts that are Amount A and Amount C for the financial year commencing on that 1 July.
- (4) Publication under subsection (3) is for public information only and a failure to publish or a delay or error in publication does not affect what is Amount A or Amount C for the year concerned.

**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.

*[Section 10A inserted by No. 58 of 2003 s. 13.]*

### **Division 3 — Fixing damages for pecuniary loss**

#### **11. Damages for loss of earnings**

- (1) In assessing damages for loss of earnings, including in an action under the *Fatal Accidents Act 1959*, the court is to disregard earnings lost to the extent that they would have accrued at a rate of more than 3 times the average weekly earnings at the date of the award.
- (2) In subsection (1) —  
*loss of earnings* means —
  - (a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
  - (b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity.
- (3) For the purpose of this section, the average weekly earnings at the date of the award is —
  - (a) the amount estimated by the Australian Statistician as the average weekly total earnings of full-time adult employees in Western Australia for the quarter ending most recently before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award; or
  - (b) if the Australian Statistician ceases to make the estimate of the amount referred to in paragraph (a), the amount fixed by, or determined in accordance with, the regulations.

#### **12. Damages for provision of home care services**

- (1) This section deals with the awarding of damages for gratuitous services of a domestic nature or gratuitous services relating to nursing and attendance that have been or are to be provided to

the person in whose favour the award is sought by a member of the same household or family as the person.

- (2) No damages are to be awarded for the services if the services would have been, or would be, provided to the person even if the person had not suffered the personal injury.
- (3) If the amount of damages that could, if this subsection did not apply, be awarded under subsection (5) or (7) is Amount B or less, no damages are to be awarded for the services.
- (4) In subsection (3) —  
*Amount B* has the meaning given by section 13.
- (5) If the services are provided or to be provided for not less than 40 hours per week, the amount of damages awarded for them is not to exceed the amount calculated on a weekly basis at the rate of —
  - (a) the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in Western Australia for the relevant quarter; or
  - (b) if the Australian Statistician ceases to make the estimate referred to in paragraph (a), the weekly amount fixed by, or determined in accordance with, the regulations.
- (6) In subsection (5)(a) —  
*the relevant quarter* means —
  - (a) the quarter in which the services were provided; or
  - (b) if at the date of the award an estimate as referred to in subsection (5)(a) is not available to the court for that quarter or the services are yet to be provided, the most recent quarter for which such an estimate is available to the court at the date of the award.
- (7) If the services are provided or to be provided for less than 40 hours per week, the amount of damages awarded for them is not to exceed the amount calculated on an hourly basis at an hourly rate that is one-fortieth of the weekly rate that would be

applicable under subsection (5) if the services were provided or to be provided for not less than 40 hours per week.

**13. Amount B**

- (1) Amount B for the financial year ending on 30 June 2003 is \$5 000.
- (2) For any other financial year, Amount B is obtained by varying Amount B for the preceding financial year according to section 4.
- (3) On or before each 1 July after this section commences, the Minister is to publish a notice in the *Gazette* specifying the amount that is Amount B for the financial year commencing on that 1 July.
- (4) Publication under subsection (3) is for public information only and a failure to publish or a delay or error in publication does not affect what is Amount B for the year concerned.

**Division 4 — Structured settlements**

**14. Term used: structured settlement**

In this Division —

*structured settlement* means an agreement that provides for all or part of the damages agreed or awarded to be paid in the form of periodic payments funded by an annuity or other agreed means.

**15. Consent order for structured settlement**

- (1) This section applies if the parties to a claim for personal injury damages make a structured settlement and apply to the court hearing, or with jurisdiction to hear, the claim for an order approving of, or in the terms of, the structured settlement.
- (2) The court may make the order even though the payment of damages is not in the form of a lump sum.

### **Part 3 — Advertising legal services relating to personal injury and touting**

#### **16. Terms used**

In this Part, unless the contrary intention appears —

**client**, of a legal practitioner, includes a person who makes a genuine inquiry of a legal practitioner about a personal injury;

**hospital** includes —

- (a) any premises used for receiving, caring for, or treating, persons who are injured, sick, or mentally ill;
- (b) any premises used for providing a service for maintaining, improving, or restoring, a person's health and wellbeing; and
- (c) any land or building occupied or used in connection with premises described in paragraph (a) or (b);

**law practice** has the meaning given in the *Legal Profession Act 2008*;

**legal practitioner** means an Australian lawyer within the meaning of that term in the *Legal Profession Act 2008* section 3;

**potential claimant** means —

- (a) a person who suffers, or may suffer, personal injury arising out of an incident; or
- (b) another person who has, or may have, a claim arising out of that personal injury;

**printed publication** includes a newspaper, magazine, journal, periodical, or directory;

**public place** means a place or vehicle that —

- (a) the public, or a section of the public, is entitled to use; or



- (b) is open to, or is being used by, the public or a section of the public,

whether on payment of money, through membership of a club or other body, or otherwise;

***publish*** means —

- (a) to include in a printed publication;
- (b) to disseminate by the exhibition or broadcast of a photograph, slide, film, video recording, audio recording or other recording of images or sound, either as a public exhibition or broadcast or as an exhibition or broadcast to persons attending a place for the purposes of receiving professional advice, treatment, or assistance;
- (c) to broadcast by radio or for television;
- (d) to include on an internet website or otherwise publicly disseminate by means of the internet;
- (e) to publicly exhibit in, on, over, or under, any building, vehicle, or place, or in the air, in view of persons in or on any street or public place;
- (f) to include in a document gratuitously sent or delivered to any person or thrown or left on premises occupied by any person or left on a vehicle; or
- (g) to include in a document provided to a person as a receipt or record for a transaction.

*[Section 16 amended by No. 65 of 2003 s. 19(2); No. 21 of 2008 s. 646(2).]*

**17. Restriction on advertising legal services relating to personal injury**

- (1) A legal practitioner or a person acting for a legal practitioner must not publish or cause to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person —

**s. 17**

---

- (a) to make a claim under any Act or law for compensation or damages for a personal injury; or
- (b) to use the services of the legal practitioner, or another named legal practitioner or a named law practice in connection with the making of a claim mentioned in paragraph (a),

except if section 18 allows publication of the statement.

Penalty: \$10 000.

- (2) A legal practitioner or a person acting for a legal practitioner does not contravene subsection (1) only because of —
  - (a) a statement made —
    - (i) to a person who is already a client of the legal practitioner or in a costs agreement as defined in the *Legal Profession Act 2008* section 252;
    - (ii) to a person at the legal practitioner's place of business; or
    - (iii) under an order by a court;
  - or
  - (b) a statement made on the legal practitioner's internet website that is limited to statements about —
    - (i) the operation of the law of negligence and a person's legal rights under that law; and
    - (ii) the conditions under which the legal practitioner is prepared to provide personal injury services.
- (3) The liability of a legal practitioner who contravenes subsection (1) to the penalty provided under that subsection does not prevent the legal practitioner from being charged with, or found guilty of, unprofessional conduct because of the conduct involved in the contravention.
- (4) Subsection (1) does not apply to a statement made in an edition published before the commencement of this section.

*[Section 17 amended by No. 65 of 2003 s. 19(3); No. 21 of 2008 s. 646(3) and (4).]*

**18. Allowed publication**

- (1) Except as stated in subsection (3), the publication of a statement that states only the name of a legal practitioner or a law practice and the contact details of the legal practitioner or law practice, with or without information as to any area of practice, speciality, or accreditation, of the legal practitioner or law practice, is allowed if it is —
  - (a) in a printed publication;
  - (b) by publishing on an internet website an electronic version merely reproducing a statement in a printed publication that is published independently of a legal practitioner;
  - (c) part of the publication on an internet website of the contents of a directory or database that is published or maintained independently of a legal practitioner;
  - (d) by public exhibition in, on, over, or under, any building, vehicle, or place, or in the air, in view of persons in or on any street or public place;
  - (e) in a printed document gratuitously sent or delivered to any person or thrown or left on premises occupied by any person or left on a vehicle; or
  - (f) in a printed document provided to a person as a receipt or record relating to a transaction.
  
- (2) For the purposes of subsection (1)(b) or (c), a printed publication, directory, or database is published or maintained independently of a legal practitioner only if —
  - (a) it is not published or maintained by the legal practitioner or by a partner, employee or member of the legal practitioner's practice; and

**s. 19**

---

- (b) the person who publishes or maintains it does so in the ordinary course of the conduct of the person's business or affairs.
- (3) Subsection (1) does not allow the publication of a statement —
  - (a) by public exhibition in or on a hospital; or
  - (b) in a printed document gratuitously sent or delivered to a hospital or left in a hospital or on a vehicle in the vicinity of a hospital.

*[Section 18 amended by No. 21 of 2008 s. 646(5).]*

**19. Prohibition on touting at scene of incidents or at any time**

- (1) At the scene of an incident from which a person allegedly suffered personal injury or at a hospital after an incident from which a person allegedly suffered personal injury —
  - (a) a person attending must not solicit or induce a potential claimant involved in the incident to make a claim; and
  - (b) a person, other than a person attending, must not solicit or induce, in a way that would be unreasonable in the circumstances, a potential claimant involved in the incident to make a claim.

Penalty: \$10 000.

- (2) In any circumstances after an incident from which a person allegedly suffered personal injury —
  - (a) a person attending; or
  - (b) a person obtaining information,

must not give a potential claimant involved in the incident, or someone on the potential claimant's behalf, any information described in subsection (4).

Penalty: \$10 000.

- (3) In any circumstances after an incident from which a person allegedly suffered personal injury, a person having contact whose contact directly involves —
- (a) the treatment or management of the injury or its physical, psychiatric, or psychological consequences; or
  - (b) the provision of administrative or other support to a person whose contact directly involves anything referred to in paragraph (a),

must not give a potential claimant (whether or not the potential claimant involved in the incident) or someone on the potential claimant's behalf, any information described in subsection (4) except if subsection (5) allows the information to be given.

Penalty: \$10 000.

- (4) The information the giving of which may be an offence under subsection (2) or (3) is the name, address, or telephone number of —
- (a) a particular legal practitioner or law practice; or
  - (b) an employee or agent of the legal practitioner or law practice.
- (5) Information described in subsection (4) may be given as described in subsection (3) if —
- (a) the information is given while simultaneously giving similar information about, or about an employee or agent of, each of at least 3 competing legal practitioners or law practices; or
  - (b) the information is given on behalf of an association in order to help a person to make use of an arrangement that the association has, as a service to its members, made with a particular legal practitioner or law practice.
- (6) When counting how many competing legal practitioners or law practices there are for the purposes of subsection (5)(a), 2 or

**s. 19**

---

more legal practitioners who are members of the same law practice count as one.

- (7) In any circumstances after an incident from which a person allegedly suffered personal injury —
- (a) a person attending;
  - (b) a person obtaining information; or
  - (c) a person having contact,

must not disclose the name or address of a person involved in the incident to anyone except if subsection (8), (9), or (10) allows the disclosure.

Penalty: \$10 000.

- (8) The name or address of a person involved in the incident may be disclosed to —
- (a) a police officer;
  - (b) a person to whom the disclosure is required under a law;
  - (c) a potential claimant involved in the incident or the potential claimant's legal practitioner or agent;
  - (d) the employer of the person making the disclosure, if that person is attending or attended at the scene of the incident for the purpose of the person's employment and the employer requires the person to disclose the information on grounds that are reasonable in the circumstances; or
  - (e) a person (*insurer*) who carries on the business of providing insurance for people or property, or someone who is acting as the insurer's legal practitioner or agent.
- (9) The name or address of a person involved in the incident may be disclosed to a legal practitioner if —
- (a) the person making the disclosure is a client of the legal practitioner for the purpose of making a claim or exercising a legal right, whatever its nature, arising out of the incident;

- (b) in the circumstances, it is reasonable for the person making the disclosure to think that the person may have a claim or a legal right; and
  - (c) the disclosure is made for the purpose of making the claim or exercising the legal right.
- (10) The name or address of a person involved in the incident may be disclosed if the disclosure is not likely to result in a potential claimant involved in the incident being solicited or induced to make a claim.
- (11) In this section —

***person attending*** means a person who, for the purpose of the person's employment, is attending or attended —

- (a) at the scene of the incident from which a person allegedly suffered personal injury; or
- (b) at a hospital after an incident from which a person allegedly suffered personal injury;

***person having contact*** means a person who, for the purpose of the person's employment, has contact with a potential claimant, whether or not the potential claimant involved in the incident, that substantially arises because of the incident from which a person allegedly suffered personal injury;

***person obtaining information*** means a person who, for the purpose of the person's employment, obtains information about the incident from which a person allegedly suffered personal injury.

*[Section 19 amended by No. 21 of 2008 s. 646(6)-(8).]*

## **20. Prohibition against paying, or seeking payment, for touting**

- (1) A person must not provide or offer to provide, or receive or seek to receive, a fee for the soliciting or inducing of a potential claimant to make a claim.

Penalty: \$10 000.

**s. 21**

---

- (2) A person does not commit an offence against subsection (1) if the fee is for a person who is not a legal practitioner and is not acting for a legal practitioner, in the ordinary course of business as an advertiser or publisher, advertising legal services about claims.
- (3) A person does not commit an offence against subsection (1) if the fee is for professional services provided by a person who is a legal practitioner or is acting for a legal practitioner to the potential claimant in the process of making a claim.
- (4) In this section —  
*fee* includes the following —
  - (a) a bonus, commission, cash payment, deduction, discount, rebate, remission or other valuable consideration;
  - (b) employment, or an agreement to give employment, in any capacity.

**21. Consequences if person approved under an Act is convicted under s. 19 or 20**

- (1) This section applies to a person if —
  - (a) under an Act (*the relevant Act*) —
    - (i) the person is approved for a profession or a kind of employment or calling; or
    - (ii) activities for the person's profession, employment, or calling are regulated;
  - and
  - (b) under the relevant Act, the person's approval may be suspended or cancelled for misconduct.
- (2) If the person is convicted of an offence against section 19 or 20, the conduct resulting in the person's conviction is conduct because of which the person's approval may be suspended or cancelled under the relevant Act.



(3) In this section —

***approved*** includes accredited, authorised, employed, licensed, registered or otherwise permitted to carry on activities;

***convicted*** includes being found guilty, and the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded;

***misconduct*** includes malpractice, professional misconduct and unprofessional conduct or practice.

## **Part 4 — Other matters**

### **22. Regulations**

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.



---

## Notes

<sup>1</sup> This is a compilation of the *Civil Liability Act 2002* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any reprint.

### Compilation table

Short title	Number and year	Assent	Commencement
<i>Civil Liability Act 2002</i>	35 of 2002	20 Nov 2002	s. 1 and 2: 20 Nov 2002; Act other than s. 1 and 2: 1 Jan 2003 (see s. 2 and <i>Gazette</i> 17 Dec 2002 p. 5905)
<i>Civil Liability Amendment Act 2003</i>	58 of 2003	30 Oct 2003	s. 1 and 2: 30 Oct 2003; Act other than s. 1, 2, 9 and 14: 1 Dec 2003 (see s. 2 and <i>Gazette</i> 28 Nov 2003 p. 4773); s. 9 and 14: 1 Dec 2004 (see s. 2 and <i>Gazette</i> 26 Nov 2004 p. 5309)
<i>Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 s. 19</i>	65 of 2003	4 Dec 2003	1 Jan 2004 (see s. 2 and <i>Gazette</i> 30 Dec 2003 p. 5722)
<i>Workers' Compensation Reform Act 2004 s. 174</i>	42 of 2004	9 Nov 2004	4 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7131)
<i>Civil Liability Amendment Act 2004</i>	43 of 2004	9 Nov 2004	Act other than Pt. 3: 9 Nov 2004 (see s. 2(1)); Pt. 3: 1 Dec 2004 (see s. 2(2) and <i>Gazette</i> 26 Nov 2004 p. 5309)
<i>Psychologists Act 2005</i> Sch. 3 cl. 1	28 of 2005	12 Dec 2005	4 May 2007 (see s. 2 and <i>Gazette</i> 4 May 2007 p. 1963)
<i>Optometrists Act 2005</i> Sch. 3 cl. 1	29 of 2005	12 Dec 2005	20 Apr 2007 (see s. 2 and <i>Gazette</i> 30 Mar 2007 p. 1451)
<i>Podiatrists Act 2005</i> Sch. 3 cl. 1	30 of 2005	12 Dec 2005	30 May 2007 (see s. 2 and <i>Gazette</i> 29 May 2007 p. 2486)
<i>Chiropractors Act 2005</i> Sch. 3 cl. 1	31 of 2005	12 Dec 2005	1 Aug 2007 (see s. 2 and <i>Gazette</i> 31 Jul 2007 p. 3789)
<i>Physiotherapists Act 2005</i> Sch. 3 cl. 1	32 of 2005	12 Dec 2005	23 Feb 2007 (see s. 2 and <i>Gazette</i> 20 Feb 2007 p. 505)

## Civil Liability Act 2002

Short title	Number and year	Assent	Commencement
<i>Osteopaths Act 2005</i> Sch. 3 cl. 1	33 of 2005	12 Dec 2005	30 May 2007 (see s. 2 and <i>Gazette</i> 29 May 2007 p. 2486)
<i>Occupational Therapists Act 2005</i> Sch. 3 cl. 1	42 of 2005	19 Dec 2005	1 Aug 2007 (see s. 2 and <i>Gazette</i> 31 Jul 2007 p. 3789)
<b>Reprint 1: The Civil Liability Act 2002 as at 10 Feb 2006</b> (includes amendments listed above except those in the <i>Psychologists Act 2005</i> , the <i>Optometrists Act 2005</i> , the <i>Podiatrists Act 2005</i> , the <i>Chiropractors Act 2005</i> , the <i>Physiotherapists Act 2005</i> , the <i>Osteopaths Act 2005</i> and the <i>Occupational Therapists Act 2005</i> )			
<i>Medical Radiation Technologists Act 2006</i> Sch. 3 cl. 1	21 of 2006	9 Jun 2006	1 Jul 2007 (see s. 2 and <i>Gazette</i> 26 Jun 2007 p. 3013)
<i>Nurses and Midwives Act 2006</i> Sch. 3 cl. 2	50 of 2006	6 Oct 2006	19 Sep 2007 (see s. 2 and <i>Gazette</i> 18 Sep 2007 p. 4711)
<b>Reprint 2: The Civil Liability Act 2002 as at 5 Oct 2007</b> (includes amendments listed above)			
<i>Legal Profession Act 2008</i> s. 646	21 of 2008	27 May 2008	1 Mar 2009 (see s. 2(b) and <i>Gazette</i> 27 Feb 2009 p. 511)
<i>Medical Practitioners Act 2008</i> Sch. 3 cl. 8	22 of 2008	27 May 2008	1 Dec 2008 (see s. 2 and <i>Gazette</i> 25 Nov 2008 p. 4989)
<i>Acts Amendment (Consent to Medical Treatment) Act 2008</i> Pt. 3	25 of 2008	19 Jun 2008	27 Jun 2009 (see s. 2 and <i>Gazette</i> 26 Jun 2009 p. 2565)
<i>Statutes (Repeals and Miscellaneous Amendments) Act 2009</i> s. 33	8 of 2009	21 May 2009	22 May 2009 (see s. 2(b))
<b>Reprint 3: The Civil Liability Act 2002 as at 20 Aug 2010</b> (includes amendments listed above)			
<i>Health Practitioner Regulation National Law (WA) Act 2010</i> Pt. 5 Div. 9	35 of 2010	30 Aug 2010	s. 40, 41(1) and 42: 18 Oct 2010 (see s. 2(b) and <i>Gazette</i> 1 Oct 2010 p. 5075-6); <a href="#">s. 41(2): 1 Jul 2012 (see s. 2(b) and <i>Gazette</i> 19 Jun 2012 p. 2631)</a>
<i>Acts Amendment (Fair Trading) Act 2010</i> s. 193	58 of 2010	8 Dec 2010	1 Jan 2011 (see s. 2(c) and <i>Gazette</i> 24 Dec 2010 p. 6805)

<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included

in this compilation. For the text of the provisions see the endnotes referred to in the table.

### Provisions that have not come into operation

Short title	Number and year	Assent	Commencement
<del><i>Health Practitioner Regulation National Law (WA) Act 2010 s. 41(2)</i><sup>2</sup></del>	<del>35 of 2010</del>	<del>30 Aug 2010</del>	<del>To be proclaimed (see s. 2(b))</del>
<i>Health, Safety and Civil Liability (Children in Schools and Child Care Services) Act 2011 Pt. 2</i> <sup>3</sup>	1 of 2011	1 Mar 2011	To be proclaimed (see s. 2(b))
<i>Education and Care Services National Law (WA) Act 2012 Pt. 4 Div. 3</i> <sup>4</sup>	11 of 2012	20 Jun 2012	To be proclaimed (see s. 2(b))

<sup>2</sup>—~~On the date as at which this compilation was prepared, the *Health Practitioner Regulation National Law (WA) Act 2010 s. 41(2)* had not come into operation. It reads as follows:~~

#### ~~41. Section 5PA amended~~

~~(2) In section 5PA delete the definition of *health professional* and insert:~~

~~*health professional* means —~~

- ~~(a) a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in any of the following health professions —~~
- ~~(i) Aboriginal and Torres Strait Islander health practice;~~
  - ~~(ii) Chinese medicine;~~
  - ~~(iii) chiropractic;~~
  - ~~(iv) dental;~~
  - ~~(v) medical;~~
  - ~~(vi) medical radiation practice;~~
  - ~~(vii) nursing and midwifery;~~
  - ~~(viii) occupational therapy;~~

- ~~(ix) optometry;~~
- ~~(x) osteopathy;~~
- ~~(xi) pharmacy;~~
- ~~(xii) physiotherapy;~~
- ~~(xiii) podiatry;~~
- ~~(xiv) psychology;~~

~~or~~

- ~~(b) any other person who practises a discipline or profession in the health area that involves the application of a body of learning.~~

<sup>2</sup> [Footnote no longer applicable.](#)

<sup>3</sup> On the date as at which this compilation was prepared, the *Health, Safety and Civil Liability (Children in Schools and Child Care Services) Act 2011* Pt. 2 had not come into operation. It reads as follows:

## **Part 2 — *Civil Liability Act 2002* amended**

### **3. Act amended**

This Part amends the *Civil Liability Act 2002*.

### **4. Section 3A amended**

In section 3A(1) in the Table item 1 column 3 after “1C,” insert:

1CA,

### **5. Section 4A amended**

In section 4A(1) after “1C,” insert:

1CA,

### **6. Part 1CA inserted**

After section 5AA insert:

## Part 1CA — Liability relating to emergency medical assistance given to enrolled children

### 5AAA. Terms used

In this Part —

*child care service* has the meaning given in the *Child Care Services Act 2007* section 4;

*community kindergarten* means a kindergarten registered under the *School Education Act 1999* Part 5;

*emergency medical assistance* means medical assistance of a type prescribed by the regulations as assistance to which this Part applies;

*enrolled child* means —

- (a) a child enrolled at community kindergarten; or
- (b) a child for whom a child care service is provided; or
- (c) a student within the meaning given in the *School Education Act 1999* section 4;

*staff member* means a natural person who is —

- (a) employed in the department of the Public Service referred to in the *School Education Act 1999* section 228; or
- (b) employed in a school registered under the *School Education Act 1999* section 160; or
- (c) a supervising officer as defined in the *Child Care Services Act 2007* section 3; or
- (d) a member of the staff of a child care service; or
- (e) prescribed (or of a class prescribed) by the regulations as a person to whom this Part applies.

### 5AAB. Application of this Part

(1) In this section —

*commencement day* means the day on which the *Health, Safety and Civil Liability (Children in Schools and Child Care Services) Act 2011* section 6 comes into operation.

- (2) Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.
- (3) 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.

- (4) 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.
- (5) 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 (4), to have happened on or after the commencement day.
- (6) This Part does not limit the protection from liability given by another written law.

**5AAC. Protection of staff members**

- (1) A staff member does not incur any personal civil liability in respect of —
  - (a) an act or omission done or made by the staff member at the scene of an emergency in assisting an enrolled child in apparent need of emergency medical assistance; or
  - (b) advice given by the staff member about assistance to be given to an enrolled child in apparent need of emergency medical assistance,if the act or omission is done or made, or the advice given, in good faith and without recklessness in the course of the staff member's employment as a staff member.
- (2) This section does not affect the vicarious liability of any person for the acts or omissions of a staff member.

**5AAD. Exclusion from protection**

The protection from personal civil liability conferred by this Part does not apply if the ability of the staff member to exercise reasonable care and skill, at the relevant time, was significantly impaired by reason of the staff member being intoxicated by alcohol or a drug or other substance capable of intoxicating a person and the intoxication was self-induced.

<sup>4</sup> On the date as at which this compilation was prepared, the *Education and Care Services National Law (WA) Act 2012* Pt. 4 Div. 3 had not come into operation. It reads as follows:



## Part 4 — Amendments to other Acts

### Division 3 — *Civil Liability Act 2002* amended

**28. Act amended**

This Division amends the *Civil Liability Act 2002*.

**29. Section 5AAA amended**

- (1) In section 5AAA delete the definition of *child care service* and insert:

*child care service* means —

- (a) an education and care service as defined in the *Education and Care Services National Law (Western Australia)* section 5(1); or
  - (b) a child care service as defined in the *Child Care Services Act 2007* section 4;
- (2) In section 5AAA in the definition of *staff member* after paragraph (c) insert:
- (da) a nominated supervisor as defined in the *Education and Care Services National Law (Western Australia)* section 5(1); or