

# Victorian Wrongs Act 1958

(edited for psychiatrists)

Note in particular:

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# WRONGS ACT 1958

## DEFINITIONS

"abuse" means physical abuse or sexual abuse;

**A.M.A. Guides** means the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition) (other than Chapter 15) as modified by or under this Part;

"approved medical practitioner" means—

(a) if a training course has been approved under section 91(1)(b) of the **Accident Compensation Act 1985** or section 54(1)(b) of the **Workplace Injury Rehabilitation and Compensation Act 2013**, a medical practitioner who has successfully completed the course; or

(b) if a training course has not been so approved, a medical practitioner;

"apology" means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault;

"attendant care services" means any of the following—

(a) services of a domestic nature;

(b) services relating to nursing;

(c) services that aim to alleviate the consequences of an injury;

"authority", in relation to a relevant organisation, includes any authority or ostensible authority that an individual associated with the relevant organisation derives from the individual's association with the relevant organisation;

"child" means a person who is under the age of 18 years;

"claimant" means a person who makes or is entitled to make a claim for personal injury damages;

"civil proceeding" includes—

(a) a proceeding before a tribunal; and

(b) a proceeding under an Act regulating the practice or conduct of a profession or occupation; and

(c) a proceeding of a Royal Commission

(d) a proceeding of a Board of Inquiry or Formal Review

"consequential mental harm" means mental harm that is a consequence of an injury of any other kind;

court includes tribunal, and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;

"criminal record", in relation to a person, means a document that sets out—

- (a) all the person's previous convictions; and
- (b) in relation to each previous conviction—
  - (i) the date of the conviction; and
  - (ii) the court in which the conviction took place; and
  - (iii) the place of sitting of that court; and
  - (iv) the offence committed; and
  - (v) the sentence imposed;

"damages" includes any form of monetary compensation;

"defendant" includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise;

"delegation" includes sub-delegation;

'dependant' means any person for whose benefit an action could be brought under Part III of this Act;

"fault" includes act or omission;

"gratuitous attendant care services" means attendant care services—

- (a) that have or are to be provided by another person to a claimant; and
- (b) for which the claimant has not paid or is not liable to pay;

"harm" means harm of any kind and includes—

- (a) injury or death; and
- (b) damage to property; and
- (c) economic loss;

"injury" means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

"legal practitioner" has the same meaning as in the **Criminal Procedure Act 2009** ;

"Medical Panel" means a Medical Panel under the **Workplace Injury Rehabilitation and Compensation Act 2013** ;

"medical question" in relation to a claim for damages, means a question as to whether the degree of impairment resulting from injury to the claimant alleged in the claim satisfies the threshold level;

"mental harm" means psychological or psychiatric injury;

"negligence" means failure to exercise reasonable care.

"non-economic loss" means any one or more of the following—

- (a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of enjoyment of life;

"permanent care order" has the same meaning as in the **Children, Youth and Families Act 2005** ;

"physical abuse" does not include an act or omission committed in circumstances that constitute—

- (a) a lawful justification or excuse to the tort of battery; or
- (b) any other lawful exercise of force;

"personal injury damages" means damages that relate to the death of or injury to a person caused by the fault of another person.

"professional" means an individual practising a profession.

"pure mental harm" means mental harm other than consequential mental harm.

"relevant organisation" means an entity (other than the State) organised for some end, purpose or work that exercises care, supervision or authority over children, whether as part of its primary functions or activities or otherwise, and is—

(a) capable in law of being sued; or

(b) not capable in law of being sued but nominates an associated legal person under section 92; or

(ba) an NGO within the meaning of the **Legal Identity of Defendants (Organisational Child Abuse) Act 2018** which is capable of being sued in accordance with that Act; or

(c) the holder of a statutory office within the meaning of the **Public Administration Act 2004** ; or

(d) a Department or Administrative Office within the meaning of the **Public Administration Act 2004** ; or

(e) a body corporate established for public purposes; or

(f) Victoria Police;

"sexual abuse" means sexual assault or other sexual misconduct;

"specified carer "means—

(a) a foster carer of a child; or

(b) an individual who is a family member of, or other person of significance to, a child with whom the child is currently placed in out of home care under the **Children, Youth and Families Act 2005** .

“ volunteer “

(1) A volunteer is an individual who provides a service in relation to community work on a voluntary basis.

(2) A person is still a volunteer even if, in providing a service, he or she receives—

(a) remuneration that he or she would receive whether or not he or she provided that service; or

(b) out-of-pocket expenses incurred in relation to providing that service; or

(c) remuneration that is not more than the amount (if any) specified in the regulations for the purposes of this section.

"wrong" means an act or omission that—

(a) gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law; or

(b) amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort.

## **PART IIC--APOLOGIES**

### **SECT 14J**

#### **Apology not admission of liability**

(1) In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law, an apology does not constitute—

(a) an admission of liability for the death or injury; or

(b) an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

(2) Subsection (1) applies whether the apology—

(a) is made orally or in writing; or

(b) is made before or after the civil proceeding was in contemplation or commenced.

(3) Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

### **SECT 14K**

#### **Reduction or waiver of fees**

(1) In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law and it is alleged that the death or injury occurred as a consequence of the provision of a service, a reduction or waiver of the fees payable for the service or a related service does not constitute—

(a) an admission of liability for the death or injury; or

(b) an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

(2) Subsection (1) applies whether the reduction or waiver of fees—

(a) is made orally or in writing; or

(b) is made before or after the civil proceeding was in contemplation or commenced.

(3) Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.



## **PART III--WRONGFUL ACT OR NEGLIGENCE CAUSING DEATH**

### **SECT 16**

#### **Liability for death caused wrongfully**

Whensoever the death of a person is caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

### **SECT 17**

#### **Action for death caused wrongfully[2]**

(1) Every such action shall be for the benefit of the dependants of the person whose death has been so caused and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury or the court if the trial is without a jury may give such damages as they or it think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought; and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before-mentioned parties in such shares as the jury or court by their or its verdict find and direct.

(2) In subsection (1) the word "dependants" means such persons as were wholly mainly or in part dependent on the person deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent.

### **SECT 18**

#### **Action for damages by persons interested**

Where in any of the cases provided for by this Part there is no executor or administrator of the person deceased, or where no action as in this Part mentioned has within six months after the death of the deceased person been brought by his executor or administrator, then and in every such case such action may be brought by all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be if it were brought by such an executor or administrator.

### **SECT 23**

#### **Mental or nervous shock**

In any action for injury to the person the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.

## **PART V--CONTRIBUTORY NEGLIGENCE**

### **SECT 26**

#### **Liability for contributory negligence[6]**

(1) If a person ( **the claimant** ) suffers damage as the result partly of the claimant's failure to take reasonable care ( **contributory negligence** ) and partly of the wrong of any other person or persons—

(a) except as provided in section 63, a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant; and

(b) the damages recoverable in respect of the wrong must be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

(1A) Subsection (1) does not operate to defeat any defence arising under a contract.

(1B) If any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages awarded to the claimant by virtue of subsection (1) is not to exceed the maximum limit so applicable.

(1C) If a claim is brought in a court of limited jurisdiction, the court may award damages up to the limit of its jurisdiction even though the amount of damages has first been reduced under subsection (1) or (1B).

(2) Where damages are recoverable by any person by virtue of subsection (1) subject to such reduction as is therein mentioned, the court shall find and record the total damages which, apart from any limitation referred to in subsections (1B) and (1C), would have been awarded, if the claimant had not been guilty of contributory negligence.

(4) Where any person dies as a result partly of his or her failure to take reasonable care ( **contributory negligence** ) and partly of the wrong of any other person or persons an action brought by the dependants of the first-mentioned person under Part III of this Act shall not be defeated nor shall any damages recoverable by those dependants under that action be reduced by reason of that first-mentioned person's contributory negligence.

(5) Where, in any case to which subsection (1) of this section applies, one of the persons responsible for the damage avoids liability to any other such person or his personal representative by pleading any enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages from that other person or representative by virtue of the said subsection.

(6) Where any case to which subsection (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been guilty of contributory negligence and the extent to which those damages are to be reduced.

## **PART VA--ASSESSMENT OF DAMAGES**

### **SECT 28A**

#### **Damages for deprivation or impairment of earning capacity**

Where in relation to a claim for damages for deprivation or impairment of earning capacity or for other personal injury it becomes material to assess such damages having regard to loss of earnings or of future probable earnings, there shall be taken into account in

reduction of the sum assessed such amount as is reasonably considered to be the amount that would have been payable as income tax by reason of the receipt of such earnings by the person who has suffered loss of them had he received them.

## **PART VB--PERSONAL INJURY DAMAGES**

### **SECT 28C**

#### **Application of Part**

(1) This Part applies to an award of personal injury damages, except an award that is excluded by subsection (2).

(2) The following awards of damages are excluded from the operation of this Part—

(a) an award where the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct;

(b) an award to which Part 3, 6 or 10 of the **Transport Accident Act 1986** applies;

(c) an award to which Part IV of the **Accident Compensation Act 1985** or Part 7 of the **Workplace Injury Rehabilitation and Compensation Act 2013** applies;

(d) an award to which the **Workers Compensation Act 1958** applies;

(e) an award of compensation under Part V of the **Country Fire Authority Act 1958**

or an award of compensation under a compensation scheme established under the regulations made under that Act;

### **SECT 28F**

#### **Damages for past or future economic loss—maximum for loss of earnings etc.**

(1) This section applies to an award of damages—

(a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or

(b) for future economic loss due to the deprivation or impairment of earning capacity; or

(c) for the loss of expectation of financial support.

(2) The maximum amount of damages that may be awarded for each week of the period of loss of earnings is an amount that is 3 times the amount of average weekly earnings at the date of the award.

(3) For the purposes of this section, the amount of average weekly earnings at the date of the award is—

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in Victoria for the most recent reference period occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award; or

(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

## **SECT 28G**

### **Fixing damages for non-economic loss**

The maximum amount of damages that may be awarded to a claimant for non-economic loss is \$577 050.

## **PART VBA--THRESHOLDS IN RELATION TO RECOVERY OF DAMAGES FOR NON-ECONOMIC LOSS**

### **Division 2--Restriction on recovery of damages for non-economic loss**

#### **SECT 28LE**

##### **Restriction on recovery of damages for non-economic loss**

A person is not entitled to recover damages for non-economic loss in any proceeding in a court in respect of an injury to a person caused by the fault of another person unless the person injured has suffered significant injury.

#### **SECT 28LF**

##### **What is significant injury?**

(1) For the purposes of this Part injury to a person (other than a psychiatric injury) is significant injury if—

(a) the degree of impairment of the whole person resulting from the injury has been assessed by an approved medical practitioner in accordance with this Part as satisfying the threshold level, unless a Medical Panel has made a determination as to the threshold level under Division 5; or

(aa) a certificate of assessment has been issued under section 28LNA in respect of the injury, unless a Medical Panel has made a determination as to the threshold level under Division 5; or

(b) a Medical Panel has determined under Division 5 that the degree of impairment of the whole person resulting from the injury satisfies the threshold level; or

(c) the injury is loss of a foetus; or

(ca) the injury is psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth; or

(d) the injury is loss of a breast.

(2) For the purposes of this Part psychiatric injury to a person is significant injury if—

(a) the degree of impairment resulting from the injury has been assessed by an approved medical practitioner in accordance with this Part as satisfying the threshold level, unless a Medical Panel has made a determination as to the threshold level under Division 5; or

(aa) a certificate of assessment has been issued under section 28LNA in respect of the injury, unless a Medical Panel has made a determination as to the threshold level under Division 5; or

(b) a Medical Panel has determined under Division 5 that the degree of impairment resulting from the injury satisfies the threshold level.

(3) For the purposes of this Part injury to a person is deemed to be significant injury if—

(a) an agreement is given under Division 4 to waive the requirement for assessment in respect of the injury; or

(aa) the injury is deemed under section 28LZG(10) or 28LZGA(4) to be significant injury; or

(b) the court makes a determination in respect of that person under section 28LZN.

### **Division 3--Assessment of impairment**

#### **SECT 28LG**

##### **Who can assess impairment?**

The assessment of degree of impairment must be made by an approved medical practitioner.

#### **SECT 28LH**

##### **How is the degree of impairment to be assessed?**

(1) Subject to this Division, an approved medical practitioner must make an assessment of degree of impairment under this Part—

(a) in accordance with—

(i) the A.M.A. Guides; or

(ii) the methods prescribed for the purposes of this Part; and

(b) in accordance with operational guidelines (if any) as to the use of those Guides or methods issued by the Minister.

(2) Nothing in subsection (1) prevents an assessment being made in respect of a degree of impairment of a person even if not all of the injuries to the person have stabilised.

#### **SECT 28LI**

##### **Assessment of certain impairments**

- (1) For the purposes of assessing the degree of psychiatric impairment the A.M.A. Guides apply, subject to any regulations made for the purposes of this section, as if for Chapter 14 there were substituted the guidelines entitled "The Guide to the Evaluation of Psychiatric Impairment for Clinicians".

#### **SECT 28LJ**

##### **Regard not to be had to secondary psychiatric or psychological impairment**

In assessing a degree of impairment of a person under this Part, regard must not be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury.

#### **SECT 28LL**

##### **Assessment in relation to injuries arising out of the same incident**

(1) If a person has more than one impairment resulting from injuries which arose out of the same incident, all of those impairments must be included in the one assessment.

(2) For the purposes of this Part, impairments, other than psychiatric impairments, resulting from injuries which arose out of the same incident are to be assessed together using the combination tables in the A.M.A. Guides or the methods prescribed for the purposes of this Part.

- (2) For the purposes of this Part, impairments from unrelated injuries or causes are to be disregarded in making an assessment.

#### **SECT 28LM**

##### **Prescribed methods for assessment**

If methods are prescribed for the purposes of this Part and apply to an assessment of impairment, the assessment must be made in accordance with those methods rather than in accordance with the A.M.A. Guides.

#### **SECT 28LN**

##### **Certificate of assessment**

(1) Subject to section 28LNA and this section, an approved medical practitioner who makes an assessment of degree of impairment under this Part must provide to the person seeking the assessment a certificate of assessment.

(2) The certificate of assessment must state whether the degree of impairment resulting from the injury satisfies the threshold level but must not state the specific degree of impairment.

- (3) If not all the injuries to a person have stabilised, a certificate of assessment can only be provided under this section in respect of the person if the injuries that have stabilised are sufficient to determine a degree of impairment that satisfies the threshold level.

## **SECT 28LNA**

### **Certificate where injury not stabilised**

(1) This section applies if, after making an assessment of degree of impairment under this Part, an approved medical practitioner is unable to determine the degree of impairment because the injury has not stabilised.

(2) If, at the end of 6 months after that first assessment, an approved medical practitioner is unable to determine the degree of impairment but is satisfied that the degree of impairment resulting from the injury will satisfy the threshold level once the injury has stabilised, that approved medical practitioner may issue a certificate of assessment under this section.

(3) The certificate of assessment must state that the approved medical practitioner is unable to determine the degree of impairment but is satisfied that the degree of impairment resulting from the injury will satisfy the threshold level once the injury has stabilised.

## **Division 4--Procedure for Claim for Non-Economic Loss**

### **SECT 28LO**

#### **Agreement to waive assessment of impairment**

(1) A claimant may, in writing, ask the respondent to waive the requirement for an assessment of degree of impairment under this Part.

(1A) A request under subsection (1) must be in the prescribed form (if any) and include the prescribed information (if any).

(2) A respondent to whom a request under subsection (1) is made must respond in writing to the request within 60 days after receiving it.

(3) The response must—

(a) state that the respondent is a proper respondent to the claim and state that the respondent agrees to waive the requirement for the assessment of degree of impairment under this Part because the injury is significant injury; or

(b) state that the respondent is a proper respondent to the claim and request that the claimant obtain an assessment of degree of impairment under this Part; or

(c) if the respondent is unable to decide, on the information contained in the request, whether the respondent is a proper respondent to the claim, advise the claimant of the further information the respondent reasonably needs to decide whether the respondent is a proper respondent to the claim; or

(d) state that the respondent believes that the respondent is not a proper respondent to the claim, give the reasons for the belief and give any information that may help the claimant to identify the proper respondent.

(4) If the respondent fails to respond within the 60 days, the requirement for the assessment of degree of impairment cannot be waived by the respondent.

## **SECT 28LW**

### **Response to medical assessment**

(1) The respondent on whom a copy of a certificate of assessment is served must respond in writing to the claimant within 60 days after receiving the certificate and the required information under section 28LT.

(2) The response to the claimant must—

(a) state that the respondent is a proper respondent to the claim and state that the respondent accepts the assessment for the purposes of this Part; or

(b) state that the respondent is a proper respondent to the claim and advise the claimant that the respondent intends to refer or has referred a medical question in relation to the assessment to a Medical Panel for determination under this Part; or

(c) if the respondent is unable to decide, on the information provided with the certificate of assessment, whether the respondent is a proper respondent to the claim, advise the claimant of the further information the respondent reasonably needs to decide whether the respondent is a proper respondent to the claim; or

(d) state that the respondent believes that the respondent is not a proper respondent to the claim, give the reasons for the belief and give any information that may help the claimant to identify the proper respondent.

(3) The respondent must state that the respondent is a proper respondent to a claim if the respondent has already stated under section 28LO or 28LP that the respondent is a proper respondent to the claim.

(4) If the respondent fails to respond in writing under this section within the 60 days, the respondent is deemed to have accepted the assessment.

## **SECT 28LWE**

### **Referral of medical question to Medical Panel**

(1) The respondent on whom a copy of the certificate of assessment is served may refer a medical question in relation to the assessment to a Medical Panel for determination under this Part—

(a) within 60 days after receiving the certificate and the required information under section 28LT; or



(b) within 60 days after receiving the information provided under section 28LWA ;  
or

(c) within 14 days after receiving the notice under section 28LWB.

(2) The respondent may not refer a medical question in relation to the assessment to a Medical Panel if the respondent has accepted the assessment or is deemed to have accepted the assessment under this Division.

(3) If the respondent advises the claimant under section 28LW, 28LWA or 28LWB that the respondent intends to refer a medical question in relation to the assessment to a Medical Panel and does not refer the question within the required time under this section, the respondent is deemed to have accepted the assessment under this Division at the expiration of that required time.

## **SECT 28LX**

### **Respondent to pay costs of referral**

The respondent is liable for the fees and costs payable in accordance with section 28LXA for a referral of a medical question to a Medical Panel for determination under this Part including the costs of—

(a) any attendance before the Medical Panel under section 28LZE of a registered health practitioner; and

(b) copying documents to be provided under section 28LZC or 28LZE; and

(c) reasonable transport arrangements for persons attending the Medical Panel.

## **Division 5--Procedure of Medical Panel**

### **SECT 28LZ**

#### **Procedure of Medical Panel**

(1) A Medical Panel is not bound by rules or practices as to evidence, but may inform itself on any matter relating to a reference in any manner it thinks fit.

(2) A Medical Panel must act informally, without regard to technicalities or legal forms and as speedily as a proper consideration of the reference allows.

(3) The Minister, after consultation with the Minister administering Part 12 of the Workplace Injury Rehabilitation and Compensation Act 2013 , may for the purposes of—

(a) ensuring procedural fairness in the procedures of Medical Panels under this Part; and

(b) facilitating the proper administration of the Medical Panels under this Part—  
issue guidelines as to the procedures of Medical Panels under this Part.

(4) The Convenor may give directions as to the procedures of Medical Panels under this Part but must not give directions inconsistent with any guidelines issued by the Minister under this Part.

### **SECT 28LZC**

#### **What can a Medical Panel ask a claimant to do?**

- (1) A Medical Panel may ask a claimant—
  - (a) to meet with the Panel and answer questions;
  - (b) to supply to the Panel copies of all documents in the possession of the claimant that relate to the medical question;
  - (c) to submit to a medical examination by the Panel or by a member of the Panel.
- (2) A request under this section must be made within 30 days after the medical question is referred to the Medical Panel.

### **SECT 28LZD**

#### **Attendance before Medical Panel to be private**

- (1) Any attendance of a claimant before a Medical Panel must be in private, unless the Medical Panel considers that it is necessary for another person to be present.
- (2) If the claimant is a person under disability, the Medical Panel must permit a representative of the claimant to be present.
- (3) In this section ***person under disability*** means a person who is—
  - (a) a minor; or
  - (b) incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the matter before the Medical Panel.

### **SECT 28LZG**

#### **Determination of Panel**

- (1) A Medical Panel must not determine the degree of impairment of a person unless it has made an assessment of the degree of impairment in accordance with Division 3.
- (2) After making the assessment, the Medical Panel must give the claimant and the respondent—
  - (a) its determination of the medical question in accordance with subsection (4); or
  - (b) its certificate, in accordance with subsection (5), that it is unable to determine the medical question but that it is satisfied that the degree of impairment will satisfy the threshold level when the injury has stabilised; or

(c) its certificate that it is unable to determine the medical question and a statement of the time fixed for further assessment of the person under subsection (6).

(3) The Medical Panel must give the determination or certificate—

(a) within 30 days after the last of the following to occur—

(i) the last date on which the claimant complies with a request under section 28LZC;

(ii) the last date on which a registered health practitioner complies with a request under section 28LZE or if a request is made to more than one registered health practitioner, the last date on which the last of the registered health practitioners to comply, complies with the request; or

(b) within such longer period as is agreed by the claimant and the respondent.

(4) If, after making the assessment, the Medical Panel determines the degree of impairment, the determination of the medical question must state whether the degree of impairment resulting from the injury satisfies the threshold level but must not state the specific degree of impairment.

(5) If, after making an assessment, the Medical Panel is unable to determine the medical question because an injury has not stabilised, but the Medical Panel is satisfied that the degree of impairment resulting from injury will satisfy the threshold level once the injury has stabilised, the Medical Panel may certify in writing to that effect.

(6) If, after making an assessment, the Medical Panel is unable to determine the medical question because an injury has not stabilised and subsection (5) does not apply, the Medical Panel must in writing—

(a) certify that it is unable to determine the medical question; and

(b) fix a time (not being later than 12 months after the first assessment) for a further assessment of the degree of impairment of the person to be made under this section.

(7) The time fixed under subsection (6) must be the earliest time by which the Medical Panel considers that the injury will have stabilised.

(8) More than one further assessment may be made under this section but each further assessment must be made within the period of 12 months following the first assessment.

(9) A determination of the Medical Panel under subsection (4) must be given in writing and be certified by the Medical Panel.

(10) If the Medical Panel gives a certificate under subsection (5) in relation to an injury, the injury is deemed to be significant injury.

## **SECT 28LZH**

### **Effect of determination as to threshold level**

(1) A determination by the Medical Panel under this Division that the degree of impairment resulting from an injury satisfies the threshold level must be accepted by a court in any proceeding on the claim as a determination of significant injury for the purposes of this Part.

(2) A determination by the Medical Panel under this Division that the degree of impairment resulting from an injury does not satisfy the threshold level must be accepted by a court in any proceeding on the claim as a determination that the injury is not significant injury for the purposes of this Part.

## **SECT 28LZI**

### **Limitations on appeal in relation to assessments and determinations**

(1) No appeal on the merits may be made to a court from an assessment or determination of a Medical Panel under this Division.

(2) Nothing in subsection (1) affects any right of a court to grant any other relief or remedy in relation to an assessment or determination of a Medical Panel under this Division.

## **PART VIA--GOOD SAMARITAN PROTECTION**

### **SECT 31B**

#### **Protection of good samaritans**

(1) A good samaritan is an individual who provides assistance, advice or care to another person in relation to an emergency or accident in circumstances in which—

(a) he or she expects no money or other financial reward for providing the assistance, advice or care; and

(b) as a result of the emergency or accident the person to whom, or in relation to whom, the assistance, advice or care is provided is at risk of death or injury, is injured, is apparently at risk of death or injury, or is apparently injured.

(2) A good samaritan is not liable in any civil proceeding for anything done, or not done, by him or her in good faith—

(a) in providing assistance, advice or care at the scene of the emergency or accident; or

(b) in providing advice by telephone or by another means of communication to a person at the scene of the emergency or accident.

(3) Subsection (2) applies even if the emergency or accident was caused by an act or omission of the good samaritan.

- (4) Subsection (2) does not apply to any act or omission of a good samaritan that occurs before the assistance, advice or care is provided by the good samaritan.

## **PART VIB--FOOD DONOR PROTECTION**

### **SECT 31F**

#### **Protection of food donors**

(1) A person who donates food ( **the food donor** ) in the circumstances listed in subsection (2) is not liable in any civil proceeding for any death or injury that results from the consumption of the food.

(2) The circumstances are—

(a) that the food donor donated the food—

(i) in good faith for a charitable or benevolent purpose; and

(ii) with the intention that the consumer of the food would not have to pay for the food; and

(b) that the food was safe to consume at the time it left the possession or control of the food donor; and

(c) if the food was of a nature that required it to be handled in a particular way to ensure that it remained safe to consume after it left the possession or control of the food donor, that the food donor informed the person to whom the food donor gave the food of those handling requirements; and

(d) if the food only remained safe to consume for a particular period of time after it left the possession or control of the food donor, that the food donor informed the person to whom the food donor gave the food of that time limit.

(3) For the purposes of this section, food is safe to consume if it is not unsafe food.

## **PART IX--VOLUNTEER PROTECTION**

### **SECT 35**

#### **Meaning of volunteer**

(1) A volunteer is an individual who provides a service in relation to community work on a voluntary basis.

(2) A person is still a volunteer even if, in providing a service, he or she receives—

(a) remuneration that he or she would receive whether or not he or she provided that service; or

(b) out-of-pocket expenses incurred in relation to providing that service; or

(c) remuneration that is not more than the amount (if any) specified in the regulations for the purposes of this section.

(3) For the purposes of this Part, the following people are not volunteers—

(a) a volunteer officer or member within the meaning of the **Country Fire Authority Act 1958** while exercising any power conferred, or performing any duty imposed, on him or her by or under that Act or the **Dangerous Goods Act 1985** ;

(b) an officer or member of an industry brigade within the meaning of the **Country Fire Authority Act 1958** while exercising any power conferred, or performing any duty imposed, on him or her by or under that Act or the **Dangerous Goods Act 1985** ;

(c) a volunteer auxiliary worker within the meaning of the **Country Fire Authority Act 1958** engaged in an authorized activity under that Act;

(d) a person complying with a direction given to him or her under the **Country Fire Authority Act 1958** ;

(e) a volunteer emergency worker within the meaning of the **Emergency Management Act 1986** engaged in an emergency activity within the meaning of that Act;

(f) a volunteer emergency worker within the meaning of the **Emergency Management Act 1986** exercising any power conferred, or performing any duty imposed, by or under the **Victoria State Emergency Service Act 2005** ;

(g) any person who would otherwise be a volunteer under this Part while he or she is engaged in any activity in respect of which an Act absolves him or her from civil liability for anything done, or not done, while he or she is so engaged;

(h) a person who does community work under an order imposed by a court.

## **SECT 36**

### **Meaning of community work**

(1) Community work is any work that is done, or to be done—

(a) for a religious, educational, charitable or benevolent purpose;

(b) for the purpose of promoting or encouraging literature, science or the arts;

(c) for the purpose of sport, recreation, tourism or amusement;

(d) for the purpose of conserving or protecting the environment;

(e) for the purpose of establishing, carrying on or improving a community, social or cultural centre;

(f) for a political purpose;

(g) for the purpose of promoting the common interests of the community generally or of a particular section of the community;

(h) for any other purpose specified in the regulations for the purposes of this section.

(2) For the purposes of this Part, community work does not include any work of a kind that is specified in the regulations as work that is not community work for the purposes of this Part.

## **SECT 37**

### **Protection of volunteers from liability**

(1) A volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by him or her in providing a service in relation to community work organised by a community organisation.

(2) Any liability resulting from an act or omission that would but for subsection (1) attach to the volunteer attaches instead to the community organisation.

## **SECT 38**

### **Exceptions to section 37(1)**

(1) Section 37(1) does not apply to a volunteer—

(a) who knew, or who ought reasonably to have known, that at the relevant time he or she was acting—

(i) outside the scope of the community work organised by the community organisation; or (ii) contrary to any instructions given by the community organisation in relation to the providing of the service; or

(b) whose ability to provide the service in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.

(2) Section 37(1) also does not apply to a volunteer—

(a) in respect of any claim to recover damages in respect of defamation; or

(b) in respect of any proceedings that are brought under the **Transport Accident Act 1986**.

(3) A reference to drugs in subsection (1)(b) does not include a reference to drugs that were taken for a therapeutic purpose or that were not taken voluntarily.

(4) A reference to alcohol in subsection (1)(b) does not include a reference to alcohol that was not consumed voluntarily.

## **PART X--NEGLIGENCE**

## Division 2--Duty of care

### SECT 48

#### Duty of Care: General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

(a) the probability that the harm would occur if care were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity that creates the risk of harm.

(3) For the purposes of subsection (1)(b)—

(a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and

(b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

### SECT 49

#### Other principles

In a proceeding relating to liability for negligence—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and



(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

## **SECT 50**

### **Duty to warn of risk—reasonable care**

A person (the defendant ) who owes a duty of care to another person (the **plaintiff** ) to give a warning or other information to the plaintiff in respect of a risk or other matter, satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information.

## **Division 3--Causation**

### **SECT 51**

#### **General principles**

(1) A determination that negligence caused particular harm comprises the following elements—

(a) that the negligence was a necessary condition of the occurrence of the harm ( **factual causation** ); and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ( **scope of liability** ).

(2) In determining in an appropriate case, in accordance with established principles, whether negligence 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) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **injured person** ) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

### **SECT 52**

#### **Burden of proof**

In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

## **Division 4--Awareness of risk**

### **SECT 53**

#### **Meaning of obvious risk**

(1) For the purposes of section 54, 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.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

## **SECT 54**

### **Voluntary assumption of risk**

(1) If, in a proceeding on a claim for damages for negligence, a defence of voluntary assumption of risk (*volenti non fit injuria*) is raised and the risk of harm is an obvious risk, the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was not aware of the risk.

(2) Subsection (1) does not apply to—

(a) a proceeding on a claim for damages relating to the provision of or the failure to provide a professional service or health service; or

(b) a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

(3) Without limiting section 47, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2).

## **SECT 56**

### **Plaintiff to prove unawareness of risk**

(1) In any proceeding where, for the purpose of establishing that a person (the **defendant** ) has breached a duty of care owed to a person who suffered harm (the **plaintiff** ), the plaintiff alleges that the defendant has—

(a) failed to give a warning about a risk of harm to the plaintiff; or

(b) failed to give other information to the plaintiff—

the plaintiff bears the burden of proving, on the balance of probabilities, that the plaintiff was not aware of the risk or information.

(2) Subsection (1) does not apply to a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

(3) Despite subsection (2), subsection (1) applies to a proceeding referred to in subsection (2) if the proceeding relates to the provision of or the failure to provide a health service.

(4) Without limiting section 47, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2) to which subsection (1) does not apply.

(5) Nothing in this section is intended to alter any duty of care to give a warning of a risk of harm or other information.

### **Division 5—Negligence of professionals and persons professing particular skills**

#### **SECT 58**

##### **Standard of care to be expected of persons holding out as possessing a particular skill**

In a case involving an allegation of negligence against a person (the ***defendant***) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care is, subject to this Division, to be determined by reference to—

- (a) what could reasonably be expected of a person possessing that skill; and
- (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

#### **SECT 59**

##### **Standard of care for professionals**

(1) A professional is not negligent in providing a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field ( **peer professional opinion** ) as competent professional practice in the circumstances.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable.

(3) The fact that there are differing peer professional opinions widely accepted in Australia by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

(5) If, under this section, a court determines peer professional opinion to be unreasonable, it must specify in writing the reasons for that determination.

(6) Subsection (5) does not apply if a jury determines the matter.

## **SECT 60**

### **Duty to warn of risk**

Section 59 does not apply to a liability arising in connection with the giving of (or the failure to give) a warning or other information in respect of a risk or other matter to a person if the giving of the warning or information is associated with the provision by a professional of a professional service.

## **Division 7--Contributory negligence**

### **SECT 62**

#### **Standard of care for contributory negligence**

(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose—

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

### **SECT 63**

#### **Contributory negligence can defeat claim**

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

## **PART XI--MENTAL HARM**

### **SECT 72**

#### **Mental harm—duty of care**

(1) A person (the defendant ) does not owe a duty to another person (the plaintiff ) to take care not to cause the plaintiff pure mental harm unless the defendant foresaw or ought to have foreseen

that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

(2) For the purposes of the application of this section, 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 danger;
  - (c) the nature of the relationship between the plaintiff and any person killed, injured or put in danger;
  - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) This section does not affect the duty of care of a person (the **defendant**) to another (the **plaintiff**) if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude.

### **SECT 73**

#### **Limitation on recovery of damages for pure mental harm arising from shock**

- (1) This section applies to the liability of a person (the **defendant**) for pure mental harm to a person (the **plaintiff**) arising wholly or partly from mental or nervous shock in connection with another person (the **victim**) being killed, injured or put in danger by the act or omission of the defendant.
- (2) The plaintiff is not entitled to recover damages for pure mental harm unless—
- (a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in danger; or
  - (b) the plaintiff is or was in a close relationship with the victim.
- (3) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.

### **SECT 74**

#### **Limitation on recovery of damages for consequential mental harm**

- (1) A person (the **plaintiff**) is not entitled to recover damages from another person (the **defendant**) for consequential mental harm unless—
- (a) the defendant foresaw or 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; or
  - (b) the defendant knew, or ought to have known, that the plaintiff is a person of less than normal fortitude and foresaw or ought to have foreseen that the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

(2) For the purposes of the application of this section, the circumstances of the case include the injury to the plaintiff out of which the mental harm arose.

## **SECT 75**

### **Liability for economic loss for mental harm**

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

- 87 Transitional

## **PART XIII--ORGANISATIONAL LIABILITY FOR CHILD ABUSE**

## **SECT 88**

### **Definitions**

In this Part—

"abuse" means physical abuse or sexual abuse;

"authority", in relation to a relevant organisation, includes any authority or ostensible authority that an individual associated with the relevant organisation derives from the individual's association with the relevant organisation;

"child" means a person who is under the age of 18 years;

"delegation" includes sub-delegation;

***individual associated with a relevant organisation*** has the meaning given in section 90;

"permanent care order" has the same meaning as in the **Children, Youth and Families Act 2005** ;

"physical abuse" does not include an act or omission committed in circumstances that constitute—

- (a) a lawful justification or excuse to the tort of battery; or
- (b) any other lawful exercise of force;

**S. 88 def. of relevant organisation amended by No. 18/2018 s. 19.**

"relevant organisation" means an entity (other than the State) organised for some end, purpose or work that exercises care, supervision or authority over children, whether as part of its primary functions or activities or otherwise, and is—

- (a) capable in law of being sued; or

(b) not capable in law of being sued but nominates an associated legal person under section 92; or

(ba) an NGO within the meaning of the Legal Identity of Defendants (Organisational Child Abuse) Act 2018 which is capable of being sued in accordance with that Act; or

(c) the holder of a statutory office within the meaning of the Public Administration Act 2004 ; or

(d) a Department or Administrative Office within the meaning of the Public Administration Act 2004 ; or

(e) a body corporate established for public purposes; or

(f) Victoria Police;

"sexual abuse" means sexual assault or other sexual misconduct;

"specified carer "means—

(a) a foster carer of a child; or

(b) an individual who is a family member of, or other person of significance to, a child with whom the child is currently placed in out of home care under the Children, Youth and Families Act 2005 .

## **SECT 90**

### **When is an individual associated with a relevant organisation?**

(1) An individual associated with a relevant organisation—

(a) includes but is not limited to an individual who is an officer, office holder, employee, owner, volunteer or contractor of the relevant organisation; and

(b) if the relevant organisation is a religious organisation, includes but is not limited to a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation; and

(c) if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to any organisation, includes but is not limited to an individual who is referred to in paragraph (a) or (b) in relation to the delegator organisation or the delegate organisation; and

(d) if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to a specified carer and a permanent care order in respect of the child has not been made, includes but is not limited to—

(i) an individual who is referred to in paragraph (a) or (b) in relation to the relevant organisation; and

(ii) the specified carer.

(2) An individual is not associated with a relevant organisation solely because the relevant organisation wholly or partly funds or regulates another organisation.

## SECT 91

### **Liability of organisations**

(1) This section imposes a duty of care that forms part of a cause of action in negligence.

(2) A relevant organisation owes a duty to take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or authority of the relevant organisation.

### **Note**

See section 90 as to when an individual is associated with a relevant organisation. In particular, section 90(1)(c) and (d) extend the meaning of that concept in the case of delegation of the care, supervision or authority over a child to—

(a) another organisation; or

(b) a specified carer.

(3) In a proceeding on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, supervision or authority, on proof that abuse has occurred and that the abuse was committed by an individual associated with the relevant organisation, the relevant organisation is presumed to have breached the duty of care referred to in subsection (2) unless the relevant organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse in question.

### **Note**

Reasonable precautions will vary depending on factors including but not limited to—

(a) the nature of the relevant organisation; and

(b) the resources that are reasonably available to the relevant organisation; and

(c) the relationship between the relevant organisation and the child; and

(d) whether the relevant organisation has delegated the care, supervision or authority over the child to another organisation; and

(e) the role in the organisation of the perpetrator of the abuse.



(4) If a claim names 2 or more relevant organisations as defendants, subsection (3) applies to each relevant organisation separately.

(5) In the case of a relevant organisation that is a public sector body within the meaning of the **Public Administration Act 2004** or another person or body acting on behalf of the State—

(a) if the relevant organisation is capable in law of being sued, the relevant organisation is the appropriate defendant for the purposes of a claim brought in reliance on the duty in subsection (2); and

(b) if the relevant organisation is not capable in law of being sued, the State is the appropriate defendant for the purposes of a claim brought in reliance on the duty in subsection (2); and

(c) any liability incurred by the relevant organisation by reason of subsection (2) is incurred by the State.

(6) Subsection (2) does not apply to abuse of a child committed by an individual associated with a relevant organisation in circumstances wholly unrelated to that individual's association with the relevant organisation.

(7) If a relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over a child to whom the claim relates to another organisation, subsection (2) does not apply to abuse of the child committed by an individual associated with the delegate organisation in circumstances wholly unrelated to that individual's association with the delegator organisation or the delegate organisation.





