

# CIVIL LIABILITY LEGISLATION in the STATES and TERRITORIES

## AUSTRALIAN CAPITOL TERRITORY- CIVIL LAW (WRONGS) ACT 2002

– [http://www7.austlii.edu.au/cgi-bin/viewdb/au/legis/act/consol\\_act/cla2002194/](http://www7.austlii.edu.au/cgi-bin/viewdb/au/legis/act/consol_act/cla2002194/)

### SECT 5

#### Protection of good samaritans from liability

(1) A good samaritan does not incur personal civil liability for an act done or omission made honestly and without recklessness in assisting, or giving advice about the assistance to be given to, a person who is apparently—

- (a) injured or at risk of being injured; or
- (b) in need of emergency medical assistance.

(2) However, the protection does not apply if—

- (a) the liability falls within the ambit of a scheme of compulsory third-party motor vehicle insurance; or
- (b) the good samaritan's capacity to exercise appropriate care and skill was, at the relevant time, significantly

impaired by a recreational drug.

#### Example—scheme of compulsory third-party motor vehicle insurance

the scheme under the Road Transport (Third-Party Insurance) Act 2008

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(3) Despite subsection (2) (b), if a good samaritan administers the drug known as naloxone, honestly and without recklessness, to a person apparently suffering from an overdose of an opioid drug for the purpose of resuscitating the person, the protection under subsection (1) applies even if the good samaritan's capacity to exercise appropriate care and skill was, at the time of administering the drug, impaired by a recreational drug.

#### Examples—opioid drugs

- heroin
- methadone
- morphine

(4) In this section:

"good samaritan" means—

(a) a person who, acting without expectation of payment or other consideration, comes to the aid of a person who is apparently—

- (i) injured or at risk of being injured; or
- (ii) in need of emergency medical assistance; or

(b) a medically qualified person who, acting without expectation of payment or other consideration, gives advice by telephone or another form of telecommunication about the treatment of a person who is apparently—

- (i) injured or at risk of being injured; or
- (ii) in need of emergency medical assistance.

"medically qualified"—a person is **medically qualified** if the person—

- (a) is a doctor; or
- (b) has professional qualifications in a field of health care that are recognised under an Act; or
- (c) works, or has worked, as a member of the ambulance service or in another paramedical capacity.

### SECT 8

#### Protection of volunteers from liability

(1) A volunteer does not incur personal civil liability for an act done or omission made honestly and without recklessness while carrying out community work for a community organisation on a voluntary basis.

(2) However, the protection does not apply if—

- (a) the liability falls within the ambit of a scheme of compulsory third-party motor vehicle insurance; or
- (b) the liability is for defamation; or

(c) the volunteer's capacity to carry out the work properly was, at the relevant time, significantly impaired by a recreational drug; or

(d) the volunteer was acting, and knew or ought to have known that he or she was acting—

- (i) outside the scope of the activities authorised by the community organisation; or
- (ii) contrary to instructions given by the community organisation.

### SECT 11B

#### Protection of food donors from liability

A donor does not incur civil liability for any personal injury that results from the consumption of food donated by the donor if—

- (a) the food was fit for human consumption when it left the possession or control of the donor; and

- (b) for food that is required to be handled in a particular way to ensure it remains fit for human consumption—the donor told the person to whom the donor gave the food about the handling requirements for the food; and
- (c) for food that would remain fit for human consumption for only a limited amount of time after it leaves the possession or control of the donor—the donor told the person to whom the donor gave the food about the time limit on the consumption of the food.

#### **SECT 14**

##### **Effect of apology on liability etc**

- (1) An apology made by or on behalf of a person in relation to an incident claimed to have been caused by the person—
  - (a) is not (and must not be taken to be) an express or implied admission of fault or liability by the person in relation to the incident; and
  - (b) is not relevant to deciding fault or liability in relation to the incident.
- (2) Evidence of an apology made by or on behalf of a person in relation to an incident claimed 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 relation to the incident.

#### **Definitions—pt 3.2**

In this part:

"child", of a person, means the son, daughter, grandson, granddaughter, stepson or stepdaughter of the person, or someone to whom the person is acting in place of a parent.

"consequential mental harm", to a person, means mental harm to the person that is a consequence of bodily injury to the person.

"family member", of a person, means—

- (a) a domestic partner;
- (b) a parent or child of the person; or
- (c) a brother, sister, half-brother or half-sister of the person.

"mental harm", to a person, means impairment of the person's mental condition.

"negligence" means failure to exercise reasonable care and skill.

"parent", of a person, means the father, mother, grandfather, grandmother, stepfather or stepmother of the person, or someone acting in place of a parent to the person.

"pure mental harm", to a person, means mental harm to the person other than consequential mental harm.

#### **SECT 33**

##### **Personal injury arising from mental or nervous shock**

In an action for personal injury, the plaintiff is not prevented from recovering damages only because the injury arose completely or partly from mental or nervous shock.

#### **SECT 34**

##### **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 mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the application of this section in relation to pure mental harm to a person, the circumstances of the case to which the court must have regard include—
  - (a) whether or not the mental harm was suffered as the result of a sudden shock; and
  - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger; and
  - (c) the nature of the relationship between the plaintiff and anyone killed, injured or put in danger; and
  - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the application of this section in relation to consequential mental harm to a person, the circumstances of the case to which the court must have regard include the nature of the bodily injury out of which the mental harm arose.
- (4) This section does not affect the duty of care a person (the **defendant**) has to another person (the **plaintiff**) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

#### **SECT 35**

##### **Mental harm—damages**

- (1) Damages must not be awarded for pure mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.
- (2) Damages must not be awarded for economic loss for consequential mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.

## SECT 40

### Definitions—ch 4

In this chapter:

"harm" means harm of any kind, and includes—

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

"negligence" means failure to exercise reasonable care and skill.

## SECT 42

### Standard of care

For deciding whether a person (the *defendant*) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

## SECT 43

### Precautions against risk—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 deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
  - (a) the probability that the harm would happen if precautions 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 creating the risk of harm.

## SECT 45

### General principles

- (1) A decision that negligence caused particular harm comprises the following elements:
  - (a) that the negligence was a necessary condition of the happening 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 (the *scope of liability*).
- (2) However, if a person (the *plaintiff*) has been negligently exposed to a similar risk of harm by a number of different people (the *defendants*) and it is not possible to assign responsibility for causing the harm to 1 or more of them—
  - (a) the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but
  - (b) the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) In deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party.

## SECT 46

### Burden of proof

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

## NSW CIVIL LIABILITY ACT 2002 – Selected extracts [http://www7.austlii.edu.au/cgi-](http://www7.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/cla2002161/)

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### 16 Determination of damages for non-economic loss

- (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
- (2) The maximum amount of damages that may be awarded for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case.
- (3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with a Table:

### 5D 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 exceptional case the court is to consider 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 would have done if the negligent person had not been negligent:

#### *5C Other principles*

In proceedings 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.

#### *5R Standard of 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.

#### *26D Assessment of permanent impairment*

(1) The degree of permanent impairment that results from an injury is to be assessed as provided by this Part and Part 7 (Medical assessment) of Chapter 7 of the Workplace Injury Management and Workers Compensation Act 1998 (the "**1998 WC Act**").

(3) If there is a dispute about the degree of permanent impairment of an injured offender, a court may not award damages unless the degree of permanent impairment has been assessed by an approved medical specialist in accordance with the 1998 WC Act.

(3A) A dispute about the degree of permanent impairment of an injured offender cannot be referred for assessment unless the offender has provided the protected defendant with a medical report by a medical practitioner that assesses that the degree of permanent impairment of the injured offender is at least 15% and sets out the medical practitioner's reasons for that assessment.

(4) A court may, at any stage in proceedings on a claim for damages, refer the matter for assessment of the degree of permanent impairment by an approved medical specialist in accordance with the 1998 WC Act.

(5) Section 151H (No damages unless permanent impairment of at least 15%) of the Workers Compensation Act 1987 applies for the purposes of an assessment under this Part of whether the degree of permanent impairment resulting from an injury is at least 15%.

#### *27 Definitions*

**"consequential mental harm"** means mental harm that is a consequence of a personal injury of any other kind.

**"mental harm"** means impairment of a person's mental condition.

**"negligence"** means failure to exercise reasonable care and skill.

**"personal injury"** includes:

- (a) pre-natal injury, and
- (b) impairment of a person's physical or mental condition, and
- (c) disease.

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

#### **SECT 50 Standard of care for professionals**

(1) A person practising a profession (

**"a professional"**) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

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

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

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

#### **56 Who is a Good Samaritan**

For the purposes of this Part, a

**"good samaritan"** is a person who, in good faith and without expectation of payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured.

**57 Protection of good samaritans**

(1) A good samaritan does not incur any personal civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured.

**58 Exclusion from protection**

(1) The protection from personal liability conferred by this Part does not apply if it is the good samaritan's intentional or negligent act or omission that caused the injury or risk of injury in respect of which the good samaritan first comes to the assistance of the person.

(2) The protection from personal liability conferred by this Part in respect of an act or omission does not apply if:

(a) the ability of the good samaritan to exercise reasonable care and skill was significantly impaired by reason of the good samaritan being under the influence of alcohol or a drug voluntarily consumed (whether or not it was consumed for medication), and

(b) the good samaritan failed to exercise reasonable care and skill in connection with the act or omission.

(3) This Part does not confer protection from personal liability on a person in respect of any act or omission done or made while the person is impersonating a health care or emergency services worker or a police officer or is otherwise falsely representing that the person has skills or expertise in connection with the rendering of emergency assistance.

**68 Definition Apology**

**"apology"** means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

**69 Effect of apology on liability**

(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and

(b) is not relevant to the determination of fault or liability in connection with that matter.

(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

**PART 2A - SPECIAL PROVISIONS FOR OFFENDERS IN CUSTODY**

**26C No damages unless permanent impairment of at least 15%**

No damages may be awarded (whether for economic or non-economic loss) unless the injury results in the death of the offender or in a degree of permanent impairment of the offender that is at least 15%.

# NORTHERN TERRITORY PERSONAL INJURIES (LIABILITIES AND DAMAGES) ACT – [http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nt/consol\\_act/piada365/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nt/consol_act/piada365/)

## SECT 7

### Volunteers and community organisations

(1) A volunteer does not incur personal civil liability for a personal injury caused by an act done in good faith and without recklessness while doing community work for a community organisation.

(2) Subsection (1) does not apply if the volunteer:

(a) knew, or ought reasonably to have known, that he or she was acting outside the scope of his or her authority or contrary to the instructions of the community organisation; or

(b) did the act while intoxicated.

(3) A community organisation:

(a) incurs the civil liability that would, but for subsection (1), have been incurred by the volunteer doing work for that organisation; and

(b) is liable for the personal injury caused by the act of the volunteer as if the volunteer were an employee of the community organisation.

(4) Liability that would be incurred under subsection (3) by a community organisation that is an Agency or department of the Territory, if the Agency or department were a body corporate, is incurred by the Territory.

(5) An agreement, undertaking or arrangement has no effect to the extent that it provides for a volunteer to give a community organisation an indemnity against, or to make a contribution to a community organisation in relation to:

(a) a liability the volunteer would incur but for subsection (1); and

(b) a liability the community organisation incurs under subsection (3).

(6) If under this section a community organisation incurs civil liability for a personal injury, a member of the organisation's management committee (however described) does not incur personal liability for that injury.

(7) In this section:

"community organisation" means a religious body, a body corporate, or an Agency or department of the Territory, that organises, directs or supervises community work done by volunteers.

"community work" means work done for any of the following purposes:

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

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

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

(d) for conserving or protecting the environment;

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

(f) for promoting the interests of a local community;

(g) for a political purpose;

(h) for any purpose prescribed by the Regulations,

but does not include work done under a community work order made under the *Sentencing Act*, *Youth Justice Act* or *Fines and Penalties (Recovery) Act*.

"volunteer", in relation to a community organisation, means a person doing community work for that organisation:

(a) who receives no remuneration for doing that work other than:

(i) remuneration that the person would receive whether or not he or she did that work; or

(ii) the reimbursement of reasonable expenses incurred by the person in doing that work; or

(b) who receives remuneration that does not exceed the amount, if any, prescribed by the Regulations.

## SECT 8

### Good Samaritans

(1) A good Samaritan does not incur personal civil liability for a personal injury caused by an act done in good faith and without recklessness while giving emergency assistance to a person.

(2) A good Samaritan with medical qualifications does not incur personal civil liability for advice, given in good faith and without recklessness, about the treatment of a person being given emergency medical assistance.

(3) This section does not apply if the good Samaritan was intoxicated while giving the assistance or advice.

(4) In this section:

"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) a 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; or

(b) a person with medical qualifications who, acting without expectation of payment or other consideration, gives advice about the treatment of a person who is apparently in need of emergency medical assistance.

"medical qualifications" means:

(a) qualifications as a medical practitioner;

- (b) professional qualifications in a category of health care recognised by statute; or
- (c) qualifications as an ambulance officer or in another recognised paramedical capacity.

**SECT 13**

**Expression of regret not admissible as evidence**

An expression of regret about a personal injury made at any time before the commencement of a proceeding in respect of that injury is not admissible as evidence in that proceeding.

**SECT 25**

**Damages other than for pecuniary loss**

A court may award damages other than for pecuniary loss, or may refuse to award such damages, only in accordance with section 27 after determining the injured person's degree of permanent impairment in accordance with section 26.

**SECT 26**

**Assessment of degree of impairment**

(1) A court, in determining the degree of permanent impairment suffered by an injured person, must do so on the basis of evidence adduced under this section.

(2) The claimant and the respondent may each adduce evidence for the purposes of subsection (1).

(3) Evidence of permanent impairment is to be given only by a medical practitioner who has assessed the degree of permanent impairment in accordance with the prescribed guides and any applicable regulation.

(4) The Regulations may provide for any matters in relation to the assessment of permanent impairment suffered by an injured person, including the following:

- (a) the content of prescribed guides, including by modification of the American Medical Association Guides to the Evaluation of Permanent Impairment;
- (b) procedures relating to the assessment of permanent impairment;
- (c) the qualifications of medical practitioners who may give evidence under this section;
- (d) the costs in connection with the assessment of impairment.

**SECT 27**

**Damages for non-pecuniary loss**

(1) The maximum amount of damages a court may award for non-pecuniary loss is:

- (a) on the commencement of this Part until the first declaration under section 28 takes effect – \$350 000; and
- (b) at any time after the first declaration under section 28 takes effect – the amount declared and in force under section 28 at the time of the award.

(2) A court must not award damages for non-pecuniary loss if the court determines the degree of permanent impairment to be less than 5% of the whole person.

(3) When awarding damages for non-pecuniary loss, a court must award the following amount:

- (a) if the court determines the degree of permanent impairment to be 85% or more of the whole person – the maximum amount;
- (b) if the court determines the degree of permanent impairment to be not less than 15% and not more than 84% of the whole person – the relevant percentage of the maximum amount;
- (c) if the court determines the degree of permanent impairment to be a percentage of the whole person specified in column 1 of the Table – the amount specified in column 2 opposite the relevant percentage.

TABLE

Column 1	Column 2
Degree of permanent impairment as percentage of whole person	Amount of damages to be awarded
not less than 5% but less than 10%	2% of the maximum amount
10%	3% of the maximum amount
11%	4% of the maximum amount
12%	6% of the maximum amount
13%	8% of the maximum amount
14%	12% of the maximum amount

## 9 GENERAL PRINCIPLES

- (1) A person does not breach a duty 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 reasonably to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among 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.

## 10 OTHER PRINCIPLES

- In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—
- (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 relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

## 11 GENERAL PRINCIPLES

- (1) A decision that a breach of duty caused particular harm comprises the following elements—
- (a) the breach of duty was a necessary condition of the occurrence of the harm ( "**factual causation**" );
  - (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ( "**scope of liability**" ).
- (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying *subsection (1) (a)*—should be accepted as satisfying *subsection (1) (a)*, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
- (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
- (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
  - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

## 12 ONUS OF PROOF

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

### SECT 21 Proactive and reactive duty of doctor to warn of risk

- (1) A doctor does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of being given medical advice) that will involve a risk of personal injury to the patient, unless the doctor at that time fails to give or arrange to be given to the patient the following information about the risk—
- (a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
  - (b) information that the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.
- (2) In this section—

**"patient"**, when used in a context of giving or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

**Example:** the responsibility a parent has for an infant child



## 22 STANDARD OF CARE FOR PROFESSIONALS

- (1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.
- (2) However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.
- (3) The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the 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) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service.

**SOUTH AUSTRALIA CIVIL LIABILITY ACT 1936** [http://www7.austlii.edu.au/cgi-bin/viewdb/au/legis/sa/consol\\_act/cla1936161/](http://www7.austlii.edu.au/cgi-bin/viewdb/au/legis/sa/consol_act/cla1936161/)

### 31—Standard of care

- (1) For determining whether a person (the "defendant") was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.
- (2) The reasonable person in the defendant's position will be taken to be sober unless—
  - (a) the defendant was intoxicated; and
  - (b) the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and
  - (c) the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs,and, in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant.

### 33—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 mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness.
- (2) For the purposes of this section—
  - (a) in a case of pure mental harm, the circumstances of the case to which the court is to have regard include the following:
    - (i) whether or not the mental harm was suffered as the result of a sudden shock;
    - (ii) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
    - (iii) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
    - (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant;
  - (b) in a case of consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose.
- (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 reasonably to know, that the plaintiff is a person of less than normal fortitude.

### 5Q . Terms used

**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.

### 41—Standard of care for professionals

- (1) A person who provides a professional service incurs no liability in negligence arising from the service if it is established that the provider acted in a manner that (at the time the service was provided) was widely accepted in Australia by members of the same profession as competent professional practice.
- (2) However, professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing professional opinions widely accepted in Australia by members of the same profession does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

- (4) Professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of a risk of death or injury associated with the provision of a health care service.

### 52—Damages for non-economic loss

- (1) Damages may only be awarded for non-economic loss if—
  - (a) the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least 7 days; or
  - (b) medical expenses of at least the prescribed minimum have been reasonably incurred in connection with the injury.
- (2) If damages are to be awarded for non-economic loss, other than in relation to personal injury arising from an MVA motor accident, they must be assessed as follows:
  - (a) the injured person's total non-economic loss is to be assigned a numerical value (the "scale value") on a scale running from 0 to 60 (the scale reflecting 60 equal gradations of non-economic loss, from a case in which the non-economic loss is not severe enough to justify any award of damages to a case in which the injured person suffers non-economic loss of the gravest conceivable kind);
  - (b) the damages for non-economic loss are to be calculated in relation to an injury arising from an accident that occurred during 2002 by multiplying the scale value by \$1 710;

### 3—Interpretation

- (1) In this Act, unless the contrary intention appears—
  - "accident" means an incident out of which personal injury arises and includes a motor accident;
  - "brother" includes half-brother and step-brother;
  - "child" includes son, daughter, grandson, granddaughter, step-son and step-daughter;
  - "consequential mental harm" means mental harm that is a consequence of bodily injury to the person suffering the mental harm;
  - "Consumer Price Index" means the Consumer Price Index (all groups index for Adelaide) published by the Australian Statistician under the *Census and Statistics Act 1905* (Cwth);
  - "contributory negligence" means a failure by a person who suffers harm to exercise reasonable care and skill for his or her own protection or for the protection of his or her own interests;
  - "damages" means compensation or damages for harm and includes solatium but does not include—
    - (a) workers compensation; or
    - (b) compensation under a statutory scheme for compensating victims of crime;
  - "domestic partner", in relation to any cause of action arising under this Act, means—
    - (a) a person declared under the *Family Relationships Act 1975* to have been a domestic partner on the day on which the cause of action arose; or
    - (b) a person who was in a registered relationship on the day on which the cause of action arose;
  - "drive" includes ride, and "driver" and "rider" have corresponding meanings;
  - "duty of care" means a duty to take reasonable care or to exercise reasonable skill (or both);
  - "harm" includes loss of life, personal injury, damage to property, economic loss and loss of any other kind;
  - "health care service" includes—
    - (a) a diagnostic service;
    - (b) a therapeutic service;
    - (c) any other service directed at maintaining or restoring health;
  - "intoxicated"—a person is intoxicated if under the influence of alcohol or a drug to the extent that the person's capacity to exercise due care and skill is impaired;
  - "medical expenses" includes—
    - (a) the fees of medical practitioners and other professional medical advisers and therapists; and
    - (b) the cost of hospitalisation; and
    - (c) the cost of medicines and therapeutic appliances;
  - "mental harm" means impairment of a person's mental condition;
  - "motor accident" means an incident in which personal injury is caused by or arises out of the use of a motor vehicle;
  - "motor vehicle" means—
    - (a) a motor vehicle as defined in the *Motor Vehicles Act 1959*; or
    - (b) a vehicle operated on a railway, tramway or other fixed track or path by—
      - (i) a person who holds a contract, licence or authority under the *Passenger Transport Act 1994*; or
      - (ii) a person who holds an accreditation under the *Rail Safety Act 1996*;
  - "MVA motor accident" means a motor accident where the motor vehicle is a motor vehicle as defined in the *Motor Vehicles Act 1959*;
  - "negligence" means failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care;

"non-economic loss" means—

- (a) pain and suffering; or
- (b) loss of amenities of life; or
- (c) loss of expectation of life; or
- (d) disfigurement;

"obvious risk"—see section 36;

"parent" includes father, mother, grandfather, grandmother, step-father and step-mother;

"passenger compartment" of a motor vehicle means a part of the vehicle designed for the carriage of passengers;

"personal injury" or "injury" means bodily injury and includes—

- (a) mental harm;
- (b) death;

"precaution" includes any action to avoid or reduce the risk of harm;

"prescribed discount rate" means—

- (a) if no percentage is fixed by regulation for the purposes of this definition—5 per cent; or
- (b) if such a percentage is fixed by regulation—the percentage so fixed;

"prescribed maximum" means—

- (a) in relation to an injury arising from an accident that occurred during 2002—\$2.2 million; or
- (b) in relation to an injury arising from an accident that occurred in a subsequent calendar year—a sum

(calculated to the nearest multiple of \$10) that bears to \$2.2 million the same proportion as the Consumer Price Index for the September quarter of the preceding year bears to the Consumer Price Index for the September quarter 2001;

"prescribed minimum" means—

- (a) in relation to an injury arising from an accident that occurred during 2002—\$2 750; or
- (b) in relation to an injury arising from an accident that occurred in a subsequent calendar year—a sum

(calculated to the nearest multiple of \$10) that bears to \$2 750 the same proportion as the Consumer Price Index for the September quarter of the preceding year bears to the Consumer Price Index for the September quarter 2001;

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

"registered relationship" means a relationship that is registered under the *Relationships Register Act 2016*, and includes a corresponding law registered relationship under that Act;

"sister" includes half-sister and step-sister;

"spouse", in relation to any cause of action arising under this Act, means a person who was legally married to another on the day on which the cause of action arose;

"State average weekly earnings" means the amount determined in accordance with the regulations by reference to publications of the Australian Statistician.

(2) For the purposes of this Act, personal injury will arise from a motor accident if the personal injury is caused by or arises out of the use of a motor vehicle.

### **53—Damages for mental harm**

(1) Damages may only be awarded for mental harm if the injured person—

- (a) was physically injured in the accident or was present at the scene of the accident when the accident occurred; or
- (b) is a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident.

(2) Damages may only be awarded for pure mental harm if the harm consists of a recognised psychiatric illness.

(3) Damages may only be awarded for economic loss resulting from consequential mental harm if the harm consists of a recognised psychiatric illness.

# TASMANIA CIVIL LIABILITY ACT 2002 [http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/tas/consol\\_act/cia2002161/](http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/tas/consol_act/cia2002161/)

## SECT 7

### Effect of apology on liability

(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the fault of the person –

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and

(b) is not relevant to the determination of fault or liability in connection with that matter.

(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the fault of the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

(3) In this section,

**apology** means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, which does not contain an admission of fault in connection with the matter.

### Division 2 - Standard of care General principles

(1) A person does not breach a duty to take reasonable care unless –

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

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would have taken precautions to avoid the risk.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among 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 potential net benefit of the activity that exposes others to the risk of harm.

(3) For the purpose of subsection (2)(c), the court is to consider the burden of taking precautions to avoid similar risks of harm for which the person may be responsible.

### Division 3 - Causation General principles

(1) Prerequisites for a decision that a breach of duty caused particular harm are as follows:

(a) the breach of duty was a necessary element of the occurrence of the harm ( "factual causation" );

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ( "scope of liability" ).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty, being a breach of duty that is established but which can not be established as satisfying subsection (1)(a), should be taken as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach –

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

## SECT 14

### Onus of proof

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact on which the plaintiff wishes to rely relevant to the issue of causation.

## SECT 21

### Division 6 - Professional negligence Proactive and reactive duty of registered medical practitioner to warn of risk

(1) A medical practitioner does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of the patient being given medical advice) that will involve or give rise to a risk of personal injury to the patient, unless the medical practitioner at that time fails to give or arrange to be given to the patient the following information about the risk (whether or not the patient asks for the information):

- (a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
  - (b) information that the medical practitioner knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.
- (2) This section does not apply where a medical practitioner has to act promptly to avoid serious risk to the life or health of the patient and –
- (a) the patient is not able to hear or respond to a warning about the risk to the patient; and
  - (b) there is not sufficient time for the medical practitioner to contact a person responsible for making a decision for the patient.
- (3) In this section,  
**patient**, when used in a context of asking for or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

## **SECT 22**

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

- (1) A person practising a profession ( "a professional" ) does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) Peer professional opinion cannot be relied on for the purpose of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purpose of subsection (1) .
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in relation to the risk of harm associated with the provision by a professional of a professional service to a person.

## **SECT 27**

### **Restrictions on damages for non-economic loss (general damages)**

- (1) If the amount of non-economic loss is assessed to be not more than Amount A, no damages are to be awarded for non-economic loss.
- (2) If the amount of non-economic loss is assessed to be more than Amount A but not more than Amount B, damages awarded for non-economic loss are calculated as follows:
- (3) If the amount of non-economic loss is assessed to be more than Amount B, damages awarded for non-economic loss are an amount equal to the amount assessed.
- (4) For the purpose of this section –
- (a) " **Amount A** " is –
    - (i) for the financial year ending on 30 June 2004, \$4 000; and
    - (ii) for the financial year commencing on 1 July 2004 and for each subsequent financial year, calculated in accordance with the following formula and rounded off

## **SECT 29**

### **PART 8 - Mental Harm Interpretation**

In this Part –

**consequential mental harm** means mental harm that is a consequence of a personal injury of any other kind;

**mental harm** means impairment of a person's mental condition;

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

## **SECT 31**

### **Personal injury arising from mental or nervous shock**

In any civil proceedings for damages, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock.

## **SECT 32**

### **Limitation on recovery 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 peril 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 peril or the immediate aftermath of the victim being killed or injured; or

(b) the plaintiff is a close member of the family of the victim.

(3) In this section –

**close member of the family** of a victim means –

(a) a parent of the victim or other person with parental responsibility for the victim; or

(b) the spouse of the victim; or

(c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility; or

(d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim;

**spouse** means –

(a) a husband or wife; or

(b) a de facto spouse –

but where more than one person would so qualify as a spouse, means only the last person to so qualify.

### **SECT 33**

#### **Pure mental harm – liability only for recognised psychiatric illness**

There is no liability to pay damages for pure mental harm resulting from breach of duty unless the harm consists of a recognised psychiatric illness.

### **SECT 34**

#### **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 mental harm unless a reasonable person in the position of 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 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 nature and extent of 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.

### **SECT 35**

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

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

### **SECT 35B**

#### **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 ill, is at risk of death or injury, is injured, is apparently ill, 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 and without recklessness –

(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.

### **SECT 47**

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

(1) Subject to subsections (2) and (3) , a volunteer does not incur civil liability for anything that the volunteer has done in good faith when doing community work.

(2) Subsection (1) does not affect any right to recover damages in respect of defamation or in respect of the death of, or personal injury to, any person directly caused by, or by the driving of, a motor vehicle if, at the time of the death or personal injury –

- (a) the vehicle was owned or being driven by a person who, but for the operation of subsection (1) , would incur liability in respect of the death or personal injury; and
- (b) the vehicle –
  - (i) was a vehicle in respect of which a premium had been paid, or had been required to be paid, in accordance with Part V of the Motor Accidents (Liabilities and Compensation) Act 1973 ; or
  - (ii) was a "permitted out-of-State vehicle" , as referred to in section 2 of that Act, in respect of which a third party insurance policy was in force as required by section 19 of that Act.
- (3) The protection given by subsection (1) does not apply to a volunteer –
  - (a) who knew or 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 instructions given by the community organisation; or
  - (b) whose ability to do the community work in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.
- (4) In this section –
  - drugs** means drugs that are taken voluntarily otherwise than for therapeutic purposes;
  - motor vehicle** has the meaning given in section 2 of the Motor Accidents (Liabilities and Compensation) Act 1973 .

## Victorian Wrongs Act 1958 (edited for psychiatrists)

### 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.

### 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.

### 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 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.

#### 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 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**

#### **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.

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

#### **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.

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.

**SECT 3**

**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; and
- (b) pre-natal injury; and
- (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.

**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); 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.

**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.

**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 —

- (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.

#### 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.

#### 5S . Mental harm: duty of care

(1) A person (the **defendant**) does not owe a duty of care to another person (the **plaintiff**) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

(2) For the purpose of the application of this section in respect of pure mental harm, the circumstances of the case include the following —

- (a) whether or not the mental harm was suffered as the result of a sudden shock;
- (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
- (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) For the purpose of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

(4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

#### 5T . Liability for pecuniary loss for consequential mental harm

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

#### 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.

#### 5AH . Effect of apology on liability

(1) An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages —

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and

(b) is not relevant to the determination of fault or liability in connection with that incident.

(2) Evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

#### 9 . 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 —

(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; and
- (b) loss of amenities of life; and
- (c) loss of enjoyment of life; and
- (d) curtailment of expectation of life; and
- (e) bodily or mental harm.