

***Carter
Newell***
LAWYERS

Australian Civil Liability Guide



10th
EDITION

Carter Newell Lawyers is an award winning specialist law firm providing legal advice to Australian and international corporate clients in our key specialist practice areas of:

- Insurance
- Construction & Engineering
- Resources
- Corporate
- Commercial Property
- Litigation & Dispute Resolution
- Aviation

Within each of these core areas we have dedicated experts who are committed to and passionate about their field and have extensive experience and knowledge.

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2016, 2015 Leading Queensland Professional Indemnity Law Firm – Doyle’s Guide to the Australian Legal Profession

2016, 2015 Leading Queensland Defendant Medical Negligence Law Firm – Doyle’s Guide to the Australian Legal Profession

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2011 Winner ALB Employer of Choice Blue Award

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NB: Due to the extensive nature of this publication and the pace of reforms and judicial consideration there may be an absence of reference to a recent case or some references to legislation and its provisions which are no longer current, yet proclaimed, amended or repealed. This publication attempts to draw out the most significant points in the relevant legislation. Whilst all care has been taken to ensure that the most up to date information has been included, not all cases or aspects of the legislation have been considered. The material contained in this publication is in the nature of general comment only, and neither purports nor is intended to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering and, if necessary, taking appropriate professional advice upon his or her own particular circumstance.

Australian Civil Liability Guide

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FOREWORD

Carter Newell Lawyers are to be commended for their publication 'Australian Civil Liability Guide'. The legislation that, since 2002, has reformed tort law in Australia has created a maze. The tangled web of statutory provisions has been made even more complex by the judgments of courts in every jurisdiction that have tried to apply and clarify the various provisions that have fallen for decision.

One of the most time-consuming problems for lawyers who have to grapple with the subtleties of the legislation involved is the difficulty in finding the relevant material. This may comprise the legislation applicable, the cases that have considered the particular issue, similar legislation in other jurisdictions, and relevant cases in those jurisdictions.

Carter Newell's publication enables one, quickly, to undertake the desired research simply and efficiently. The material is comprehensive and well-organised. The legislation is sensibly divided into different categories annotated with cases and commentary. Each category deals separately with each State and Territory. The language used is clear and direct. The time and trouble that has been taken in the production of the guide is obvious. Its quality as a reference work speaks for itself. It is an extremely helpful tool for any tort lawyer, whether practitioner or academic, and for any person who is interested in the changes to Australian tort law that have occurred since 2002.

The Honourable Justice David A Ipp AO QC

ENDORSEMENT

Insurance law was the first area of law I knew and when I started there were no publications such as this 9th edition Australian Civil Liability Guide. The State by State break down highlighting the effects of the tort reform introduced in 2002; the cases reviewed, interpretation and assessment of heads of damage clearly demonstrate an excellent understanding of this area of law by the team at Carter Newell Lawyers. This publication is a great resource and a fine example of why I have always felt at home in the family of insurance lawyers.

The Honourable Michael Kirby AC CMG

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INTRODUCTION

Carter Newell Lawyers is pleased to release the 10th edition of the *Australian Civil Liability Guide*. This *Guide* continues to evolve from the first *Australian Civil Liability Guide* which was published in 2005, and was endorsed by Justice Ipp and later by Justice Kirby.

This *Guide* addresses legislative and case law developments relevant to civil liability federally and in all Australian States and Territories since the reform process began in 2002. It should be noted that the *Guide* does not address the law relating to claims in respect of motor vehicle accidents or workers compensation claims. Tables summarising all relevant legislation and cases for the Commonwealth and each State and Territory can also be found at the commencement of the *Guide*.

Background to the Australian tort reform

A perceived ‘*insurance crisis*’ and concerns over the availability and affordability of personal injury liability insurance prompted the Ipp report published in October 2002. This report was, in turn, a springboard for tort law reform throughout Australia. Many, though not all, of the Ipp report’s recommendations were incorporated into current reforms at both Commonwealth and State territory level. In some cases, the reforms went well beyond what the Ipp panel had recommended. The desirability of uniform reform of tort legislation was emphasised by the Ipp report and confirmed as an objective of the federal government in April 2003 at its Joint Communiqué: Ministerial Meeting on Insurance Issues. Unfortunately, despite over a decade passing since the introduction by many states of civil liability legislation, a uniform approach remains illusive.

Commentary

Since the reforms were introduced, there has been debate regarding the very existence of a liability insurance crisis and its causes and whether the reforms have achieved the important goal of restoring balance between the rights of victims of negligence and the stability of the insurance market.

Initial debates between stakeholders about the merits of recent Australian tort reform have been supplemented by a growing body of commentary from the judiciary and government.

Whether or not the original objective has been achieved, it is clear that the reforms have served to tighten the law of negligence throughout Australia by imposing limitations on certain types of claims and capping various heads of damages. In some States and in one Territory, reforms to the substantive legal principles have also been coupled with a major procedural overhaul which has introduced legislative steps that must be taken prior to a claimant being entitled to commence court proceedings.

Future reform

Over the last decade, since the reform process began, there has been much commentary and some opportunity for judicial consideration of the reforms. It is unclear how much further reform will potentially unfold over time, however, there have been no concrete steps taken by any jurisdictions to wind back the reforms.

The debate on legislative reform for personal injury litigation continues across Australia as the legislature and the judiciary attempt to find a balance between personal responsibility and social

expectation of proper compensation and care for injured persons. In the meantime, this *Guide* is designed to assist in understanding the reforms that have occurred to date and the current state of civil liability law in Australia.

The Guide is part of our suite of related industry publications which includes:

- *A Legal Guide to Contract Works and Construction Liability Insurance in Australia;*
- *Australian Airports Liability and Compliance Guide;*
- *Asia Pacific Carriers' Liability Guide;*
- *A Guide to Directors' and Officers' Liability and Insurance;* and our
- *Injury Liability, Professional Management and Liability, Workplace Relations and Property and Real Estate Gazettes.*

As the legislation and case law develops, we continue to provide a comprehensive and updated annotated guide to the law of negligence Australia wide.

***Carter
Newell***
LAWYERS

Queensland



QUEENSLAND

Application of Statutory Reforms¹

Parties to personal injuries claims in Queensland are required to comply with procedural steps as set out in the *Personal Injuries Proceedings Act 2002* (Qld) (**PIPA**), other than claims by an employee under the workers' compensation scheme, claims governed by civil aviation liability legislation, smoking, dust disease and discrimination claims.

The *Civil Liability Act 2003* (Qld) (**CLA (Qld)**) applies to any civil claim for damages for harm (per s 4). The definition of civil claim is wide enough to encompass claims for breach of contract, breach of statutory duty and actions in tort against property or person, at least where that duty is concurrent with a duty of care in negligence. Therefore, the CLA (Qld) applies to the extent of any cause of action involving the discharge of duty to exercise reasonable care.

Some exceptions are outlined in s 5 of the CLA (Qld). Motor accident claims, workers' compensation claims (other than journey claims) and injuries arising out of dust related conditions and smoking are generally excluded.

Section 5 does not expressly exclude intentional torts, but the courts have consistently applied a narrow interpretation of the term '*civil claim*' to exclude the application of the CLA (Qld) from such claims.

Both the PIPA and the CLA (Qld) impact on the common law method of calculating damages and costs.

Pre-court Procedures²

The PIPA outlines various steps that must be completed prior to court proceedings being instituted in applicable personal injuries claims. The provisions are designed to encourage the economical and early resolution of claims for damages arising out of personal injuries without the parties having to proceed to court.

A claimant is required to serve a Notice of Claim form providing full details of the claimant, the incident, the injuries suffered, the treatment obtained and the reasons why the claimant considers the respondent is liable. Further obligations are imposed for claims regarding medical negligence.

A Notice of Claim must be served on a respondent within nine months of the incident or within one month of the claimant seeking legal advice, whichever is earlier. If the Notice of Claim is not served within that time, the obligation to serve a Notice of Claim continues, but a reasonable excuse must be provided as to the reason for the delay.³

A respondent may serve a contribution notice on any other parties claiming contribution or an indemnity. All parties to a claim must co-operate through full and early disclosure of documents and information including all investigative, medical and rehabilitation reports.

The extent of disclosure to be provided by each party has been considered by courts, with a particular focus on the obligations of a respondent.

¹ *Personal Injuries Proceedings Act 2002* (Qld) s 6, *Civil Liability Act 2003* (Qld) ss 4–5.

² *Personal Injuries Proceedings Act 2002* (Qld) ss 9–44 and ss 47–60.

³ See discussion under '*Limitation Periods*' for examples of cases involving the provision of a '*reasonable excuse*'.

There are two aspects to a respondent's disclosure obligations under s 27 of the PIPA. The first is a respondent's obligation to disclose documents that are both directly relevant to an issue in dispute and about the incident. The second relates to a respondent's obligation to respond to a request for information made by the claimant. This must relate to the circumstances of, or reasons for, the incident.

The scope of a respondent's obligations to disclose information and documents was discussed by the Queensland Court of Appeal in *Haug v Jupiters Limited t/as Conrad Treasury Brisbane*⁴ and the Supreme Court in *Oliver v Mulp Pty Ltd*.⁵

In *Haug* it was held that an 'incident' for the purposes of s 27 must be a reference to the incident as described and particularised in the Notice of Claim form. The court held that a respondent's obligation to disclose documents about an incident is narrower than a request for information.

A claimant has more scope in a request under s 27 than a respondent has via its reciprocal powers under s 22. Nevertheless, the court limited the operation of s 27(1)(b), emphasising that a claimant is not at large with respect to the information sought. A request for information must still be in connection to the circumstances of, or the reasons for, the incident as referred to in the Notice of Claim. Moreover, the request is dependent on the information sought actually being in the respondent's possession.

The court in *Oliver* held that the process under s 27 is designed to assist a claimant to determine what a respondent knows about the incident and not to enable a claimant to interrogate the respondent.

Legal professional privilege can be claimed in accordance with s 30 but privilege does not extend to investigative and medical reports.

Disclosure of privileged documents was considered in several key decisions of the Queensland courts in the cases of *Watkins v State of Queensland*,⁶ *Felgate v Tucker*,⁷ *State of Queensland v Allen*,⁸ and *Mahoney v Salt*.⁹

Watkins was a medical negligence case. The State of Queensland (the respondent) denied liability in a response provided pursuant to s 20 of the PIPA and provided a report from a medical specialist in support of its denial with the response. The medical specialist's report referred to three letters of instruction from the claimant's solicitor. Attached to the report was a tax invoice, which referred to a 30 minute telephone conversation with the respondent's solicitor. The claimant sought disclosure of these documents including the record of the discussion between the expert and the solicitor.

All of the documents were disclosable because:

- section 20 of the PIPA requires all documents used to assess liability to be disclosed;
- the specialist's report was obtained for the purpose of complying with the pre-litigation steps of the PIPA and not for the purpose of anticipated litigation; and
- section 30 (which allows documents to be withheld if they are subject to legal professional privilege) does not apply to s 20.

⁴ [2008] 1 Qd R 276.

⁵ [2009] QSC 340.

⁶ [2008] Qd R 546.

⁷ [2011] QCA 194.

⁸ [2012] 2 Qd R 148.

⁹ [2012] QSC 43.

In *Allen*, shortly after performing a medical procedure a hospital, in contemplation of possible legal action and on legal advice, obtained statements from the doctors involved. The claimant sought disclosure of the statements from the doctors and of file notes made by solicitors during conferences with those doctors.

By the time the appeal was heard, only one witness statement was in contention. That doctor's witness statement was disclosable because the subject of the document was the claimant's condition and the doctor's involvement with him and, in content and form, resembled other medical reports prepared for the courts in similar matters. However, the file notes made by the respondent's solicitors retained legal professional privilege and were not disclosable.

In *Felgate*, the appellant underwent laparoscopic surgery during which she suffered from a phenomenon called '*surgical awareness*', where she was conscious throughout the procedure but unable to communicate with medical staff. Soon after, she commenced a claim against her anaesthetist for damages for personal injuries.

During the compulsory conference, the appellant became aware of a document produced by her anaesthetist titled '*Interpretation of anaesthetic record*', which she claimed was disclosable. However, the court held the document was not disclosable as any communications to a solicitor by a client seeking legal advice are privileged irrespective of impending litigation.

The matter was unsuccessfully appealed.¹⁰ The appeal court found that:

- even though the document was used in mandatory pre-court proceedings, it was privileged as it was created for the dominant purpose of use in anticipated litigation;
- the word '*report*' in s 30 was not intended to include notes and statements given by clients to their lawyers for the purposes of progressing or answering a claim under the PIPA; and
- there was no implied waiver of privilege by producing the document at compulsory conference as the document contained no more information than what was in already disclosed medical records and it would be unfair to deny the respondent its right to maintain privilege.

The decision in *Mahoney* followed both the *Allen* and *Felgate* positions and further clarified what constitutes an '*investigative report*' for the purposes of s 30(2) of the PIPA. In this case, the claimant commenced a claim in respect of injuries sustained when she fell at her parents' home. The respondents made a claim under their home insurance policy. The insurer appointed solicitors and included in their instructions that they should provide advice on indemnity and appoint a loss adjuster to undertake a factual investigation. The loss adjuster took statements (both draft and signed) from the respondents and forwarded these on to the respondents' solicitor.

The applicant argued that the statements were '*investigative reports*' and therefore must be disclosed. However the court agreed with the respondents that statements are not investigative reports and, as they were brought into existence for the purpose of providing the insurer with legal advice, they attracted legal professional privilege.

This decision makes clear that legal professional privilege attaches to a witness statement made for the dominant purpose of providing legal advice.

¹⁰[2011] QCA 194.

Compulsory conference

Sections 36 to 42 of the PIPA address the obligation of parties to participate in a compulsory conference.

Once disclosure has been completed, the parties to the claim are required to participate in a conference and exchange mandatory final offers at the close of the conference should the matter not be resolved. The exchange of mandatory final offers is an important consideration for the parties and may have adverse cost consequences to a claimant or respondent if a better outcome is not achieved after proceeding to trial.¹¹

The parties must sign a certificate of readiness for trial prior to the compulsory conference. The 2010 amendments to the PIPA have slightly relaxed this requirement, requiring now that the certificate states that the parties are ready in all aspects for the conference and trial, rather than being ready subject to compliance with the procedural requirements of the *Uniform Civil Procedure Rules 1999*.

In practice, it may be beneficial to seek agreement from the parties that the requirement to sign a certificate of readiness be waived if it is anticipated that further evidence needs to be obtained if the matter does not settle at conference.

Commencing court proceedings

Despite the obligations under the PIPA, a claimant may commence proceedings in the relevant court with the agreement of the other parties notwithstanding non-compliance with the pre-court procedure if certain criteria can be met. Commonly, that urgency will arise because of the imminent expiration of the limitation period.¹² Section 43 does not affect the operation of the limitation period, but provides a mechanism to apply for a court's order in relation to it.

Section 43 does not apply where the claimant is suffering from a terminal condition, where the trial of the proceeding to be commenced should be expedited.

The court proceeding will be stayed until the pre-court procedures have been completed, unless the claimant is suffering from a terminal condition and the trial should be expedited so the court orders the proceeding be given priority.

Section 44 allows the parties to consent to the early commencement of a claim, avoiding an application under s 43.

Section 59 of the PIPA allows a claimant to commence a proceeding after the limitation period has expired if a complying Notice of Claim has been given before the end of the limitation period. The proceeding must be started within six months (or a longer period allowed by order of the court) after pt 1 of the Notice of Claim is given or leave to commence proceedings is granted. If a proceeding is commenced, the claimant must still comply with the pre-court steps before the claim can proceed.

As to the interaction between ss 43 and 59, if a claim could be commenced upon reliance of s 59, there would be no urgency to start the proceeding to justify an application under s 43. However, the impending expiration of the six month period outlined in s 59 may justify an application in reliance on s 43.¹³

¹¹ See discussion under 'Legal Costs'.

¹² *Gillam v Queensland* [2004] 2 Qd R 251 [24].

¹³ *Ghobrial v Assaf* [2014] QDC 141 [25]-[26].

The Law of Negligence – Scope of Duty of Care

*Standard of care*¹⁴

Section 9 of the CLA (Qld) states that a person does not breach a duty to take precautions against a risk unless:

- the risk was foreseeable (being a risk which the person knew or reasonably should have known about);
- the risk was not insignificant; and
- a reasonable person in the position of the person would have taken precautions.

The probability, likely seriousness and social utility of the activity creating the harm and the burden precautions would create are factors a court should take into account when considering what precautions a reasonable person would take against the risk.

The key element of s 9 is the ‘*not insignificant*’ test. The purpose of the test is that respondents should only be held liable for failing to take precautions in relation to risks that are ‘*not insignificant*’, rather than being required to take precautions in response to an array of risks which are unlikely to materialise. The common law test regarding foreseeability from the decision of *Wyong Shire Council v Shirt*¹⁵ defined a foreseeable risk as one that was ‘*not far-fetched or fanciful*’.

The Queensland Supreme Court considered the meaning of the double negative in s 9 and concluded that:

*‘Unless a risk is insignificant it should lead to the taking of precautions if it is foreseeable that the risk might lead to harm and if a reasonable person in the circumstances would have taken precautions.’*¹⁶

In that case, the court concluded that the risk of the plaintiff being struck by a fellow player’s golf ball was not insignificant, although ultimately found that no warning was required because the risk of being struck by a golf ball on a golf course is obvious and, pursuant to s 15 of the CLA (Qld), no duty was owed to warn of an obvious risk.

The High Court in *New South Wales v Fahy*¹⁷ sought to reinforce that the *Shirt* test should not focus only upon how the particular injury happened, but requires a more thorough inquiry in identifying what a reasonable person would have done in the circumstances. Further, it was stated that the test requires more than a comparison between the cost of avoiding the injury and its consequence. The court must look forward to identify what a reasonable person would have done, rather than looking backward to identify what would have avoided the injury.

The Queensland Court of Appeal in *Meandarra Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd*¹⁸ accepted that the test in s 9 was more demanding than the common law test established in *Shirt*. His Honour stated that, in determining claims to which the CLA applies, the ‘*not insignificant*’ test should be applied instead of the common law test of ‘*not far-fetched or fanciful*’.

The following are a few recent examples of the application of test in s 9.

¹⁴ *Civil Liability Act 2003* (Qld) ss 9–10.

¹⁵ (1980) 146 CLR 40.

¹⁶ *Pollard v Trude* [2008] QSC 119 [40].

¹⁷ (2007) 232 CLR 486.

¹⁸ [2013] 1 Qd R 319.

In *Windley v Gazaland Pty Ltd (t/as Gladstone Ten Pin Bowl)*,¹⁹ the plaintiff slipped on a bowling lane surface when the lights were dimmed for 'glow in the dark' bowling. The plaintiff alleged the Ten Pin Bowling centre failed to take reasonable steps to ensure that the foul line was clearly visible or give adequate warning of the dangers of going over the foul line. The court held that the risk was foreseeable and significant and a reflective strip should have been used to identify the point where the lane was oiled.

In *Hamcor Pty Ltd v Queensland*,²⁰ the Queensland Fire and Rescue Service (QFRS) extinguished a fire in the plaintiffs' chemical factory with water. The water combined with chemicals at the factory to produce a very large quantity of contaminated fluid which soaked into the soil and large concrete slabs and entered the plaintiff's storage dams. As a result, the land was classified as Contaminated Land pursuant to ch 7 of the *Environmental Protection Act 1994* (Qld). The plaintiff sued the State of Queensland in respect of the acts and omission of the QFRS. It was held that the risk was foreseeable.

In *Du Pradal v Petchell*,²¹ the plaintiff was run over by a motor boat driven by the defendant. The defendant was held to have breached his duty of care because the risk of harm was foreseeable and not insignificant. A reasonable person would have observed the presence of anchored vessels and a dive float signalling the presence of a diver in the water and travelled further out from the shoreline to avoid the area.

The Queensland Court of Appeal considered the question of breach of duty in *Boon v Summs of Qld Pty Ltd*.²² The plaintiff was accidentally stabbed in the hand by another employee with a sharp blade which was used to peel an orange. He sued his employer in negligence for failing to properly supervise or give instructions the employee with respect to the use of the knife. The court held that the co-worker ought to have known there was a risk someone may be struck by the blade in the busy area if he stood without retracting the blade or looking to see if anyone was coming towards him. The employer was vicariously liable for his actions.

These decisions demonstrate that it is still open to the court to have regard to common law principles when determining the appropriate standard of care.

Causation²³

The provisions dealing with causation in the CLA (Qld) maintain common law principles used to determine causation.

The CLA (Qld) requires that, for a finding of causation, there must initially be:

- factual causation (the belief that negligence was a necessary condition of the harm); and
- a finding that the harm comes within the scope of the negligent person's liability.

When determining issues of causation, the court must consider whether or not and why the responsibility for the harm rests with the defendant. A plaintiff's evidence as to what they would have done if no breach of duty had occurred is inadmissible.

Pursuant to s 12 of the CLA (Qld), the plaintiff always bears the onus of proof on the balance of probabilities in establishing causation.

¹⁹ [2014] QDC 124.

²⁰ [2014] QSC 224.

²¹ [2014] QSC 261.

²² [2016] QCA 38.

²³ *Civil Liability Act 2003* (Qld) ss 11 and 12.

In *State of Queensland v Nudd*,²⁴ the Court of Appeal reviewed a trial's conclusion that causation had been established. The plaintiff, who was incarcerated, suffered an injury when one of his crutches slipped on a small puddle of water in the common area of his cell block. Initially, it was found that two-hourly inspections of the area where he fell would probably have led to the discovery and removal of the water. However, on appeal, the court held that the plaintiff failed to prove that a reasonable system of inspection probably would have detected the presence of that water before the incident.

Section 12 of the CLA (Qld) is mirrored by s 5E of the *Civil Liability Act 2002* (NSW) (**CLA (NSW)**). The High Court considered the section in *Tabet v Gett*.²⁵ The plaintiff alleged that a delay by a doctor in diagnosing her brain tumour resulted in her losing the chance of avoiding brain damage. At first instance the plaintiff won her claim,²⁶ but the decision was reversed on appeal.²⁷ The High Court held that the chance of a better medical outcome amounted to a mere possibility, as opposed to a probability as required by the section. Her claim therefore failed.

A more detailed discussion of these principles can be found in the New South Wales jurisdiction section.

Obvious risk²⁸

Section 15 of the CLA (Qld) states that there is no proactive duty to warn another of an obvious risk. Section 16 creates a defence in providing that there is no liability in negligence for harm suffered as a result of the materialisation of an inherent risk.

An 'obvious risk' is defined in s 13 as a risk that, in the circumstances, would have been obvious to a reasonable person in that person's position and includes risks that are patent or a matter of common knowledge. In accordance with s 14, a person will be deemed to be aware of an 'obvious risk' unless they can prove that they were not aware of it. This creates a reverse onus on the claimant to prove that they were not aware of the risk, despite it being obvious, and that such unawareness was reasonable.

A risk can be an obvious risk even if there is a low probability of the risk occurring. The considerations relevant to determining whether a risk is obvious are broad and have been held to include a claimant's personal characteristics, expertise and age.

The case of *Lynch v Kinney Shoes (Australia) Ltd & Ors*²⁹ provides an indication of those matters taken into account by a court when considering whether a risk was obvious as a concept under the common law. Despite presenting a tripping hazard, as no other entrants to a store had tripped over a display platform, the court held that the defendant was entitled to assume that those entering the store would take notice of the risk as it was obvious. The court ultimately found that the cause of the plaintiff's fall was her failure to look where she was going. An appeal was unsuccessful.

The court held that the generality of the experience of walking into a shop was to be given greater significance than expert evidence suggesting specific precautions that could have been taken to prevent the incident. The same type of reasoning could arguably apply when dealing with the obvious risk provisions contained in the CLA (Qld).

²⁴ [2012] QCA 281.

²⁵ (2010) 240 CLR 537.

²⁶ *Tabet v Mansour* [2007] NSWSC 36.

²⁷ *Gett v Tabet* (2009) 254 ALR 504.

²⁸ *Civil Liability Act 2003* (Qld) ss 13–16.

²⁹ [2004] QSC 370.

The High Court in *Thompson v Woolworths (Qld) Pty Ltd*³⁰ held that, ‘in the case of some risks, reasonableness may require no response’.

*Kelly v State of Queensland*³¹ involved a claim for a catastrophic injury which required careful consideration of the principles of causation. The plaintiff suffered injuries rendering him a partial tetraplegic after falling while running down sand dunes into a lake on Fraser Island. The plaintiff argued that the State had breached its duty of care by failing to warn of the risks associated with such an activity. The State argued that the risk of falling was so ‘obvious’ within the meaning of s 13 of the CLA (Qld) that it had no duty to warn of the risks associated with the activity. The court had regard to the plaintiff’s age and previous inexperience with sand dunes and found that, as the plaintiff had performed the activity several times prior to his injury and had watched other people perform the same activity on the day, there was no ‘obvious risk’ associated with the activity.

The decision turned on the specific nature of the activity being undertaken by the plaintiff and the detail of the warnings and signage displayed at the lake. Weight was also given to evidence of numerous prior incidents at the site resulting in serious injury which were known to the State authority who elected not to implement any recommended changes to reduce the risk.

This decision was upheld on appeal. In response to the decision, the Queensland’s State Government passed the *Regional Planning Interests Act 2014* (Qld) to provide civil liability protection to the State in their dealings with publically managed land. This would likely result in the plaintiff’s claim failing if it were heard today.

Section 15 of the CLA (Qld) was successfully raised in *Pollard v Trude*³² where a plaintiff sought damages for injuries sustained when he was struck by a stray golf ball hit by the defendant. Chesterman J found that, whilst the risk of the plaintiff being hit was small, it was nevertheless an obvious risk. The court concluded that the plaintiff (an experienced golfer) knew the risks associated with standing on a golf course fairway. Because the risk was obvious, the claim failed. This decision was affirmed in the Court of Appeal.³³

Dangerous recreational activities³⁴

Section 19 of the CLA (Qld) states that there is no liability in negligence for harm resulting as a result of the materialisation of an obvious risk of a dangerous recreational activity. The provision applies whether or not the person who suffered harm was aware of the risk. The term ‘*dangerous recreational activity*’ is defined in s 18 as an activity engaged in for enjoyment, leisure or relaxation which involves a significant degree of risk of physical harm.

There has been little consideration of these sections in Queensland courts. In *Wilson v Lambkin*,³⁵ Griffin DCJ stated, ‘it is necessary to consider not only the activity itself but the circumstances surrounding which that activity was conducted’. In that case, the plaintiff and another man were seriously injured in a motor vehicle accident in circumstances where there was evidence that the young men had been doing ‘burnouts’. It was determined that the conduct could not be properly characterised as a dangerous recreational activity within the meaning of the CLA (Qld).

Further guidance as to the scope of the sections can be drawn from consideration of the similarly worded sections of the CLA (NSW).

³⁰ (2005) 221 CLR 234.

³¹ [2013] QSC 106.

³² [2008] QSC 119.

³³ *Pollard v Trude* [2009] 2 Qd R 248.

³⁴ *Civil Liability Act 2003* (Qld) ss 17–19.

³⁵ [2010] QDC 254.

The concept of a ‘*dangerous recreational activity*’ was considered in *Perrett v Sydney Harbour Foreshore Authority*.³⁶ The plaintiff attended the Sydney Convention Centre during the Good Food and Wine Festival to interview a potential recruit for his business. Having concluded his meeting, the plaintiff walked through the foyer towards the car park when he tripped down some stairs and sustained an injury.

The Convention Centre attempted to argue that the plaintiff was participating in a dangerous recreational activity because of the venue. The court rejected this argument, ruling that the dangerousness of the relevant activity ‘*is to be determined by reference to the activities engaged in by the plaintiff at the relevant time*’. It was held that walking through the Convention Centre to his car following an interview with a potential recruit did not amount to a dangerous recreational activity for the purposes of the CLA (NSW). Even if the plaintiff’s conduct could be described as a recreational activity, it is unclear how it could be characterised as ‘*dangerous*’.

Liability of public authorities³⁷

The CLA (Qld) contains a public policy defence describing the principles to be taken into account when deciding whether a public authority has a duty of care and if, by its conduct or inaction, that duty has been breached.³⁸

The CLA (Qld) outlines the general principles to be used in determining liability of a public authority. Section 35 provides that the resource allocations made by public authorities are not open to challenge. Section 36 provides that, in the instance of an allegation of wrongful exercise of authority, the act or omission in question will only be wrongful if it is so unreasonable that no other public authority in the same circumstances would have made the same decision.

Section 37 encapsulates what is known as the ‘*highway immunity rule*’ which provides that road authorities are not liable for the condition of roads due to their actions or inactions unless they had knowledge of the defect prior to the incident causing the damage.

In response to the Supreme Court decision in *Kelly*, the State Government introduced legislation which made a number of changes to several Acts that limit the State’s exposure to liability in Queensland Parks and Wildlife Service (QPWS) managed areas. As a result, the State and various nominated officials will not be civilly liable in a proceeding for any act done, or omission made, in relation to the functions of particular entities.

The CLA (Qld) became law in November 2013 and it remains to be seen how these provisions will be treated by the courts.

Liability of volunteers and Good Samaritans³⁹

Each state and territory has an exemption from civil liability for ‘*volunteers*’ who perform ‘*community work*’ for a ‘*community organisation*’. These three elements must be satisfied for the exemption to apply.

The CLA (Qld) limits the liability of volunteers in Queensland. These provisions deal with both general conduct by volunteers doing community work for community organisations and conduct related to the donation of food.

There are four common types of activities across all State and Territory legislation that has been defined as ‘*community work*’ that is, work done for charitable, benevolent, educational or sporting purposes.

³⁶ [2009] NSWSC 1026.

³⁷ *Civil Liability Act 2003* (Qld) ss 34–37.

³⁸ *Reardon v State of Queensland* [2007] QSC 105.

³⁹ *Civil Liability Act 2003* (Qld) ss 38A–38C and ss 39–44 and *Law Reform Act 1995* (Qld) ss 15–16.

The CLA (Qld) defines ‘community organisation’ to include a list of legal entities that can be considered ‘organisations’. The term also includes local councils, religious groups, registered political parties and trustees in exercising the role of trustee, but not unincorporated associations.

In Queensland, a volunteer who acts in good faith whilst undertaking community work in Queensland will be protected from liability, with some exceptions.

Food donors

The CLA (Qld) protects food donors from civil liability, providing the donation is:

- given in good faith;
- for charitable, benevolent or other philanthropic purpose;
- given with the intention that the consumer will not have to pay for the food; and
- safe to consume at the time of the donation.

The food donor must advise the person to whom they give food whether the food must be handled in a particular way and the timeframe in which the food should be consumed.

Good Samaritans

In relation to Good Samaritans, ss 15 and 16 of the *Law Reform Act 1995* (Qld) govern the actions of medical personnel only. Further, ss 26 and 27 of the CLA (Qld) provide indemnity to certain emergency response entities named in the *Civil Liability Regulation 2003* (Qld) and their employees or volunteers acting under their instruction, while providing services that enhance public safety.

At present, there is protection from liability to a person performing duties for entities that enhance public safety (e.g. Brisbane City Council, Queensland Ambulance, State Emergency Services and the like). However, the CLA (Qld) does not provide protection to persons who provide assistance in other emergency situations.

Liability for mental harm

The CLA (Qld) does not address liability for mental harm so it is considered pursuant to the common law in accordance with the principles outlined by the High Court in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd*⁴⁰ and *Gifford v Strang Patrick Stevedoring Pty Ltd*.⁴¹

The High Court in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd*⁴² limited the scope of recovery for emotional reactions to a defendant’s conduct. Only recognised psychiatric illnesses are accepted in order to avoid imposing ‘an intolerable burden on ordinary behaviour’. Mere emotional disturbances or normal grief reactions are excluded.

The High Court limited recovery to instances where the defendant’s conduct was such that it was foreseeable that a person of normal fortitude might suffer a recognised psychiatric illness. However, the ‘normal fortitude’ test may not apply to exclude a claim if the defendant had actual or constructive knowledge of the plaintiff’s susceptibility to suffering a psychiatric illness.

Liability for mental harm was considered by the Queensland Court of Appeal in *Pickering v McArthur*.⁴³ The court was tasked with assessing the liability of an individual who falsely holds themselves out as being qualified to provide advice, and by doing so causes mental harm to another individual relying on the advice.

⁴⁰ [2002] 211 CLR 317; refer to the discussion of the New South Wales provisions on liability for mental harm for a thorough analysis.

⁴¹ (2003) 214 CLR 269.

⁴² [2002] 211 CLR 317. See the New South Wales chapter for a more detailed analysis.

⁴³ [2005] QCA 294.

The plaintiff alleged that, over a three year period while receiving massage therapy from the defendant, he also received relationship advice, which the therapist indicated he was qualified to provide. The plaintiff said that, following the advice, he terminated his de facto relationship and suffered psychiatric injury as a result. The court held that, because of the nature of the relationship between the parties, there was a strong case recognising a duty to exercise reasonable care to avoid inflicting psychiatric injury. Citing *Tame*, the Court of Appeal held that susceptibility to psychiatric injury would not mitigate the plaintiff's case due to the circumstances of the relationship between them.

Intoxication and illegal activity⁴⁴

Intoxication

When deciding whether a party owed a duty of care to an intoxicated claimant, it is not relevant to consider the possibility or likelihood that a person may be intoxicated or exposed to increased risk because their capacity to exercise reasonable care is impaired as a result of their intoxication.

The CLA (Qld) states that a person is not owed a duty of care merely because the person is intoxicated. The fact that a person may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person.

That is, a person has no greater or lesser duty of care to an intoxicated person.

However, it is expressly provided that this section does not affect the liability arising out of conduct on licensed premises.⁴⁵

The case of *French v QBE Insurance (Australia) Ltd*⁴⁶ looked at the operation of s 46 of the CLA. The plaintiff's de facto partner was killed when he wandered, intoxicated, onto the road after being dropped at the wrong address by a taxi driver. The taxi driver, who was aware that his passenger was heavily intoxicated, did not write down the correct address when it was given to him. The plaintiff argued that, irrespective of the deceased's intoxication, he was owed a duty of care by the taxi driver because he was a passenger in the taxi. The court noted that s 46 does not reduce the standard of care owed to a person who is voluntarily intoxicated. The taxi driver was found to be 80% responsible for the deceased's death (with the other 20% attributed to the unidentified driver who ran down the deceased).

Sections 47 and 48 of the CLA (Qld) create presumptions of contributory negligence in relation to intoxication. If the presumption is raised against an intoxicated plaintiff, the court must reduce the plaintiff's damages by 25% or greater in certain circumstances unless the plaintiff can show the intoxication did not contribute to the breach of the duty or that the intoxication was not self-induced.

Where a person suffers harm after relying on the care and skill of a person they know or ought reasonably to have known was intoxicated, the presumption can be rebutted if the intoxication did not contribute to their breach of duty, or the plaintiff could not reasonably be expected to have avoided relying on the defendant's care and skill.

⁴⁴ *Civil Liability Act 2003* (Qld) ss 45–49.

⁴⁵ *Ibid* s 46(2). For guidance on the standard of care owed in relation to incidents happening on licensed premises see the following cases: *Cole v South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469; *Brophy v Dawson & Anor* [2004] QSC 372; *Livermore v Crombie & Anor* [2006] QCA 169; *Adeels Palace v Moubarak* (2009) 239 CLR 420.

⁴⁶ (2011) 58 MVR 214.

The minimum discount for contributory negligence is increased to 50% for plaintiffs injured as a passenger in a vehicle being driven by a person who has a blood alcohol content of 0.15 or more or is under the influence of drugs to the extent that they are incapable of exercising effective control over the vehicle. This discount was applied in the case of *Hawira v Connolly and Anor*; *Connolly v Hawira and Anor*⁴⁷ where a plaintiff rode unrestrained in a car with her heavily intoxicated co-worker.

The onus is on a defendant to raise a plaintiff's intoxication to enjoy the liability exemption afforded by these provisions. The onus then switches to the plaintiff to rebut the presumption.

Illegal activity

A person does not incur civil liability if the court is satisfied that a person who suffered harm was engaged in an indictable offence and the person's conduct contributed materially to the risk of harm, unless the provision results in a harsh or unjust result (s 45). If the circumstances allow for an award of damages, the court must decrease the claimant's damages by a minimum of 25% to take the plaintiff's conduct into account.

The plaintiff does not have to be convicted and a court need only be satisfied on the balance of probabilities that the plaintiff has committed an indictable offence.

Section 6 of the *Criminal Code Act 1899* (Qld) also prevents recovery of damages by a plaintiff who suffers injury in the course of committing an indictable offence. Although the plaintiff must have been found guilty for the defence to apply, the intoxication need not have caused the injury but simply have occurred at the same time.

Contributory negligence⁴⁸

The factors relevant to determining a defendant's breach of duty of care also apply to consideration of a plaintiff's contributory negligence in failing to take precautions against the risk of that harm.

The standard of care is that of a reasonable person on the basis of what they knew, or ought reasonably to have known, at the time the harm was suffered.

Pursuant to s 24, the courts have the power to reduce a plaintiff's damages by up to 100% in situations where it is just and equitable to do so.

It is important to note that contributory negligence is a concept that will turn on the facts of each case. What is considered negligent conduct on the part of a plaintiff in respect of the cause of his or her own injuries is entirely circumstantial.

The Queensland Court of Appeal considered an argument for contributory negligence in *Green v Hanson Construction Materials Pty Ltd*.⁴⁹ The plaintiff fell down a flight of stairs. A handrail was present, but not used. The Court of Appeal, disagreeing with the trial judge who made no discount, held that the failure to use the handrail consisted of contributory negligence, which was assessed at 30%.

In *French* the court made no discount for contributory negligence because the deceased's death was not a reasonably foreseeable consequence of his getting drunk at a friend's house. Further, it could not be said that the deceased voluntarily exposed himself to the risk that resulted in his death as he was not sufficiently in control of himself at the time of the accident.

⁴⁷ [2008] QSC 4.

⁴⁸ *Civil Liability Act 2003* (Qld) ss 23–24 and ss 47–49.

⁴⁹ (2007) Aust Torts Reports 81–907; [2007] QCA 260.

The onus is on the defendant to show that the plaintiff's actions are a causative factor of the incident resulting in the injury.⁵⁰ Mere inadvertence may not be sufficient to prove contributory negligence.⁵¹

Where a person is intoxicated, contributory negligence is presumed unless the plaintiff can rebut that conclusion.⁵²

Proportionate liability⁵³

The proportionate liability provisions of the CLA (Qld) apply to an apportionable claim for economic loss or property damage from a breach of duty of care or some consumer laws.

In a claim where proportionate liability applies, the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss and damage claimed that the court considers just and equitable having regard to the extent of that party's responsibility for the loss and damage.

The following requirements must exist for the proportionate liability provisions to apply:

- the proceeding must involve an '*apportionable claim*' – i.e. a claim for economic loss or damage to property in an action for damages arising from a breach of duty of care; and
- a defendant must be a '*concurrent wrongdoer*' – i.e. a person who is one of two or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim (where it does not matter that a concurrent wrongdoer is insolvent, being wound up, has ceased to exist or is dead).

A claim with both apportionable and non-apportionable components can be separated and considered within their separate regimes.

Claims arising out of personal injury and claims by consumers are specifically excluded from the proportionate liability regime.

The CLA (Qld) expressly prohibits a party from contracting out of the proportionate liability provisions. Concurrent wrongdoers are required to assist the plaintiff by identifying any other concurrent wrongdoers which may include providing information to assist with the identification of the wrongdoer, and the circumstances involving the alleged wrongdoers' involvement.

There is an independent obligation on the plaintiff to make a claim against all persons which it has reasonable grounds to believe may be liable for the damage.

There are adverse costs and consequences for both plaintiffs and concurrent wrongdoers who fail to comply with those obligations. For example, s 31(1)(a) allows for a defendant's liability to be assessed at less than 100% of the plaintiff's loss if there are likely to be other concurrent tortfeasors who are not parties to the action.⁵⁴

A concurrent wrongdoer will be severally liable for the damages awarded against any other concurrent wrongdoer if:

⁵⁰ *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445; 212 ALR 158; [2004] FCA 1211; *Nominal Defendant v Rooskov* (2012) 60 MVR 350; [2012] NSWCA 43.

⁵¹ *Bankstown Foundry Pty Ltd v Braistina* (1996) 160 CLR 301 [310]; *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 [37]; *J Blackwood & Son v Skilled Engineering Ltd* [2008] NSWCA 142.

⁵² For further discussion, see '*Intoxication and Illegal Activity*'.

⁵³ *Civil Liability Act 2003* (Qld) ss 28–33.

⁵⁴ See de Jersey CJ in *WorkCover Queensland v Amaca Pty Ltd*.

- they fraudulently caused the loss or damage;
- they intended to cause the loss or damage; or
- they engaged in misleading or deceptive conduct under s 18 of the *Australian Consumer Law* (Qld).

A court may discount a claim in respect of a plaintiff's contributory negligence where deemed appropriate.

Concurrent wrongdoers cannot pursue contribution from other concurrent wrongdoers towards the determination of their apportionment of liability in respect of an apportionable claim. Similarly, concurrent wrongdoers cannot be required to indemnify other concurrent wrongdoers. Controversy exists as to whether the prohibition against concurrent wrongdoers indemnifying each other extends to contractual indemnity agreements entered into between two or more concurrent wrongdoers. One view is that in the absence of clear legislative intent, such a prohibition, was not the purpose of the legislation.⁵⁵

The legal principles of vicarious liability and the joint and several liability principles applicable to agency and partnership relationships remain unaffected by these provisions.

A case which demonstrates the application of these principles is *GEJ & MA Geldald Pty Ltd v Mobbs (No 2)*.⁵⁶ The plaintiff, a cotton farmer, brought a claim for economic loss against eight defendants, comprising of the owners of adjacent properties, the supplier of herbicides and the aerial spraying company and its pilot. The plaintiff reached an out of court settlement with all of the defendants other than the pilot and his employer. At trial, the plaintiff established that the remaining defendants were responsible for the loss and was awarded damages.

The court held it was for the defendant to prove that the damages awarded against them should be reduced by an amount proportionate to the contribution by the other concurrent wrongdoers. The other six defendants had settled out of court. The remaining defendants failed to lead any evidence in respect of their conduct allegedly causing or contributing to the loss and therefore failed to establish that the other defendants were concurrent wrongdoers. As such, it was not open to the court to apportion liability between the original eight defendants, so the total loss fell with the remaining two.

The case makes clear that, when arguing proportionate liability as a defence, there must be sufficient evidence to establish the liability of other potential parties.

The plaintiffs in this case were left in the unusual but favourable position of not only recovering the full amount of their loss at trial from the remaining defendants but also receiving an out of court settlement from the other defendants.⁵⁷ This became the issue of a subsequent trial, in which it was decided that the out of court settlement amount could not be ignored.⁵⁸ It was concluded that to allow otherwise would clearly go against both the common law and CLA (Qld) philosophy that a plaintiff should not be compensated by more than the amount of its loss.

⁵⁵ In comparison to Tasmania, Western Australia and Northern Territory where the prohibition on the requirement to indemnify does not affect subsisting agreements by defendants to contribute to the damages recoverable from, or to indemnify, other concurrent wrongdoers.

⁵⁶ [2012] 1 Qd R 120.

⁵⁷ This was because the settlement amount avoided the operation of s 32A (which would prevent the recovery of damages that exceeds the amount of the loss) because it did not constitute a judgment previously recovered for the same loss.

⁵⁸ *GEJ & MA Geldald Pty Ltd v Mobbs (No 3)* [2011] QSC 297 [24].

In *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd & Anor*,⁵⁹ the Queensland Supreme Court considered whether a third party could be a ‘concurrent wrongdoer’ within the meaning of s 30 of the CLA.

Hobbs had purchased a truck from Zupps under a ‘contract of sale or supply’. It was agreed the truck would be modified, with the price of these modifications included in the contract price. This modification work was subcontracted to a third party (Trakka) by Zupps.

Following the modification work, Hobbs alleged that Zupps had breached certain implied conditions of consumer protection laws. Subsequently, Zupps joined Trakka as a third party to the proceedings.

In essence Zupps argued that its liability to Hobbs, if any, should be reduced to nil by reason of the proportionate liability defence under s 31 of the CLA (Qld) as Trakka caused the loss or damage in undertaking the defective modifications.

Zupps argued on the other hand that Trakka was not a ‘concurrent wrongdoer’ within the meaning of the CLA (Qld) because Trakka was not ‘a person whose acts or omissions caused the loss or damage that is the subject of the claim, independently of Hobbs’ acts or omissions.’ The court agreed with Zupps’ position.

For further discussion of decisions addressing similarly worded provisions of proportionate liability legislation, see the discussion of *Reinhold v New South Wales Lotteries Corporation (No 2)*⁶⁰ under Proportionate Liability in the New South Wales chapter.

Vicarious liability

An employer can be found vicariously liable for a wrongful, unauthorised or negligent act of an employee which is carried out in the course of his or her employment and is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court case of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland*⁶¹ in which three appeals were held simultaneously.

An employer will not always be held responsible for the actions of his or her employees. The act must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be held vicariously liable for the actions of his or her employee will depend upon the specific facts in each case.

The CLA (Qld) does not address vicarious liability.

Case law on vicarious liability is discussed further in the equivalent New South Wales and Victorian sections.

Non-delegable duties

The term ‘non-delegable duty’ is somewhat misleading. It does not mean that a party owing a duty cannot delegate the task to a third party, but rather that the liability for breach of the duty cannot be delegated. As such, it is a duty to ensure that reasonable care is taken. Therefore, if the third party to whom the task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached.

The categories of non-delegable duties continue to evolve. The courts have struggled, however, to clearly define the parameters required to justify the existence of a non-delegable duty of care.

⁵⁹ [2013] QSC 319.

⁶⁰ (2008) 82 NSWLR 762.

⁶¹ (2003) 212 CLR 511.

The known criteria include the superior capacity of the defendant to bear the risk of the mishap, the special obligation which it is proper to attach to extra-hazardous activities and the special dependence or vulnerability of the person to whom the duty is owed.⁶²

Previously recognised categories of persons between whom non-delegable duties are owed include:

- employer and employee;⁶³
- host employer and contractor;⁶⁴
- school and student;⁶⁵
- hospital and patient;⁶⁶ and
- owner of premises and licensee.⁶⁷

The CLA (Qld) does not address non-delegable duties.

Exclusion clauses

Queensland has not introduced any legislative reforms dealing with the issue of exclusion clauses.

The common law principles therefore remain applicable. Accordingly, in order to have any prospect of an exclusion clause being upheld, the person or entity including such a clause should ensure that the clause is clearly incorporated into the contract, specifically drafted to cover the factual scenario encountered by the person or entity seeking to enforce it and, to the extent possible, is brought to the attention of the other party to the contract.⁶⁸

Where the claim is one captured by the Australian Consumer Law, there are certain guarantees which cannot be excluded or limited by contract. See divs 2–3 of sch 2 of the *Competition and Consumer Act 2010* (Cth).

Expressions of regret and apologies⁶⁹

Section 71 of the CLA (Qld) defines an expression of regret as ‘any oral or written statement expressing regret for the incident to the extent that it does not contain an admission of liability on the part of the individual or someone else’.

An apology is defined as ‘an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not it admits or implies an admission of fault in relation to the matter’.

An expression of regret about an incident that does not admit liability is not admissible in a proceeding relating to personal injury if it was made prior to the commencement of the proceeding.

Queensland courts are yet to consider these provisions.

⁶² *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

⁶³ *Kondis v State Transport Authority* (1984) 154 CLR 672.

⁶⁴ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

⁶⁵ *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁶⁶ *Samios v Repatriation Commission* [1960] WAR 219.

⁶⁷ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

⁶⁸ The New South Wales Court of Appeal decision of *Lormine Pty Ltd v Anor v Xuereb* [2006] NSWCA 200 may be of some assistance when considering how an exclusion clause might be interpreted in Queensland.

⁶⁹ *Civil Liability Act 2003* (Qld) ss 68–72 and ss 72A–72D.

In New South Wales, the Supreme Court considered statements by a personal trainer to his injured client that he ‘*shouldn’t have started [him] off so hard*’ and ‘*we should have done more core strengthening exercises first*’ to be expressions of regret rather than admissions of breach of the legal standard of care.

For some High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins*.⁷⁰

Limitation periods⁷¹

Section 11 of the *Limitation of Actions Act 1974* (Qld) (LAA) prescribes an underlying limitation period of three years in personal injury claims.

A plaintiff may apply to the court to extend the limitation period by virtue of s 31 of the LAA if it can be shown that:

- a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
- there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation.

Subject to several exceptions, the PIPA requires a Notice of a Claim to be given to each defendant within nine months of the incident or within one month of seeking legal advice, whichever is sooner (s 9).

If a Notice of Claim is not provided within that timeframe, a claimant is required to provide a reasonable excuse for delay, or seek the respondents’ consent or, failing that, leave of the court to commence proceedings despite their non-compliance with the pre-court procedure. However, in practice, only cases in which a respondent can show real prejudice have successfully defeated late claims and those circumstances are very rare.

In *Brease v State of Queensland*,⁷² an application for an extension of the limitation period was granted as the court held that a material fact was not known until after the limitation period had expired. In that case, an application was made for an extension of the limitation period for a workers’ compensation claim. The applicant attempted rehabilitation and sought to exhaust employment opportunities before seeking legal advice, following which a medical report was obtained to determine whether a claim should be pursued. The court extended the limitation period as material facts were not known until after the medical report had been received.

The case of *Gillespie v Swift Australia Pty Ltd*⁷³ involved an appeal against the extension of a limitation period. In 2001 the respondent injured his knee at work and after minor surgery resumed normal duties within three months. Over the next seven years, the respondent continued normal duties with episodic pain and first aid treatment but did not take leave or seek further medical advice.

⁷⁰ (2003) 215 CLR 317.

⁷¹ *Limitation of Actions Act 1974* (Qld) and *Personal Injuries Proceedings Act 2002* (Qld) s 9.

⁷² [2007] QSC 43.

⁷³ [2009] QCA 316.

By the time the injury to his knee deteriorated to the extent he could no longer work, the limitation period to bring an action for damages in negligence had expired. Accepting, therefore, that the relevant material fact (that his knee would mean he could no longer work) was not within the means of knowledge of the respondent before the limitation period expired, the trial judge granted an extension of time pursuant to s 30(1)(c) of the LAA.⁷⁴ An appeal on the basis that the plaintiff should have sought medical advice sooner, failed.

However, in some circumstances, a court will restrict a plaintiff's right to pursue a claim where the defendant will suffer real prejudice if the claim were to proceed.

For example, in the case of *Hargen v Kemenes*,⁷⁵ a woman sought to pursue her CTP claim after the expiration of the limitation period claiming the onset of severe pain during strenuous dramatic rehearsals raised the material fact of a decisive nature being the realisation that her injuries would inhibit her earning capacity in her chosen career.

The plaintiff was unsuccessful both at first instance and on appeal on the basis that the pain she began to experience during rehearsals was in fact the realisation of the prediction that had been made to her at the time of her injury. As such, it could not be said that the plaintiff would not have realised that the pursuit of her contemplated career was contrary to the medical advice given to her some years before or that she was unaware of potential future lost earning capacity.

Another noteworthy decision is *Fanti v State of Queensland*⁷⁶ in which the Supreme Court of Queensland held an application for an extension to a limitation could not be granted due to the prejudice that would be suffered by the defendant. The plaintiff had worked in the Queensland Radium Institute from 1976 to 1991. The plaintiff became an asthmatic sometime between 1990 and 1991. Despite the applicant demonstrating the criteria required by s 31 of the LAA at an application in 2002, the court held that there would be significant prejudice to the defendant, including:

- the defendant would have difficulty locating relevant witnesses;
- the witnesses, if located, would have to recall events from a long time ago; and
- the defendant's premises where the breach was alleged to have occurred had since been demolished.

It was therefore held that it would not be in the interests of justice to allow the application due to the prejudice that the defendant would suffer.

Section 43 of the PIPA and s 31 of the LAA can both arise in specific circumstances. In *Gu v To*,⁷⁷ the Court of Appeal held that a judge hearing an application under s 43 should not decide the application as if it were an s 31 application. The fact that there is an issue likely to require determination in a s 31 application was considered sufficient reason to have allowed the s 43 application on the facts of this case.

See also *Cross v Moreton Bay Regional Shire Council*⁷⁸ for an example of a defendant successfully opposing a plaintiff's attempt to join it as a third party to the claim after the expiry of the limitation period

Section 44 of the PIPA allows a claimant to commence urgent proceedings with the agreement of the other parties. This provision mirrors s 276 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

⁷⁴ *Gillespie v Swift Australia Pty Ltd* [2009] QSC 10.

⁷⁵ [2011] QCA 251.

⁷⁶ [2005] QSC 393.

⁷⁷ [2005] QCA 480.

⁷⁸ (2011) 207 IR 197.

Damages Awards

The CLA (Qld) significantly impacts upon the assessment of damages under the common law.

The provisions do not apply to claims for a workplace injury (apart from ‘*journey claim*’ injuries), an injury from a dust related condition or an injury related to smoking.

General damages⁷⁹

The CLA (Qld) regulates the assessment of general damages.

A cap on general damages was initially set at \$250,000 with no minimum threshold (distinct from some other jurisdictions).

Since 1 July 2010, the scale has been indexed each financial year to reflect increased values as a result of changes in average weekly earnings. For the 2015/2016 financial year, the cap on general damages was \$358,500. At the time of publication, we await the 2016/2017 cap figure.

This cap will continue to be increased at the start of each financial year to reflect CPI increases.

Each injury is assigned an Injury Scale Value (**ISV**) in a range from 0 to 100 reflecting 100 equal graduations of harm from the least to most severe case depending on its type, nature and severity.

The allocation of an ISV is based on a comprehensive table of injuries and symptoms contained in the *Civil Liability Regulations 2003* (Qld). The Regulation provides an evidential preference for medical assessments undertaken in accordance with the *AMA Guides to the Evaluation of Permanent Impairment* (Fifth edition).⁸⁰

There is provision in the legislation for an ‘*uplift*’ of the awarded ISV to be made in cases involving multiple injuries.

A court must only assess an injury and the claimant’s symptoms according to the ISV schedule and table of injuries. The courts must also have regard to the ISV applied in analogous cases.

The maximum uplift should rarely be more than 25% higher than the maximum dominant ISV but the court can, in its discretion, award a greater amount if detailed written reasons are given for that increase. However, in practice, there are many examples of the court allowing for more than the 25% uplift.⁸¹ Generally speaking, they are cases in which there have been multiple injuries of some severity. In any case, a trend has appeared towards awards much greater than the 25%, even as high as 100% uplift.

Each case will, of course, turn on its own facts.

Economic loss⁸²

In assessing damages for loss of earnings (including a dependency claim), a court must disregard earnings above three times the average weekly earnings per week.

Where damages for loss of earnings cannot be precisely calculated, the court must have regard to the person’s age, work history, actual loss of earnings, permanent impairment and other relevant matters and state the assumptions and methodology used to calculate the award.

⁷⁹ *Civil Liability Act 2003* (Qld) s 62.

⁸⁰ Gunner B. J. Andersson and Linda Cocchiarella, *Guides to the Evaluation of Permanent Impairment* (American Medical Association 5th ed, 200).

⁸¹ For example, see *Clark v Hall and Anor* [2006] QSC 274 [67] and [71].

⁸² *Civil Liability Act 2003* (Qld) ss 54–56.

Despite this provision, significant and, sometimes, arguably excessive, awards for economic loss continue to be made.

*Tomlins v Sheikh*⁸³ provides an early example of a sizeable global award of damages for future economic loss despite the introduction of this provision. In that case, despite the court finding that ‘the plaintiff’s capacity to work in full time employment had not been diminished’ and she had taken no sick leave due to her injury, the court allowed a \$25,000 global amount.

A court will consider evidence regarding a plaintiff’s education, intentions with respect to future employment, opportunities of overtime and other relevant factors including their pre-existing health when assessing potential losses and discounting factors.

For example, in *Martin v Andrews & Anor*,⁸⁴ although a plaintiff sought a large global sum for economic loss, the court considered his loss of earning capacity in performing specialised high-voltage electrical fitter work and his efforts at mitigating his past losses. He was awarded almost \$800,000 in total for economic loss as a result of neck and back injuries.

A plaintiff’s future earning prospects, but for their injury, will also be considered. In *Yamaguchi v Phillips & Anor*,⁸⁵ economic loss was assessed on the assumption that the plaintiff was likely to be promoted several times through her career within a department where she had begun to progress prior to her injury.

There are some circumstances where no award for economic loss will be made.⁸⁶

Gratuitous care⁸⁷

Damages for gratuitous care received by an injured person will not be awarded unless the services were necessary, the need for the services arose solely out of the injury for which the damages are being awarded and the services are, or are to be, provided for at least six hours per week and for at least six months.

Section 59A of the CLA (Qld) addresses care that was formerly provided by the injured person who is, as a result of the injury, was unable to provide the care. Those damages are assessed with reference to s 59C, requiring the court to take into account the injured person’s capacity to provide the service before the injury, the benefit to the recipient of the services and the vicissitudes of life. Sections 59A(2) and (4) outline the many factors of which the court must be satisfied before an award can be made under this section.

Section 59B restricts the circumstances in which an award for these damages can be made. Section 59D prevents double recovery where a loss has already been compensated through s 59A.

Despite being generally excluded from the CLA (Qld), damages for gratuitous care can be claimed for dust and smoking related conditions.⁸⁸

Interest⁸⁹

No interest is to be awarded on general damages or gratuitous care provided to an injured person.

⁸³ [2005] QDC 174.

⁸⁴ [2016] QSC 20.

⁸⁵ [2016] QSC 151.

⁸⁶ See, for example, *Farnham v Pruden* [2016] QCA 18.

⁸⁷ *Civil Liability Act 2003* (Qld) s 59.

⁸⁸ *Ibid* s 5(3).

⁸⁹ *Ibid* s 60.

Interest is calculated with reference to the ten year Treasury bonds published by the Reserve Bank of Australia at the beginning of the quarter in which the award of interest is made.

Interest may be awarded on past economic loss and past special damages.⁹⁰

Discount rate⁹¹

A discount rate of 5% is applied to awards for future economic loss or for damages for gratuitous services.

The purpose of this provision is to prevent a plaintiff from being over-compensated for their injuries, where a lump sum is awarded to an injured plaintiff and may be invested or otherwise dealt with sooner than if they had to earn it over time.

Exemplary, punitive or aggravated damages⁹²

A court cannot award exemplary, punitive or aggravated damages in relation to a personal injury claim.

However, this restriction does not apply to injuries arising from an unlawful intentional act done with the intent to cause injury or unlawful sexual assault or misconduct.⁹³

In *Coffee v State of Queensland and Ors*,⁹⁴ the court considered whether ‘*humiliation, frustration and anger*’ were a form of personal injury for which exemplary damages could be awarded. The plaintiff alleged that his claim for damages for the emotional harm he suffered at the hands of the defendant was not a claim for personal injury damages and as such, the court was free to award aggravated damages. Whilst conceding that injured feelings constituted harm, the Court of Appeal did not believe that they would (in the absence of a conventional personal injury) constitute an injury as contemplated by the CLA.

Structured settlements⁹⁵

The CLA (Qld) facilitates structured settlements, allowing a plaintiff to avoid the unrecoverable costs associated with managing a lump sum and to access a source of long term income.

Section 63 defines a ‘*structured settlement*’ as:

‘an agreement providing for the payment of all or part of an award of personal injury damages in the form of periodic payments funded by an annuity or other agreed means’.

A court is required to give the parties a reasonable opportunity to negotiate a structured settlement. The parties may apply to the court for an order that the settlement be in a form agreed between them. A lawyer engaged by a plaintiff is under an obligation to advise in writing about the availability of a structured settlement and lump sum option while negotiating a settlement for a claim in personal injuries.

Regarding the issue of costs, the court may consider the cost to which a defendant would be put in agreeing to a structured settlement as compared to a lump sum payment when deciding whether a reasonable offer of compromise has been made in a formal offer under the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR).

⁹⁰ *Hunt v Lemura & Anor* [2011] QSC 378.

⁹¹ *Civil Liability Act 2003* (Qld) s 57.

⁹² *Ibid* s 52.

⁹³ *Ibid* s 52(2).

⁹⁴ [2010] QSC 291.

⁹⁵ *Civil Liability Act 2003* (Qld) ss 63–67.

In practice, these provisions are very rarely used. In circumstances where a party is under a legal disability (for example, a minor), settlement funds are generally paid as a lump sum to an administrator such as the Office of the Public Trustee to manage the funds over time.

Legal costs⁹⁶

The PIPA outlines the amount of legal costs recoverable by a party to a personal injuries claim up until the point that it proceeds to trial. These provisions, however, do not apply to the cost of an appellate proceeding. To determine the amount of costs recoverable by the claimant, reference must be had to a schedule outlining various thresholds. These thresholds are indexed each financial year.

If a matter proceeds to trial, where standard costs may be claimed, the damages awarded are compared to both the plaintiff's and defendant's mandatory final offers made at the unsuccessful compulsory conference to determine whether a plaintiff can seek their costs.

For example, where the amount of the damages award is equal or less than the lower offer limit *and* less than the claimant's mandatory final offer but more than the respondent's mandatory final, no costs are to be awarded.⁹⁷

The court must not award costs to a party related to the introduction of unnecessarily repetitive evidence.⁹⁸

The weight given by a court to mandatory final offers as compared to formal offers which may be later made under the UCPR can be uncertain.

In *Tomlins v Sheikh*,⁹⁹ Tutt DCJ opined that formal offers made under the UCPR do not have any relevance to the issue of costs in cases where the PIPA applies. However, in *Nicholls v Telstra Corporation Limited & Anor*,¹⁰⁰ the court considered that a mandatory final offer would only be relevant to the extent that it might impact upon the other party's attitude or approach in any subsequent litigation between the parties which could influence any subsequent offers to settle under the UCPR.

The parties should also contemplate interest that may accrue up until trial should the matter not settle as this will not be dissected from the final judgment sum in determining the issue of costs.¹⁰¹

⁹⁶ *Personal Injuries Proceedings Act 2002* (Qld) s 56 and *Civil Liability Act 2003* (Qld) s 67.

⁹⁷ *Personal Injuries Proceedings Act 2002* (Qld) s 56(2)(a).

⁹⁸ *Civil Liability Act 2003* (Qld) s 56(4), with the example of a party introducing evidence of substantially the same effect from two expert witnesses.

⁹⁹ [2005] QDC 174.

¹⁰⁰ [2008] QDC 13.

¹⁰¹ *Ward v Coomber and Allianz Australia* [2005] QDC 251 which dealt with the application of similarly worded costs provisions in the *Motor Accident Insurance Act 1994* (Qld).

***Carter
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LAWYERS

New South Wales



NEW SOUTH WALES

The *Civil Liability Act 2002* (NSW) (**CLA (NSW)**) applies to civil claims for damages regardless of whether the claim is brought in tort, contract or breach of statute. The CLA (NSW) does not however apply to all civil liability.¹⁰² In particular, it does not apply to civil liability in proceedings for damages for dust diseases, where an injury or death results from smoking or from the use of tobacco products, or workers compensation claims. The CLA (NSW) also does not apply in respect of civil liability of a person in respect of an intentional act done with intent to cause injury or death or that is sexual assault or sexual misconduct.

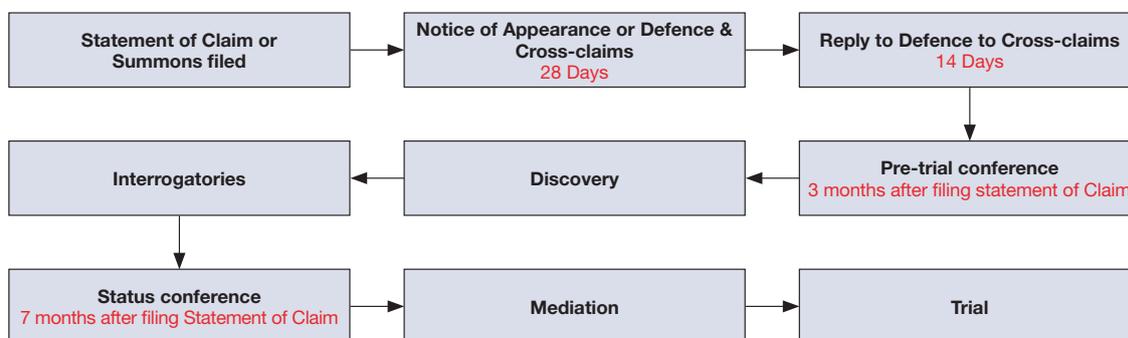
The provisions of the CLA (NSW) which apply to motor vehicle accidents are set out in s 3B(2). They include, inter alia, the provisions relating to negligence, loss of superannuation, mental harm, and intoxication. With the exception of the provisions listed in s 3B(2) however, the CLA (NSW) otherwise does not apply to motor vehicle accidents.

Procedures

There are no pre-court procedures for civil claims in New South Wales other than pre-court procedures arising out of motor vehicle accidents as governed by the *Motor Accident Compensation Act 1999* (NSW) which were in place prior to the Ipp report.

The court does however have the power to compel pre-litigation disclosure of documents relevant to identifying a potential defendant and/or cause of action.¹⁰³

The following timeline outlines the usual steps taken once proceedings are commenced:



The Law of Negligence – Scope of Duty of Care

Standard of care

A person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), the risk was not insignificant, and in the circumstances, a reasonable person in the person’s position would have taken those precautions.¹⁰⁴

¹⁰² Refer to s 3B of the Act for a complete list of the civil liability excluded from the Act.

¹⁰³ Part 5 of the *Uniform Civil Procedure Rules 2005* (NSW).

¹⁰⁴ *Civil Liability Act 2002* (NSW) s 5B.

In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm, and the social utility of the activity that creates the risk of harm.¹⁰⁵

The subsequent taking of precautions that would have prevented the risk from occurring (if taken earlier) does not constitute an admission, nor does it give rise to or affect the determination of liability.

Case law shows that the reasonableness of a defendant's precautions pursuant to s 5B is influenced by the court's assessment of whether the risk in question was inferable from common knowledge.¹⁰⁶ That assessment is often plagued with uncertainty for the stakeholders involved.

Causation

In proceedings relating to liability for negligence, the plaintiff bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.¹⁰⁷ That is, the plaintiff must prove that a breach of a duty of care caused his or her injuries in order to successfully recover damages.

A determination that negligence caused particular harm comprises the following elements:

- that the negligence was a necessary condition of the occurrence of the harm (*factual causation*); and
- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).¹⁰⁸

In order to determine factual causation, the court undertakes an enquiry whether the defendant's conduct historically played a part¹⁰⁹ in bringing about the harm or loss complained of. In mainstream cases, this issue is resolved by determining whether or not the defendant's conduct was, as a matter of commonsense and experience,¹¹⁰ a cause of the loss. If the answer is in the affirmative, factual causation is established.

For the purpose of determining the scope of the liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.¹¹¹

In most cases the two limbs will be readily resolved. However, there are cases (referred to within s 5D(2) as '*exceptional cases*') where a court must exercise value judgments in evaluating whether or not a defendant should be held liable to pay damages. While the CLA (NSW) does not expressly define the phrase '*an exceptional case*', historically, these cases have largely applied to medical malpractice litigation, where proving factual causation is commonly difficult.

¹⁰⁵ Ibid s 5B(2).

¹⁰⁶ *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239; *Shoalhaven City Council v Pender* [2013] NSWCA 210.

¹⁰⁷ *Civil Liability Act 2002* (NSW) s 5E.

¹⁰⁸ Ibid s 5D.

¹⁰⁹ The defendant's conduct need only be one of any number of concurrent causes for liability to attach to his/her actions/inaction. It is incorrect for a court to search for a solitary cause in its quest for the determination of fault when multiple causes exist – per *Shorey v P T Ltd* (2003) 197 ALR 410.

¹¹⁰ In *Medlin v State Government Insurance Commission* [1995] 182 CLR 1, the High Court stated that the enquiry as to '*whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved as a matter of commonsense and experience*'.

¹¹¹ *Civil Liability Act 2002* (NSW) s 5D(4).

In determining in an exceptional case, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.¹¹²

The High Court considered whether a defendant's act caused a plaintiff's injury in *Strong v Woolworths Pty Ltd*.¹¹³ In that case, the plaintiff slipped and fell on a chip lying on the floor of an area occupied by Woolworths. The plaintiff argued that Woolworths' failure to have a system in place for the periodic inspection and cleaning of the area was a '*necessary condition of the occurrence of the harm*'.

The Court of Appeal rejected that argument and held that it could not conclude from the evidence that, had there been a proper cleaning system in place, it was more likely than not that the chip would have been detected and the plaintiff would not have slipped.

However, on appeal to the High Court, the court found in favour of the plaintiff and held that while a plaintiff must show that it was more probable than not that the negligence was a necessary condition of the harm, the onus can be discharged on the balance of probabilities, where there is a lack of evidence.

Therefore, where there is insufficient evidence presented by the plaintiff to complete the chain of causation necessary to show that the defendant's breach had been causative of the plaintiff's injury, courts can determine on the balance of probabilities that the injury would not have occurred had the defendant complied with its duty of care. This decision implies that a plaintiff will not fail to establish causation merely because there is an absence of evidence establishing a causal link between the defendant's actions and the incident giving rise to the plaintiff's injury.

The same absence of a direct causal link was present in *Jones Lang LaSalle (NSW) Pty Ltd v Taouk*.¹¹⁴ Sometime between 11:00pm and 11:30pm, the plaintiff had slipped and fallen on grease and oil in a car park. The spillage started sometime after 8:00pm, but there was no evidence making it more likely that the discharge had commenced at some particular time between 8:00pm and 10:45pm than at any other time in that period. Applying *Strong*, the New South Wales Court of Appeal held that the balance of probabilities favoured a finding that the spillage commenced between 8:00pm and 10:00pm rather than after 10:00pm and just before 10:45pm. On the assumption, adopted at trial and on appeal, that there should have been hourly inspections of the car park, factual causation was made out because an inspection would have noticed and rectified the spillage and consequently prevented the fall.¹¹⁵

Accordingly, in '*exceptional cases*', a plaintiff is required to show that, on the balance of probabilities, the defendant '*materially contributed*' to the injury suffered.

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, the matter is to be determined subjectively in light of all relevant circumstances and any statement made by the person suffering 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.¹¹⁶

¹¹² *Ibid* s 5D(2).

¹¹³ (2012) 246 CLR 182.

¹¹⁴ [2012] NSWCA 342.

¹¹⁵ *Ibid* [57]–[64], [81].

¹¹⁶ *Civil Liability Act 2002* (NSW) s 5D(3).

This issue generally arises in cases of informed consent versus a failure to warn in medical liability litigation. There, a plaintiff would typically give evidence that he or she would not have undertaken elective surgery had he or she been properly warned beforehand about the risks of the procedure.

Rather than accepting the plaintiff's evidence as to how he or she may have acted differently, a court is required by s 5D(3) of the CLA (NSW) to have regard to subjective factors, in light of all the relevant circumstances that existed at the time of the breach, in determining whether the breach was the cause of the damage. Exactly what those subjective factors may include is not specified within the CLA (NSW). Examples in a medical treatment context include the plaintiff's demonstrated desire for the treatment, past experiences (for example, prior similar surgery) and particular knowledge.¹¹⁷

By contrast, the Victorian legislation does not contain an analogous provision to s 5D(3)(b)¹¹⁸ – in which case a plaintiff's evidence about what he or she would have done is not absolutely inadmissible in that jurisdiction.

In *Lederberger and Scheiner v Mediterranean Olives Financial Pty Ltd*¹¹⁹ the Victorian Court of Appeal was inclined to rely on such evidence as the basis for establishing factual causation under s 51 of the *Wrongs Act 1958* (Vic). While acknowledging that the court would ordinarily have given little, if any, weight to such evidence, the fact that the evidence was strongly credible and unchallenged at trial meant the trial judge should not have rejected it.

Conversely, the Victorian Court of Appeal in *Odisho v Bonazzi*¹²⁰ reiterated Kirby J's dicta in *Burns*, highlighting the danger in accepting a plaintiff's hypothetical evidence. In that case, the plaintiff claimed that her medical condition was caused by the negligence of the defendant in failing to warn of the side effects of a prescribed drug. In upholding, in obiter, the trial judge's rejection of the plaintiff's evidence as to whether she still would have taken the drug, Beach JA and McMillan AJA held:

‘ . . . The dangers that may be associated with the acceptance of such evidence were, in our view, well-illustrated in the present case. The exaggerated nature of the appellant's answers to the questions put to her on the issue of what she would have done had she received a warning well justified the trial judge's rejection of this evidence. When one looks at the whole of the evidence, including the evidence of treatment to which the appellant was prepared to consent, like the trial judge, we are unpersuaded that an appropriate warning of the risk of pulmonary emboli would have made any material change to the events that occurred.’¹²¹

Obvious risk

A person does not owe a duty of care to another person to warn of an obvious risk.¹²²

The meaning of an obvious risk is found in s 5F of the CLA (NSW) which provides:

- an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person;¹²³

¹¹⁷ *Elbourne v Gibbs* [2006] NSWCA 127 per Basten JA.

¹¹⁸ Which provides that 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.

¹¹⁹ [2012] 38 VR 509.

¹²⁰ [2014] VSCA 11.

¹²¹ *Ibid* [41].

¹²² *Civil Liability Act 2002* (NSW) s 5H.

¹²³ *Ibid* s 5F(1).

- obvious risks include risks that are patent or a matter of common knowledge;¹²⁴
- a risk of something occurring can be an obvious risk even though it has a low probability of occurring;¹²⁵ and
- a risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.¹²⁶

A plaintiff who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the plaintiff proves on the balance of probabilities that he or she was not aware of the risk.¹²⁷ A person is aware of the risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent, manner or occurrence of the risk.¹²⁸

Consideration of a risk and whether it is ‘obvious’ turns on the facts of each case. The plaintiff’s age, characteristics and expertise are important factors in considering what would have been obvious to a reasonable person in the same position as the plaintiff.¹²⁹

A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk (something occurring that cannot be avoided by the exercise of reasonable care and skill).¹³⁰

The New South Wales Court considered what constituted an obvious risk in the case of *C G Maloney Pty Ltd v Hutton-Potts and Anor*.¹³¹ The court considered the liability of a hotelier in circumstances where a patron had slipped and fallen on a polished floor. A warning sign was displayed and a person was using a buffing machine in the vicinity of the plaintiff’s fall. The court held that a reasonable person in the position of the plaintiff would have observed, or ought to have made observations that would have alerted the plaintiff to the possibility of, some risk.

However, the court concluded that this did not amount to an obvious or patent risk, but only a possible one. The court found that the test of whether the plaintiff was aware of the risk in order to rebut the presumption was a subjective one to be determined on the balance of probabilities. The Court of Appeal agreed with the trial judge’s findings that both the owner and cleaner had been negligent in the circumstances.

The existence of an obvious risk has the effect of negating the proactive duty to warn a person of the risk, but it does not affect liability in relation to a failure to take other precautions a reasonable person would have taken in response to the risk.¹³²

The decision in *C G Maloney* was distinguished in *Vreman and Morris v Albury City Council*.¹³³

That case involved injuries to plaintiffs who fell from their bicycles allegedly due to an anti-graffiti coating which had been applied to the concrete at a skate park. The court held that reasonable persons in the position of the plaintiffs would have been aware that the concrete coating increased the risk of a fall. As a result, the court ruled in favour of the defendants. Harrison J compared the two cases at [102] when he said:

¹²⁴ Ibid s 5F(2).

¹²⁵ Ibid s 5F(3).

¹²⁶ Ibid s 5F(4).

¹²⁷ Ibid s 5G(1).

¹²⁸ Ibid s 5G(2).

¹²⁹ See *Dederer v Roads and Traffic Authority and Anor* (2005) Aust Torts Reports 81–792; *Doubleday & Anor v Kelly* [2005] NSWCA 151.

¹³⁰ *Civil Liability Act 2002* (NSW) s 51.

¹³¹ [2006] NSWCA 136.

¹³² See *C G Maloney Pty Ltd v Hutton-Potts and Anor* [2006] NSWCA 136 at [119]–[121].

¹³³ [2011] NSWSC 39.

'This is not a case like Maloney v Hutton-Potts where the person suffering harm was confronted with a risk that could not have been anticipated or detected as a normal (or obvious) risk associated with a freshly polished floor. The fact that the floor had been polished was obvious but the unremoved residue of polish was not obvious to a reasonable person in that plaintiff's position. The reasonable person in the position of Mr Vreman must be taken to have ridden on the painted surface of the skate park many times and to have been able to form his or her own conclusions about its suitability for riding upon in those circumstances. Similarly, the reasonable person in the position of Mr Morris must be taken to have had knowledge that Mr Vreman had been injured because his bike wheel reputedly slipped on the painted surface and also to have been able to form his or her own conclusions about its suitability for riding upon in those circumstances. The risks would have been obvious to a reasonable person in the position of each man.'

Dangerous recreational activities

Part 1A, div 5 of the CLA (NSW) applies in respect of liability in negligence for harm resulting from a recreational activity. A recreational activity includes:

- any sport (whether or not the sport is an organised activity), and
- any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.¹³⁴

A defendant is not liable in negligence for harm suffered by the plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff,¹³⁵ whether or not the plaintiff was aware of the risk.¹³⁶

A dangerous recreational activity means a recreational activity that involves a significant risk of physical harm and an obvious risk is that defined in section 5F as discussed above.¹³⁷

Whether or not an activity constitutes a '*dangerous recreational activity*' will very much depend on the particular facts of each case. For example, it has been held:

- games such as Oztag (which involve a degree of athleticism, no tackling and no risk of being struck by a hard ball) are not dangerous recreational activities;¹³⁸
- dolphin watching cruises are not dangerous recreational activities;¹³⁹
- spear fishing was not a dangerous recreational activity (where the plaintiff was experienced, in company, close to shore and his gun was attached to a buoy above him by a rope);¹⁴⁰ and
- a kangaroo shoot at night was a dangerous recreational activity (although the risk that materialised did not constitute an '*obvious risk*' of the dangerous recreational activity).¹⁴¹

A defendant does not owe a duty of care to another person who engages in a recreational activity (the plaintiff) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.¹⁴²

¹³⁴ *Civil Liability Act 2002* (NSW) s 5K.

¹³⁵ *Ibid* s 5L(1).

¹³⁶ *Ibid* s 5L(2).

¹³⁷ *Ibid* s 5K.

¹³⁸ *Falvo v Australian Oztag Sports Association and Anor* (2006) Aust Torts Reports 81–831; [2006] NSWCA 17.

¹³⁹ *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200.

¹⁴⁰ *Smith v Perese* [2006] NSWSC 288.

¹⁴¹ *Fallas v Mourlas* (2006) 65 NSWLR 418.

¹⁴² *Civil Liability Act 2002* (NSW) s 5M(1).

A risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.¹⁴³ It can be given orally or in writing.¹⁴⁴

Sections 5M(6) to (9) of the CLA (NSW) set out a number of circumstances in which a defendant is not entitled to rely on a risk warning.

In *Ackland v Stewart*,¹⁴⁵ the plaintiff suffered injuries rendering him a quadriplegic when attempting a back-flip on a jumping pillow at an amusement park.¹⁴⁶ Burns J accepted that such an activity was a ‘*dangerous recreational activity*’ because it exposes a person to a risk of catastrophic physical harm if they fail to execute the manoeuvre perfectly (as occurred with the plaintiff).¹⁴⁷ Burns J was not persuaded on balance, however, that this risk was an ‘*obvious*’ one because a reasonable person in the plaintiff’s position (a 21-year-old with sufficient intelligence to study law at university and who was not inebriated) would have perceived only a minor, and not a serious, risk of injury in attempting the backward somersault on the jumping pillow.¹⁴⁸ The plaintiff’s experience with trampolines was noted to have informed his assessment of the risk, despite the jumping pillow being far less elastic.

In *Campbell v Hay*,¹⁴⁹ the plaintiff suffered injuries during a flying lesson when the plane was subject to an emergency landing by his flying instructor. At first instance, the District Court of New South Wales held that the injuries sustained were a materialisation of an obvious risk of a dangerous recreational activity. On appeal, the Court of Appeal considered that the instructor’s failure to keep the plane within reach of a possible landing area when the plane’s engines began to shudder, was unsatisfactory.¹⁵⁰ However, the court confirmed that the defendant was not liable in negligence for the plaintiff’s injuries because it was found to be a dangerous recreational activity and there was an obvious risk, stating:

‘as a matter of common knowledge and common sense, there was a risk [albeit a low risk] that the defendant might be negligent in the manner in which he operated the aircraft after the second set of vibrations occurred, and that the aircraft engine might fail in flight and the defendant would be compelled to conduct a forced landing’.

The plaintiff therefore failed in his claim.

Liability of professionals

Section 5O(1) of the CLA (NSW) provides a person practising a profession 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. However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.¹⁵¹

¹⁴³ Ibid s 5M(3).

¹⁴⁴ Ibid s 5M(4).

¹⁴⁵ [2014] ACTSC 18. Decision affirmed in *Stewart v Ackland* (2015) 10 ACTLR 207.

¹⁴⁶ Although the case was heard in the ACT, the incident occurred in New South Wales and the Act applied in considering liability.

¹⁴⁷ Ibid [296].

¹⁴⁸ Ibid [304].

¹⁴⁹ (2013) 16 DCLR (NSW) 74. Decision affirmed in *Campbell v Hay* [2014] NSWCA 129.

¹⁵⁰ [2014] NSWCA 129.

¹⁵¹ *Civil Liability Act 2002* (NSW) s 5O(2).

Judge Levy in *Hope v Hunter and New England Area Health Service*,¹⁵² provided guidance as to the interpretation of the term ‘irrational’ in s 50(2). His Honour held that the term did not mean ‘without reason’, but rather, referred to ‘reasons that are illogical, unreasonable or based on irrelevant considerations’.

Section 50 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 the risk of death of or injury to a person associated with the provision by a professional of a professional service.¹⁵³

It is intended to operate as a defence where the defendant, if found to have failed to exercise reasonable care and skill, could avoid liability if he or she established that he or she acted according to widely accepted peer professional opinion.¹⁵⁴

Giles JA, on appeal, held that:

*‘The plaintiff will usually call his expert evidence to the effect that the defendant’s conduct fell short of acceptable professional practice, and will invite the court to determine the standard of care in accordance with that evidence . . . The defendant has the interest in calling expert evidence to establish that he acted according to professional practice widely accepted by peer professional opinion, which if accepted will (subject to rationality) mean that he escapes liability.’*¹⁵⁵

He went on to say:

*‘It follows that I do not accept the [defendant’s] submission that s 50 did not provide a defence but defined the content of the duty of care owed by the [defendant] . . . with the onus on the [plaintiff] to prove that the manner in which he acted was not widely accepted by peer professional opinion as competent professional practice. Section 50 may end up operating so as to determine the defendant’s standard of care, but the standard of care will be that determined by the court with guidance from evidence of acceptable professional practice unless it is established (in practice, by the defendant) that the defendant acted according to professional practice widely accepted by (rational) peer professional opinion.’*¹⁵⁶

The *Professional Standards Act 1994* (NSW) is also relevant to the issue of professional standards. One of the objects of this Act is to enable the creation of schemes to limit the civil liability of professionals.¹⁵⁷

Liability of public authorities

The liability in tort of public and other authorities is governed by pt 5 of the CLA (NSW).¹⁵⁸ This includes liability of the Crown, government departments, public health organisations, local councils, a public or local authority constituted under the CLA (NSW) and persons exercising public or other functions prescribed by regulations.

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability:

¹⁵² [2009] NSWDC 307.

¹⁵³ *Civil Liability Act 2002* (NSW) s 5P.

¹⁵⁴ *Dobler v Kenneth Halverson; Dobler v Kurt Halverson (by his tutor)* (2007) 70 NSWLR 151 at [157].

¹⁵⁵ *Ibid* [167].

¹⁵⁶ *Ibid* [167].

¹⁵⁷ *Professional Standards Act 1994* (Cth) s 3.

¹⁵⁸ Part 5 of the Act extends any such liability even if the damages are sought in an action for breach of contract or any other action: s 40(2) of the Act.

- The functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions.
- The general allocation of those resources by the authority is not open to challenge.
- The functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate).
- The authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.¹⁵⁹

Section 43(2) of the CLA (NSW) provides an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

Further, s 43A(3) provides any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

In the case of *T & H Fatouros Pty Ltd v Randwick City Council*,¹⁶⁰ the Council had approved works undertaken on a set of stairs which was within the local government area administered by the Council. The Council undertook a number of inspections between the time the works began and the date of the incident. The court considered that the Council owed a duty of care because it had acted so that another relied on it to take care for their safety. Importantly, this decision was reversed in the New South Wales Court of Appeal. The trial judge had found that the *Environmental Planning and Assessment Regulation 1994* (NSW) imposed a duty on the Council when issuing fire safety orders to supervise the whole building, not just those matters specified in the orders. Therefore, Council had a duty to ensure the safety of the external stairway even though it was not mentioned in the orders. On appeal, the court held that by issuing a fire safety order, or giving a notice to issue one, a Council does not take over the supervision of the whole building with respect to fire safety, any other result would be a disincentive to the Council to exercise their discretion to issue fire orders. The court made the following pertinent points:¹⁶¹

- Courts must be cautious in imposing common law duties of care on statutory authorities.
- For any duty to arise the measure of control must be significant and special.
- In determining the quality of reliance sufficient to contribute materially, regard must be had to the seriousness of the risk, the likelihood of its occurrence and the vulnerability of the persons at risk.
- An acknowledgment that a stairway is adequate as regards fire safety does not create a duty of care.
- The fundamental elements of control, reliance, and vulnerability on the part of the respondent must be considered.
- The danger constituted by the stairway was obvious to the respondent and could be remedied by him.
- There was no evidence that the respondent had relied upon the council's conduct.
- The respondent was not a vulnerable person and was able to protect himself from harm.
- The failure to prove vulnerability was fatal.

¹⁵⁹ *Civil Liability Act 2002* (NSW) s 42.

¹⁶⁰ (2005) 142 LGERA 271.

¹⁶¹ *Randwick City Council v T & H Fatouros Pty Ltd* (2007) 155 LGERA 37.

In *Rickard v Allianz Australia Insurance*,¹⁶² the court considered the meaning of unreasonableness under s 43(2) of the CLA (NSW). Having determined that the RTA was in breach of its duty to appropriately position a sign, the court was required to apply the test in s 43A(3). The question posed was whether the decision to place a warning sign some distance away from the danger was unreasonable or irrational. The court concluded it was, noting that common sense dictated that positioning a warning sign so far away from the specific hazard was unlikely to alert a driver to that hazard.

The RTA also sought to rely on s 44 of the CLA (NSW) which provides a public or other authority is not liable in proceedings for civil liability to which pt 5 of the CLA (NSW) applies to the extent that the liability is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff. The court held that to ‘prohibit or regulate’ an activity as envisaged under the CLA (NSW) did not encompass the concept of warning.¹⁶³ Accordingly, the RTA could not rely on s 44.

The approach outlined in *Rickard* was adopted by Beech-Jones J in *Collins v Clarence Valley Council (No 3)*.¹⁶⁴ The plaintiff, injured as a result of a fall from an unsafe bridge she was cycling on, claimed damages in negligence from the defendant, who had the care, control and management of the area in which the bridge was located. While the claim for damages was ultimately unsuccessful,¹⁶⁵ the plaintiff successfully overcame s 43A. The court held that if the defendant Council did not propose to take some step to repair or rebuild the bridge then it was unreasonable for it to not have at least erected a sign. Such a measure was cheap, easy to undertake and likely to reduce the risk of injury faced by a significant group of cyclists that traverse the bridge.¹⁶⁶

*Warren Shire Council v Kuehne*¹⁶⁷ provides a useful summary relating to the ambit of s 43A of the CLA (NSW) and found that the provision protected the Council. This case involved an appeal against a finding of the District Court of New South Wales that the Council had been negligent in failing to declare a number of dogs dangerous under the *Companion Animals Act 1998* (NSW), after a young girl had been mauled to death by pig-hunting dogs when she wandered unattended onto a neighbour’s property. Whealy JA found that the infrequent nature of complaints about the dogs could have been reasonably dealt with, as they in fact were, by approaches being made by the council to their owner on occasions when the dogs were roaming the streets. To the extent that it could be argued that the Council had failed to act reasonably in seeking a declaration that any of the dogs were dangerous, that failure could not, in his Honour’s view, be said to be based on unreasonableness ‘of an order sufficient to attract liability under the statute’. This indicates that s 43A provides substantial protection to councils and other public authorities when exercising particular statutory powers.

A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.¹⁶⁸ The requisite knowledge of a public authority was described in *North Sydney Council v Roman*,¹⁶⁹ namely that of actual knowledge of the particular risk at or above the level of the officer responsible for undertaking necessary repairs.¹⁷⁰ Thus, Basten JA held that the section precludes reliance on constructive or imputed knowledge.¹⁷¹

¹⁶² (2009) 54 MVR 214.

¹⁶³ *Ibid* [327].

¹⁶⁴ [2013] NSWSC 1682. Affirmed on appeal *Collins v Clarence Valley Council* (2015) 91 NSWLR 128.

¹⁶⁵ See discussion above in relation to ‘*Obvious risk*’.

¹⁶⁶ [2013] NSWSC 1682 [206]–[207].

¹⁶⁷ (2012) 188 LGERA 362.

¹⁶⁸ *Civil Liability Act 2002* (NSW) s 45.

¹⁶⁹ (2007) 69 NSWLR 240.

¹⁷⁰ *Ibid* [271] per Basten JA (with whom Bryson JA agreed). Although see McColl JA’s contrary opinion 255.

¹⁷¹ *Ibid* [272].

Liability of volunteers and Good Samaritans¹⁷²

The CLA (NSW) limits or excludes liability for Good Samaritans, food donors and volunteers.

Good Samaritans

A Good Samaritan is defined under the CLA (NSW) as 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.¹⁷³

Under s 57, a Good Samaritan is protected from 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.¹⁷⁴ There are however exceptions to this protection.¹⁷⁵

Food donors

Where food is donated in good faith for a charitable or benevolent purpose, with the intention that the consumer of the food would not have to pay for the food, and the food was safe to consume at the time it left the possession or control of the food donor, the donor is excluded from liability for bodily injury.¹⁷⁶

Volunteers

In New South Wales, a ‘volunteer’ is a person who does ‘community work’ on a voluntary basis. ‘Community work’ focuses on the overall activity engaged in by the ‘community organisation’ (not the conduct of the volunteer) and is work that is done not for financial gain, but rather for charitable, benevolent, philanthropic, educational, cultural or sporting purposes.

Each jurisdiction (other than the Commonwealth) provides a definition of ‘community organisation’ and includes a list of legal entities that can be considered ‘community organisations’.

In New South Wales, volunteers are protected against liability when doing community work in good faith. There are however exceptions to this protection.¹⁷⁷

Liability for mental harm¹⁷⁸

Part 3 of the CLA (NSW) sets out the extent to which a plaintiff can recover damages resulting from psychiatric injury. It essentially replicates much of what the High Court held in deciding *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd*.¹⁷⁹ For more information on these decisions, refer back to the Queensland section in this guide.

The CLA (NSW):

- precludes the recovery for pure mental harm arising from shock unless the plaintiff witnessed at the scene the victim being killed, injured or put in peril, or the plaintiff is a close member of the family of the victim;¹⁸⁰
- precludes the recovery of damages for mental harm in the absence of proof of a diagnosed recognised psychiatric injury;¹⁸¹ and

¹⁷² *Civil Liability Act 2002* (NSW) pts 8, 8A and 9 ss 55–66 commenced 20 March 2002.

¹⁷³ *Ibid* s 56.

¹⁷⁴ *Ibid* s 57.

¹⁷⁵ *Ibid* s 58.

¹⁷⁶ *Ibid* ss 58A–58C.

¹⁷⁷ *Ibid* ss 63–66.

¹⁷⁸ *Civil Liability Act 2002* (NSW) pt 3 ss 27–33 commenced 20 March 2002.

¹⁷⁹ [2002] 211 CLR 317.

¹⁸⁰ *Ibid* s 30.

¹⁸¹ *Ibid* s 31.

- provides that no duty of care to avoid mental harm is owed ‘. . . 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’.¹⁸²

In order to limit the number of potential claimants seeking damages for pure nervous shock, s 30(2) provides that the plaintiff is not entitled to recover damages for pure mental harm unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril; or
- the plaintiff is a close member of the family of the victim¹⁸³ who suffers mental harm either as a result of witnessing the victim’s plight or later learning of it.¹⁸⁴

It should also be noted that pt 3 of the CLA (NSW) draws a distinction between ‘*pure mental harm*’, namely that is not suffered as a consequence of a personal injury; and ‘*consequential mental harm*’, namely mental harm that is a consequence of a physical injury of another kind.

The decision of *Wicks v State Rail Authority of New South Wales*¹⁸⁵ made four relevant findings on the issue of mental harm under the CLA (NSW):

- The expression ‘*being put in peril*’ found in ss 30(1) and 30(2)(a) has the meaning that the words ordinarily convey. A person is put in peril when put at risk; the person remains in peril (is ‘*being put in peril*’) until the person ceases to be at risk.
- Section 30 and particularly s 30(2)(a) does not assume that all cases of death, injury or being put in peril are events that begin and end in an instant, or even that they are events that necessarily occupy only a time that is measured in minutes. Death, injury or being put in peril can take place over an extended period.
- The consequences of the derailment took time to play out. Some aboard the train were killed instantly, some injuries were suffered during the process of derailment and others during the process of removal. The survivors of the derailment remained in peril until they had been rescued and taken to a place of safety.
- The rescuers at the scene of the derailment witnessed victims of the accident being put in peril as a result of the negligence of the respondent, even though the rescuers did not witness the derailment.

Lastly, in a departure from the common law, the contributory negligence of a person killed or injured as a result of the defendant’s conduct will now result in a corresponding reduction in the damages recovered by a person bringing a resultant action for pure mental harm.¹⁸⁶

Intoxication and illegal activity¹⁸⁷

Intoxication

Under pt 6, a court cannot award damages to a plaintiff where the plaintiff was intoxicated to the extent that the plaintiff’s capacity to exercise reasonable care and skill was impaired at the time of the act or omission causing death, injury or damage.¹⁸⁸

¹⁸² *Civil Liability Act 2002* (NSW) s 32.

¹⁸³ Close members of the family are defined under s 30(5) to include, apart from the obvious examples, the de-facto partner, half and step siblings of the victim.

¹⁸⁴ According to the High Court in *Annetts*, a family member need not be present at the time of the victim’s death or injury and thereby directly perceive the event or its aftermath. This point was reinforced in the subsequent High Court decision of *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

¹⁸⁵ (2010) 241 CLR 60.

¹⁸⁶ *Civil Liability Act 2002* (NSW) s 30(3).

¹⁸⁷ *Civil Liability Act 2002* (NSW) pts 6 and 7 (ss 47–54H) commenced 20 March 2002.

¹⁸⁸ *Ibid* s 48.

Pursuant to s 48 of the CLA (NSW), a reference to a person being intoxicated is a reference to a person being under the influence of alcohol or drugs (whether or not taken for a medicinal purpose and whether or not lawfully taken).

However, there is an exception in s 50(2) in circumstances where the court is satisfied that the injury was likely to have occurred even if the person had not been intoxicated. Section 50(3) provides that if the court is satisfied that the injury would have occurred even if the person had not been intoxicated, a presumption of contributory negligence will apply unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.

If the court is satisfied that the injury is likely to have occurred even if the person had not been intoxicated, there is a presumption of contributory negligence of at least 25% unless the court is satisfied the person's intoxication did not in any way contribute to the cause of death, injury or damage.

A further exception to the rule is made under s 50(5) in circumstances where the court is satisfied that the intoxication was not self-induced.

Illegal activity

Pursuant to s 54(1) of the CLA (NSW), a court must not award damages in a claim to which the CLA (NSW) applies if the death or injury to the plaintiff occurred at the time of or following conduct by the plaintiff which constitutes a serious offence and that conduct contributed materially to the death, injury or damage, or to the risk of death, injury or damage.

For s 54 to apply it is not necessary for the plaintiff to have been convicted of an offence or to have been sentenced to imprisonment. Moreover, the commission of a serious offence need only be proven on the balance of probabilities.

Under pt 7 of the CLA (NSW) a person does not incur liability arising from conduct carried out in self defence if the conduct to which the person was responding was unlawful or would have been unlawful had the person carrying out the conduct not been suffering from a mental illness.

Part 1 of the CLA (NSW) excludes the application of the CLA (NSW) in relation to an intentional act that is done with intent to cause injury or death or sexual assault or other sexual misconduct apart from the provisions relating to interest on damages and pt 7 relating to self defence and recovery by criminals.

Contributory negligence¹⁸⁹

A plaintiff's damages must be reduced to account for the personal degree of liability attributed to their injuries. Section 5R of the CLA (NSW) provides that the principles which apply to determining whether a person has been negligent also apply in determining whether a plaintiff has been contributory negligent in failing to take precautions against the risk of that harm.

In accordance with s 5S, the court has the power to reduce damages by up to 100% for contributory negligence if the court thinks it just and equitable to do so; and in such circumstances the claim will be defeated.

Section 5T also provides that a claim brought under the *Compensation to Relatives Act 1897* (NSW) may also be reduced for contributory negligence on the part of the deceased.

¹⁸⁹ *Civil Liability Act 2002* (NSW) pt 1A, div 8 ss 5R–5T commenced 20 March 2002.

It is important to note that contributory negligence is a concept that will turn on the facts of each case. Despite being an objective test, what is considered negligent conduct on the part of a plaintiff in respect of the cause of his or her own injuries will be entirely circumstantial. However, there are guiding principles that courts rely upon in assessing a plaintiff's conduct.

Any conclusion of contributory negligence on the part of the plaintiff will result in an apportionment of liability.¹⁹⁰ The approach of the court is therefore twofold; firstly to determine that negligence on the part of the plaintiff occurred, and secondly to attribute a value or weight to such negligence, usually expressed as a percentage. In apportioning liability, it is important to note that appellate courts will not interfere with a trial judge's apportionment in the absence of some demonstrated error of principle or of fact or unless the apportionment is plainly wrong.¹⁹¹

The case of *Jones v Dapto Leagues Club Limited*¹⁹² is one of a long line of judicial considerations of contributory negligence in accidents involving intoxication of a plaintiff.¹⁹³ The plaintiff, whilst drinking and playing pool at his local leagues club, stuck his fingers into an empty (and readily accessible) light socket forming part of ornamental lighting on a barrier near the pool table. The plaintiff believed the power to be turned off, having earlier witnessed this. The power had been restored by a staff member of the club, and the plaintiff suffered electric shock, burns and subsequently post-traumatic stress disorder.

The court considered the plaintiff's actions in the context of what was deliberate or accidental. As no one was aware that the power had been restored, on appeal, the court considered that, in the circumstances, the plaintiff had not been negligent.

However, characterising conduct as merely accidental does not necessarily escape a finding of contributory negligence.¹⁹⁴ Conversely, an instance of momentary inattention in the context of a failure to keep a proper lookout has been held to be a departure from the standard of care one ought exercise.¹⁹⁵

The decision of *Sheldrick v State of New South Wales*¹⁹⁶ is notable in respect to the objective test to be applied in characterising the plaintiff's conduct. In this case, the plaintiff's inexperience in cycling did not impact on the assessment of the standard of care to be expected by a reasonable person of his age. A plaintiff's degree of experience is therefore not a circumstance imposed upon the 'reasonable person' test.

However, as the standard of care required of a person who has suffered harm is that 'of a reasonable person in the position of that person', courts have assessed the physical and mental capabilities of that particular person. In the case of *Smith*, the plaintiff was an elderly and poor sighted pedestrian who took a shortcut across the road and was hit by a car. The court reduced the contributory negligence attributed to the plaintiff by reference to her physical capabilities.

¹⁹⁰ See 'Proportionate liability'. In considering apportionment, it is common place for courts to be guided by the leading authority of *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 494.

¹⁹¹ *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532; 59 ALJR 492, 494. For a recent application of this principle, see *Marien v Gardiner; Marien v HJ Heinz Company Australia Ltd* (2013) 66 MVR 1, 13-14.

¹⁹² [2008] NSWCA 32.

¹⁹³ It is of value to refer also to the section 'Intoxication and Illegal Activity'.

¹⁹⁴ *Sheldrick v State of New South Wales* [2007] NSWCA 105.

¹⁹⁵ *Boral Bricks Pty Ltd v Cosmidis (No 2)* (2014) 86 NSWLR 393.

¹⁹⁶ [2007] NSWCA 105.

The onus is on the defendant to show that the plaintiff's actions are a causative factor of the incident resulting in the injury.¹⁹⁷ Mere inadvertence may not be sufficient to prove contributory negligence.¹⁹⁸

Proportionate liability¹⁹⁹

The proportionate liability provisions in the CLA (NSW) apply to incidents occurring on or after 26 July 2004.²⁰⁰

Pursuant to the CLA (NSW), an apportionable claim is defined as a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care.²⁰¹

The provisions also apply to a claim for economic loss or damage to property in an action for damages under s 42 of the *Fair Trading Act 1987* (NSW) or s 18 of the *Australian Consumer Law 2010* (Cth), where applicable.²⁰² The provisions will not however apply to claims arising out of personal injury.²⁰³

A 'concurrent wrongdoer' is defined in s 34 as a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

With respect to apportionable claims, the liability of a defendant, who is a concurrent wrongdoer in relation to that claim, is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just, having regard to the extent of the defendant's responsibility for the damage or loss.²⁰⁴

Importantly, if the proceedings involve both an apportionable claim and a claim that is not an apportionable claim, then liability for the non-apportionable part of the claim is to be determined in accordance with ordinary applicable legal rules.²⁰⁵ Therefore, the principle of joint and several liability still applies to non-apportionable parts of a plaintiff's claim.

In the decision of *Ucak v Avante Developments Pty Ltd*,²⁰⁶ Hammerschlag J provided guidance for defendants intending to plead and rely on proportionate liability provisions. It was held that a defendant, pleading and relying on proportionate liability, must plead and rely upon the material facts pertaining to the causes of action by which it is alleged the claim is an 'apportionable claim'. Put simply, if a defendant intends to allege that other concurrent wrongdoers either caused or contributed to the plaintiff's loss, the defendant must allege the relevant facts which caused the defendant to make these assertions.

¹⁹⁷ *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445; *Nominal Defendant v Rooskov* (2012) 60 MVR 350.

¹⁹⁸ *Bankstown Foundry Pty Ltd v Braistina* (1996) 160 CLR 301, 310; *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24, 37; *J Blackwood & Son v Skilled Engineering Ltd* [2008] NSWCA 142.

¹⁹⁹ *Civil Liability Act 2002* (NSW) pt 4 ss 34–39 commenced 20 March 2002, s 34(1)(b) removed and substituted 1 January 2011

²⁰⁰ *Civil Liability Regulation 2009* (NSW) reg 5.

²⁰¹ *Civil Liability Act 2002* (NSW) s 34(1).

²⁰² *Ibid* s 34(1)(b).

²⁰³ *Ibid* s 34(3).

²⁰⁴ *Ibid* s 35(1).

²⁰⁵ *Ibid* s 35(2).

²⁰⁶ [2007] NSWSC 367.

When apportioning responsibility for a claim, a court is to exclude that proportion of the damage caused by the plaintiff's own contributory negligence,²⁰⁷ and may also have regard to comparative responsibility of any concurrent wrongdoer whether or not the wrongdoer is a party to the proceedings.²⁰⁸

The recent High Court decision of *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*²⁰⁹ has provided some discussion as to the purpose of proportionate liability legislation.

Finally, concurrent wrongdoers have a duty to assist the plaintiff in identifying other concurrent wrongdoers, including providing in writing, as soon as practicable, notice of the identity of the other wrongdoer and the circumstances which make the other person a concurrent wrongdoer under the claim.²¹⁰ The failure to do so can have adverse cost consequences for the concurrent wrongdoer.²¹¹

Vicarious liability

New South Wales has not introduced any legislative reforms dealing with the concept of vicarious liability.

At common law an employer can be found vicariously liable for a wrongful, unauthorised or negligent act of an employee which is carried out in the course of his or her employment and is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court case of *New South Wales v Lepore; Samin v Queensland; Rich v Queensland*²¹² in which three appeals were held simultaneously.

An employer will not always be held responsible for the actions of his or her employees.²¹³ The CLA (NSW) must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be held vicariously liable for the actions of his or her employee will depend upon the specific facts in each case.

In *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* was applied in *Sweeney v Boylan Nominees Pty Ltd*.²¹⁴ In that case the appellant was injured when the door of a refrigerator fixed by a third party contractor fell off and hit her. The appellant argued the respondent was vicariously liable for the conduct of the contractor. The court said the proposition underpinning the appellant's argument, that if one person 'represents' a second, then the second person is vicariously liable for the conduct of the first, is so general that it goes well beyond the bounds set in previous cases by notions of control or notions of course of employment. The distinction between independent contractors and employees has been critical to defining the ambit of vicarious liability. The view that the distinction should be abandoned in favour of a wider principle has not been accepted by a majority of the High Court of Australia.

In *Webster v Coles Myer Limited; Thompson v Coles Myer Limited*,²¹⁵ the plaintiffs claimed the defendant was vicariously liable for the actions of its employee where that employee falsely and maliciously identified the plaintiffs as credit card fraudsters to the police. The court cited with approval the finding of Gummow and Hayne JJ in *Lepore* that vicarious liability will be established where:

²⁰⁷ *Civil Liability Act 2002* s 35(3)(a).

²⁰⁸ *Ibid* s 35(3)(b).

²⁰⁹ (2013) 247 CLR 613.

²¹⁰ *Civil Liability Act 2002* s 35A.

²¹¹ *Ibid* s 35A(2).

²¹² (2003) 212 CLR 511.

²¹³ *Ibid*.

²¹⁴ (2006) 266 CLR 161.

²¹⁵ (2009) 9 DCLR (NSW) 123.

... the conduct of which complaint is made was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.²¹⁶

The court heard evidence on the system employed by the defendant for reporting potential criminal conduct and found that its employees' vigilance and duty to report suspicious or dishonest conduct to the police was an integral part of that system. With this in mind, the defendant was found vicariously liable for the conduct of its employee. This decision was later affirmed by the New South Wales Court of Appeal.²¹⁷

*Withyman v State of New South Wales*²¹⁸ concerned a claim for vicarious liability where a special care school teacher engaged in a sexual relationship with one of her pupils. The student successfully claimed damages against the teacher for psychological harm and damage caused by her termination of this sexual relationship, but unsuccessfully argued the State was vicariously liable for the misconduct. On appeal, the plaintiff argued that, applying *Lepore*, there was a sufficient connection between the teacher's misconduct and her employment because the intimacy and vulnerability inhering in such student/teacher relationships created a risk of sexual activity. The New South Wales Court of Appeal (Allsop P, Meagher and Ward JJA agreeing) rejected this argument, holding that the emotional vulnerability of special care pupils does not create a new ambit of risk of sexual activity. As such, there was an insufficient nexus to justify the imposition of liability on the State for the teacher's out of character, sexual misconduct.²¹⁹

A similar line of reasoning was applied in *Zakka v Elias*.²²⁰ The plaintiff claimed that the employer solicitor was vicariously liable for the professional negligence of its employee solicitor who was found to have breached her duty of care in respect of legal advice given for loan transactions entered into by the plaintiff. In circumstances where the plaintiff approached the employee personally and not the firm, the employee's conduct was not authorised to be done as an employed solicitor of the firm. The employer therefore had done nothing to position the employee with respect to the plaintiff to commit the wrongful act, other than to employ her as a solicitor. Instead, the employee *'engaged in a frolic of her own or at her own whim'*.²²¹ The New South Wales Court of Appeal (Ward JA, Emmett JA and Tobias AJA agreeing) held there was an insufficient connection between the employee solicitor's unauthorised conduct and her employment to invoke the doctrine of vicarious liability as explained in *Lepore* and *Withyman*.

Non-delegable duties²²²

The term *'non-delegable duty'* is somewhat misleading. It does not mean a party owing a duty of care cannot delegate the task to a third party, but rather that the liability for breach of a duty to take reasonable care cannot be delegated. As such, there is a duty to ensure that reasonable care is taken. Therefore, if a third party to whom a task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached.

The categories of non-delegable duties continue to evolve. The courts have struggled, however, to clearly define the parameters required to justify the existence of a non-delegable duty of care. The known criteria include the superior capacity of the defendant to bear the risk of the mishap, the special obligation which it is proper to attach to extra-hazardous activities, and the special dependence or vulnerability of the person to whom the duty is owed.²²³

²¹⁶ Ibid [236].

²¹⁷ [2009] NSWCA 299.

²¹⁸ [2013] NSWCA 10.

²¹⁹ Ibid [143].

²²⁰ [2013] NSWCA 119.

²²¹ Ibid [142].

²²² *Civil Liability Act 2002* (NSW) pt 1A div 7 s 5Q.

²²³ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

Common relationships in which non-delegable duties exist include:

- employer and employee;²²⁴
- host employer and contractor;²²⁵
- school and student;²²⁶
- hospital and patient;²²⁷ and
- owner of premises and licensee.²²⁸

Apology²²⁹

An apology is defined as:

'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'.

The Supreme Court of New South Wales distinguished an expression of regret from an apology in the case of *David Michael Wilson v Nilepac Pty Ltd t/as Vision Personal Training (Crows Nest)*.²³⁰ In that case, a personal trainer was being sued by his client for an injury sustained during a training session. The plaintiff placed reliance on two statements made by the defendant after having suffered his injury that he *'shouldn't have started [him] off so hard'* and *'we should have done more core strengthening exercises first'*. The court construed these statements as being mere expressions of regret and not admissions of breach of the legal standard of care.²³¹

An apology in connection with any matter alleged to have been caused by a person does not constitute an admission of liability by the person in connection with that matter and will not be relevant to the determination of fault or liability. Evidence of an apology is not admissible in a court hearing as evidence of fault or liability (other than categories of civil liability excluded by s 3B of the CLA (NSW)).

For High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins*.²³²

Limitation periods²³³

New South Wales has not legislated to change the limitation period in personal injury actions (apart from survivorship action and compensation to relatives' actions) which remains three years from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.²³⁴ However, the *Limitation Act 1969* (NSW) does not apply to death or personal injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle.²³⁵

²²⁴ *Kondis v State Transport Authority* (1984) 154 CLR 672.

²²⁵ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

²²⁶ *Commonwealth v Introvigne* (1982) 150 CLR 258.

²²⁷ *Samios v Repatriation Commission* [1960] WAR 219.

²²⁸ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

²²⁹ *Civil Liability Act 2002* (NSW) pt 10 ss 67–69.

²³⁰ [2009] NSWSC 1365.

²³¹ It should be noted that this decision was overturned on appeal (*Wilson v Nilepac Pty Ltd (t/as Vision Personal Training) (Crows Nest)* [2011] NSWCA 63), however the trial judge's findings in relation to these comments were left undisturbed.

²³² (2003) 215 CLR 317.

²³³ *Limitation Act 1969* (NSW).

²³⁴ *Ibid* s 18A; compare general limitation of six years.

²³⁵ *Motor Accidents Compensation Act 1999* (NSW) s 109.

A plaintiff is able to extend the limitation period should a plaintiff be able to point to a ‘*fact of material and decisive character*’ that was not within the knowledge of the applicant until after expiration of the limitation period.²³⁶

In survivorship actions and compensation to relatives’ actions, the limitation provisions applying to negligence actions involving personal injury or death are as follows:²³⁷

- the period starting three years from when the cause of action is discoverable, or 12 years starting from the occurrence that gives rise to the claim, whichever expires first;
- the 12 year period may be extended at the discretion of the court but not beyond three years after the cause of action is discoverable;
- the suspension of a limitation period during incapacity will not apply to a child who has a capable parent or guardian and discoverability of a cause of action by a minor will be assessed according to the knowledge of the parent or guardian;
- for actions by minors injured by a parent or guardian or close associate of their parent or guardian, the applicable limitation period will not start running until the person turns 25 years of age; and
- where the failure to bring an action on behalf of a minor was due to an irrational decision by a parent or guardian of the minor, a court will be able to extend a limitation period by up to one year.²³⁸

In relation to defamation, an action for defamation is not maintainable if brought after the end of a limitation period of one year running from the date of the publication of the matter complained of.²³⁹

However, a person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action under s 56A *Limitation Act 1969* (NSW).²⁴⁰

Damages Awards

Awards of damages in personal injuries claims in New South Wales are regulated by the CLA (NSW).

Non-Economic Loss (general damages)²⁴¹

The CLA (NSW) provides that no allowance is to be made in respect of non-economic loss unless the severity of the loss is equal to or greater than 15% of a most extreme case.

Where the severity of the non-economic loss is equal to or greater than 15% of the most extreme case, the allowance for general damages is to be calculated by the court with reference to s 16(3) of the CLA (NSW). The operation of this scale was illustrated recently in *Berkeley Challenge Pty Ltd v Howarth*.²⁴² In assessing non-economic loss for the respondent who was injured during work Basten JA stated that:

²³⁶ *Limitation Act 1969* (NSW) s 58.

²³⁷ *Ibid.*

²³⁸ *Ibid* s 62D.

²³⁹ *Ibid* s 14B.

²⁴⁰ If a court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of the publication, then the court must extend the limitation period mentioned in s 14B to a period of up to three years running from the date of the publication.

²⁴¹ *Civil Liability Act 2002* (NSW) ss 16–17A.

²⁴² [2013] NSWCA 370.

'damages for non-economic loss are required to be assessed as a proportion of a most extreme case: Civil Liability Act 2002 (NSW), s 16. Non-economic loss assessed at less than 15% of such a case cannot be compensated: s 16(1). An assessment between 15% and 33% gives rise to an award on a scale increasing from 1% to 33% of the prescribed maximum amount. The trial judge assessed the severity at 33% of a most extreme case, thus permitting an award of 33% of the maximum amount, being \$171,500. The appellant submitted that this assessment of severity was disproportionate and that the proper figure should have been in the order of 25%. Because of the tapered scale, the result of such a variation has a disproportionate effect on the award. An assessment of severity as 25% of a most extreme case will give rise to an award of \$33,780, being a reduction of \$137,720. Thus, the effect of the taper is that a variation from 33% of a most extreme case to 25% gives rise to an 80% reduction in an award.'

Depending on the severity of the loss, the amount allowed for general damages is calculated as a percentage of the maximum amount, which is currently capped at \$594,000.00 (effective from 1 October 2015). The maximum amount allowable for general damages is gazetted each year prior to 1 October.

Economic loss²⁴³

A person is restricted to claiming damages for economic loss (both past and future). The court is to disregard the claimant's gross weekly earnings to the extent that they exceed an amount that is three times the average weekly earnings at the date of the award.²⁴⁴

The court is not to award damages for future economic loss unless it is satisfied that the assumptions about future economic earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury. The court is required to state the assumptions on which the award is based. If the court makes an award for future economic loss, it must reduce the award by reference to the percentage possibility that the events might have occurred but for the injury.

When assessing damages for future economic loss, the court is also to apply a prescribed discount rate of 5% (if no discount rate is otherwise prescribed by the Regulation) to the present day value of that future economic loss. Superannuation is to be allowed at the minimum percentage required by law to be paid as employer superannuation contributions. In cases involving consequential mental harm, the CLA (NSW) states the court is not to award damages unless the harm consists of a recognised psychiatric illness.²⁴⁵ Similarly, the CLA (NSW) states that damages for economic loss are not to be awarded where the conduct of a mentally ill plaintiff constituting a serious offence results in the loss.²⁴⁶

There are some circumstances where the court will allow a buffer for economic loss awards. For example in the case of *Pollard v Baulderstone Hornibrook Engineering Pty Ltd*,²⁴⁷ the court held that an award of a buffer is appropriate when *'the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine'*.²⁴⁸

²⁴³ *Civil Liability Act 2002* (NSW) pt 2 div 2 ss 12–15C, pt 3 ss 27–33 and pt 7 ss 51–54A.

²⁴⁴ *Ibid* s 12(2).

²⁴⁵ *Ibid* pt 3.

²⁴⁶ A serious offence is an offence punishable by imprisonment for six months or more. *Civil Liability Act 2002* (NSW) pt 7.

²⁴⁷ (2008) Aust Torts Reports 81-949.

²⁴⁸ *Ibid* [84].

The court must not award a claimant future economic loss unless they are satisfied the claimant assumptions about future earning capacity on which the award is to be based, accords with the most likely future circumstances but for the injury.²⁴⁹ This was considered by McClellan AJA in *MacArthur District Motorcycle Sportsmen Inc v Ardizzone*²⁵⁰ and *Penrith City Council v Parks*.²⁵¹

*“the court must determine the “most likely future circumstances” of a claimant “but for the injury”. This requires the court to assess matters such as the prospects of a claimant gaining or remaining in employment, and for what period and also determine the rate at which he or she may earn during that employment; these are “assumptions about future or other events”. Secondly, the court must make an adjustment to any award by reference to “the percentage possibility that the events might have occurred but for the injury”. Thirdly, the assumption and percentage must be stated.”*²⁵²

Gratuitous care²⁵³

Gratuitous attendant care

Damages for gratuitous attendant care are the equivalent of the damages formerly known as *Griffiths v Kerkemeyer*²⁵⁴ damages under common law. Damages for gratuitous attendant care are not to be awarded to a plaintiff unless there is reasonable need for the services, the need has arisen solely because of the injury and the care would not have been provided but for the injury. Further the care needs to have been (or will be) provided for at least six hours per week and for six months.

The provision of gratuitous assistant care was considered in the case of *Harrison v Melhem*.²⁵⁵ In that case, Spigelman J considered the threshold provision contained in the CLA (NSW) and held that ‘when either threshold in s 15(3) is satisfied, recovery for gratuitous services is open to be awarded’.²⁵⁶ His Honour found that the fact that for the purposes of calculating this head of damage, it is divided into two periods (before trial and in the future), does not require the threshold to be applied to each period. Once either threshold is satisfied, the plaintiff may recover damages for gratuitous services, subject to the other provisions of s 15 of the CLA (NSW). Therefore, a claimant is not required to need future care for at least six hours per day for at least six months if they have already received this amount of care.

Where the amount of care required exceeds 40 hours per week, damages must not exceed the amount estimated by the Australian Statistician per week comprising the average weekly total earnings of all employees in New South Wales.²⁵⁷ Where the amount of care is less than 40 hours per week, the amount allowed must not exceed the amount calculated at an hourly rate of one-fortieth of the amount per week comprising the average weekly total earnings of all employees in New South Wales.²⁵⁸

Loss of capacity to provide domestic services

The CLA (NSW) also provides for damages for loss of capacity to care for others. This is the equivalent of the damages formerly known as *Sullivan v Gordon*²⁵⁹ damages. Damages may be awarded where the court is satisfied of the loss of the claimant’s capacity to provide gratuitous

²⁴⁹ *Civil Liability Act 2002* (NSW) s 13.

²⁵⁰ [2004] NSWCA 145.

²⁵¹ [2004] NSWCA 201.

²⁵² *Ibid* [51].

²⁵³ *Civil Liability Act 2002* (NSW) pt 2 div 2 ss 15–15C.

²⁵⁴ (1977) 15 ALR 387.

²⁵⁵ (2008) Aust Torts Reports 81-951.

²⁵⁶ *Ibid* [20].

²⁵⁷ *Civil Liability Act 2002* (NSW) s 15(4).

²⁵⁸ *Ibid* s 15(5).

²⁵⁹ (1999) 47 NSWLR 319.

domestic services and where the claimant provided domestic services to those dependants before the time that the liability in respect of the claim is made arose; and the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity. The minimum requirements for this entitlement mirror that for gratuitous attendant care: the care must be required for six hours per week for six months.

However, if the dependant to whom the services were to be provided has recovered damages in respect of that loss, no allowance is to be made. Similarly, if the claimant has recovered damages by reason of the claimant's loss of capacity to provide gratuitous domestic services, another person may not recover damages by reason of the claimant's loss of capacity to provide the services to that person.

In *Harrison v Melhem*²⁶⁰ the court contrasted s 15B with s 15. The court determined that s 15B was entirely unambiguous in its application in that it required both the intensity (six hours per week) and duration (six consecutive months) threshold be met before damages under this head could be awarded, whereas s 15 (although similarly worded) allowed for either threshold to be met before damages for gratuitous services could be recovered.

Interest rate and discount rate

The court cannot order the payment of interest on damages awarded for non-economic loss, gratuitous attendant care services or loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants.²⁶¹ On all other past losses the interest rate is to be equivalent to the Commonwealth Government 10 year benchmark bond rate as at the date of the determination of the damages.²⁶²

The prescribed discount rate is a discount rate of the percentage prescribed by regulations or, if no percentage is prescribed, a discount rate of 5% is applicable.²⁶³

Exemplary, punitive or aggravated damages²⁶⁴

In cases involving personal injury claims where the act or omission that caused the injury or death was negligence, an award of punitive, exemplary or aggravated damages cannot be made.

Legal costs

If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:

- in the case of legal services provided to a plaintiff, maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater; or
- in the case of legal services provided to a defendant, maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.²⁶⁵

Where the matter has proceeded to a District Court trial after a failed arbitration, and damages are less than \$100,000 the recoverable costs are increased:

- in the case of legal services provided to the plaintiff, an additional amount of 15% of the amount recovered or \$7,500 whichever is greater; or

²⁶⁰ (2008) Aust Torts Reports 81-951.

²⁶¹ *Civil Liability Act 2002* (NSW) pt 2 div 4 s 18 (1).

²⁶² *Ibid* pt 2 div 4 s 18(4).

²⁶³ *Ibid* pt 2 div 2 s 14(2).

²⁶⁴ *Ibid* pt 2 div 6 s 21.

²⁶⁵ *Legal Profession Uniform Law Application Act 2014* (NSW) sch 1 s 2(1).

- in the case of legal services provided to the defendant an additional 15% of the amount sought or \$7,500, whichever is greater.²⁶⁶

Where a decision of the District Court in respect of a claim is the subject of an appeal, the maximum costs for legal services provided to the respondent to the appeal are increased by the additional amounts above, or two times the additional amount if subclause (2) (above) also applies to legal services provided to the respondent.²⁶⁷

In the case of legal services provided to a plaintiff in connection with a claim for personal injury damages, that is eligible to be satisfied from a victim trust fund, the maximum costs are determined as follows:²⁶⁸

Amount recovered	Maximum costs (whichever is greater)
Not exceeding \$100,000	20% of amount recovered or \$10,000
Exceeding \$100,000 but not exceeding \$250,000	18% of amount recovered or \$20,000
Exceeding \$250,000 but not exceeding \$500,000	16% of amount recovered or \$45,000
Exceeding \$500,000	15% of amount recovered or \$80,000

²⁶⁶ *Legal Profession Uniform Law Application Act 2014* (NSW) sch 1 s 3(2) and 3(4).

²⁶⁷ *Ibid* sch 1 s 3(3) and 3(4).

²⁶⁸ *Civil Liability Act 2002* (NSW) s 26U.

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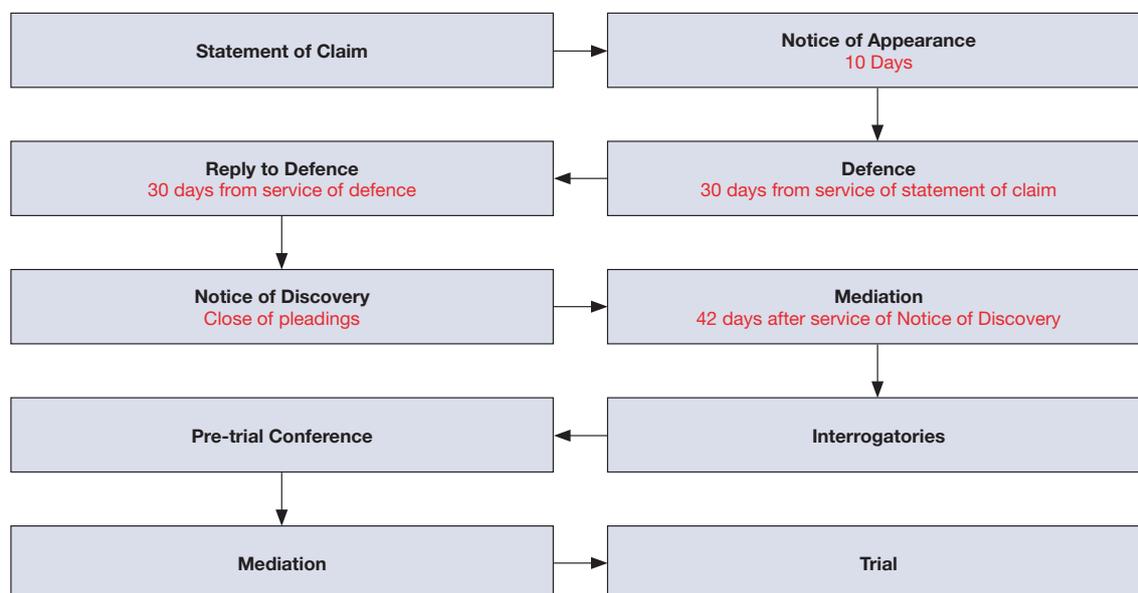
VICTORIA

The *Wrongs Act 1958* (Vic) (**Wrongs Act**) applies to claims for damages for personal injury resulting from negligence, breach of contract or other causes of action. It does not apply to actions resulting from motor vehicle accidents, workers compensation, dust related diseases and smoking, where various emergency services legislation applies and where other discrete legislation applies for damages.

The *Transport Accident Act 1986* (Vic) applies to motor vehicle injuries and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) apply to workplace injuries.

Procedure²⁶⁹

The *Civil Procedure Act 2010* (Vic) (**Civil Procedure Act**) applies to all court proceedings in Victoria with exceptions for some types of actions.²⁷⁰



The Civil Procedure Act initially included pre-court procedures which required parties take reasonable steps to resolve the dispute and to clarify the issues in dispute before the commencement of proceedings. This would have required the parties to exchange all correspondence, information and documents critical to the resolution of the dispute and to consider all options for resolving the dispute such as alternative dispute resolution. These procedures were removed before they came into force with the principal concern it would increase the costs of litigation.

The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provides mechanisms to allow parties to receive disclosure from prospective parties.

²⁶⁹ *Civil Procedure Act 2010* (Vic) as amended 12 May 2016.

²⁷⁰ For a complete list of exceptions see s 4(2) of the Wrongs Act.

Notwithstanding the removal of the pre-court procedures, the Civil Procedure Act introduced ‘*overarching obligations*’ that apply to any person who is party to a proceeding, a legal practitioner, a law firm or a person providing financial assistance or who has direct or indirect control over the proceeding (for example, an insurance company).²⁷¹ These obligations include a paramount duty to the court to further the administration of justice. Other requirements include obligations to act honestly, to use reasonable endeavours to resolve the dispute, minimise delay, narrow the issues in dispute and ensure costs are reasonable.²⁷²

When corresponding with other parties prior to the institution of proceedings, a party can refer to the overarching obligations to place pressure on those parties to disclose documents and narrow the issues in dispute, which can increase the chances of resolving the matter before proceedings are instituted.

If the matter cannot be resolved and proceedings are commenced, that is done so by way of writ and statement of claim filed in Magistrates Court, County Court or Supreme Court of Victoria. Defendants generally have 10 days to file a notice of appearance and a further 30 days to file a defence.

The Law of Negligence – Scope of Duty of Care²⁷³

The Wrongs Act²⁷⁴ provides that a person is not negligent unless the risk was foreseeable, not insignificant and, in the circumstances, a reasonable person in the person’s position would have taken those precautions.

When considering liability, the court must take into consideration the probability and seriousness of the harm, the burden of taking precautions and the social utility of the activity which creates the harm.

The fact a risk of harm could have been avoided by doing something in a different way or the subsequent taking of action that would have (had it happened earlier) avoided the risk of harm, do not themselves effect liability or amount to an admission of liability in relation to a risk.

The significant body of common law that has developed around the law of negligence is still applicable, so long as it is not inconsistent with the Wrongs Act.

Causation²⁷⁵

Once it is established that a defendant owes a duty of care and that duty has been breached, the plaintiff must prove that the breach of duty was causative of his or her injuries in order to succeed in a claim for damages.

In order to prove causation, there must be factual causation (the defendant’s negligence was a necessary condition of the harm) and the harm which the plaintiff has suffered must fall within the scope of the defendant’s legal responsibility. The second consideration (scope) requires the court to consider whether or not and why the responsibility for the harm rests with the defendant.

The plaintiff bears the onus of proof in relation to establishing causation.

A more detailed discussion of case law relating to causation is discussed in the Queensland and New South Wales sections of this guide.

²⁷¹ *Civil Procedure Act 2010* (Vic) s 10.

²⁷² For a complete list of all the Overarching Obligations see *Civil Procedure Act 2010* (Vic) ss 16–26.

²⁷³ *Wrongs Act 1958* (Vic) ss 48–49.

²⁷⁴ *Ibid* s 48.

²⁷⁵ *Ibid* ss 51–52.

Obvious risk²⁷⁶

An ‘*obvious risk*’ is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff, even if it has a low probability of occurring or is not prominent, conspicuous or physically observable. In considering what would have been obvious to a reasonable person in the same position as the plaintiff, the plaintiff’s age, personal characteristics and expertise are important factors in establishing sufficient maturity for a plaintiff to exercise his or her own judgment and fully appreciate any risk.

Given the similar wording of provisions in New South Wales and Queensland, cases determined pursuant to those provisions as well as the decisions of *Dederer v Roads and Traffic Authority and Anor*²⁷⁷; *Doubleday & Anor v Kelly*²⁷⁸ and *Leyden v Caboolture Shire Council*²⁷⁹ are relevant to considering the application of the provisions in Victoria.

Unlike other jurisdictions, Victoria has not enacted express provisions removing the duty to warn of an obvious risk. However, s 54 of the Wrongs Act provides that, where a defendant raises the common law defence of voluntary assumption of risk, a plaintiff is presumed to have been aware of the risk of harm if it was an obvious risk, unless the plaintiff proves on the balance of probabilities that he or she was not aware of the risk. Whilst an objective test is used to determine the obviousness of a risk under s 53, any attempt by a plaintiff to rebut the presumption of an awareness is based on a subjective test taking into account the plaintiff’s knowledge and appreciation at the relevant time and any implied agreement from the conduct of the plaintiff.²⁸⁰

An example of the application of the ‘*obvious risk*’ provisions of the Act is the case of *Chandley v Roberts*.²⁸¹ In that decision, the plaintiff, a subcontractor, fell four metres from scaffolding and suffered severe injuries. The plaintiff claimed that the defendant, the principal contractor, was negligent because he failed to secure the ladder holding the scaffolding as he usually would, according to their established system of work. The defendant pleaded that the ladder presented an obvious risk. The court found the risk was not obvious because, although it would have been easy for the plaintiff to check whether a chock had been nailed to the floor to stabilise the ladder, the two men had been working together for 25 years and, according to usual practice, it was the defendant who took that safety precaution and the plaintiff was not in the habit of checking that it was secure.

Dangerous recreational activities and exclusion clauses²⁸²

Victoria has not enacted any provisions dealing specifically with obvious risk in relation to dangerous recreational activities, although the general provisions relating to obvious risk will apply.²⁸³

Section 22 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) is relevant to dangerous recreational activities and exclusions clauses. That provision provides that the term of a contract for recreational services that excludes, restricts or modifies liability is allowed but the term must relate only to death or personal injury only (and not, for example, to property damage), it must be in the prescribed form and must be brought to the attention of the purchaser of the services prior to their supply.

The exclusion of liability does not apply to a death or injury caused by a failure to comply with a guarantee under the Australian Consumer Law, an act or omission done with reckless disregard of the consequences of the act or omission.

²⁷⁶ Ibid ss 53–56.

²⁷⁷ [2005] Aust Torts Reports 81–792; [2005] NSWSC 185.

²⁷⁸ [2005] NSWCA 151.

²⁷⁹ [2007] QCA 134.

²⁸⁰ *Paltidis v The State Council of the Young Men’s Christian Association of Victoria* (2006) Aust Torts Reports 81–850.

²⁸¹ [2005] VSCA 273.

²⁸² *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 22.

²⁸³ See *Wrongs Act 1958* (Vic) ss 53–56.

Liability of professionals²⁸⁴

Section 59 of the Wrongs Act governs the standard of care owed by professionals in Victoria. A professional is not negligent in providing a professional service if, at the time of providing the service, the professional acted in a manner which was widely accepted in Australia by a significant number of respected practitioners in the field (peer professional opinion) as competent professional practice. However, peer professional opinion cannot be relied upon if the court determines that the opinion is unreasonable.

The Victoria County Court recently considered the operation of the professional liability provisions in the case of *Hooper v Efe*,²⁸⁵ where Saccardo J considered that the provisions operate as a potential defence with the burden of proof lying with the defendant. In that case, the plaintiff suffered severe complications after undergoing breast reduction surgery. She alleged that her doctor breached the duty of care owed to her by choosing an inappropriate surgical method. The doctor was not able to rely on the 'defence' in the Wrongs Act as she was not able to establish that the chosen surgical method was consistent with peer professional opinion. A similar finding was made by the the Supreme Court of Victoria in *Brakoulis v Karunaharan*²⁸⁶ in 2012.

This finding is consistent with the position of the New South Wales court in relation to the similarly worded section in that jurisdiction.²⁸⁷

In *Grinham v Tabro Meats Pty Ltd*,²⁸⁸ Forrest J wrote of what was required of the application of the s 59 defence [181]:

'Peer professional opinion is directed to acceptance or otherwise of the manner in which the professional acted in the circumstances confronting the defendant. It is to this issue that the opinions of the other professionals in the field are directed. It may be that in some cases an opinion is based upon hypothetical analysis rather than one actually encountered in practice. Whilst this factor may go to the quality of the opinion expressed, what matters is the opinion of the other professionals as to the way in which the defendant carried out or failed to carry out the professional tasks impugned in the proceeding.'

As is the case in New South Wales, Victoria has not codified the duty of care with respect to liability arising in connection with giving warnings about a risk. Section 60 of the Wrongs Act specifically provides that s 59 does not apply to liability arising in connection with giving (or failure to give) a warning about a risk to a person if the giving of the warning is associated with the provision by a professional of a professional service.

Liability of public authorities²⁸⁹

There is a 'public policy' defence to public authorities in the Wrongs Act. The Wrongs Act sets out the principles to be taken into account when determining whether a public authority has a duty of care and if, by its conduct or inaction, that duty has been breached.

The Wrongs Act sets out the general principles to be used in determining liability, provides that resource allocations by authorities are not open to challenge and determines the standard by which authorities are to be judged as that of a 'reasonable public authority'.

²⁸⁴ *Wrongs Act 1958* (Vic) ss 57–60.

²⁸⁵ [2010] VCC 880 [95].

²⁸⁶ [2012] VSC 272.

²⁸⁷ For more information, see the discussion of *Dobler v Kenneth Halverson*; *Dobler v Kurt Halverson* (by his tutor) [2007] NSWCA 335 in 'Liability of Professionals' – New South Wales.

²⁸⁸ *Grinham v Tabro Meats Ltd*; *Victorian Work Cover Authority v Munway* [2012] VSC 491.

²⁸⁹ *Wrongs Act 1958* (Vic) ss 79–87.

As a case example, in *Whittlesea City Council v Merie*,²⁹⁰ the respondent sustained injuries when she fell over a piece of concrete which was detached from the footpath, and alleged this fall was the consequence of the Council's negligence. The trial judge concluded the Council was in breach of a duty of care in that the piece of concrete was improperly laid, the Council ought to have been aware of the danger and failed properly to repair it, thereby creating a situation of danger that created a foreseeable risk of injury to a user of the footpath. One of the issues on appeal was whether the Council had breached its duty of care to a pedestrian exercising reasonable care for their own safety. The Victorian Court of Appeal upheld the trial judge's decision and held that the Council was in breach of its duty of care as it was specifically aware of the hazard and had not taken reasonable remedial action. Such awareness was concluded on the basis of a negligent attempt by the Council to patch up the footpath in 1997, as well as the Council failing to rectify the paving or eliminate the hazard. The matter would likely have been different if the claimant was not aware of the hazard.

The Victorian Court of Appeal reconsidered the duty of care of public authorities in the more recent case of *Central Goldfields Shire v Haley*,²⁹¹ where it reversed the trial judge's decision and held that the content of the duty where the statutory powers gave the appellant a measure of control over the highway in question was to be informed by whether the respondent had taken reasonable care for her own safety. That is, the nature and purpose of the powers being exercised and the context in which they are performed determine the content of the duty of care. Further, the degree to which the risk of harm may be obvious to a pedestrian exercising reasonable care for their safety is in most cases material in determining the reasonableness of the response to the danger. In this case, the obviousness of the risk of harm of mesh netting lying on a temporary footpath precluded the finding of a breach of duty.

Unlike other jurisdictions, Victoria has not codified the highway immunity or non-feasance rule.

Liability of volunteers and Good Samaritans²⁹²

The Wrongs Act limits or excludes liability for volunteers, food donors and Good Samaritans for incidents which arise out of their charitable actions. Each group is discussed under the headings below.

Volunteers²⁹³

The Wrongs Act stipulates that a person who provides a service in relation to community work on a voluntary basis, is protected from liability so long as the person acts in good faith.

The term '*community work*' in this context is defined under s 36 to mean any work that is done, or to be done for:

- a religious, educational, charitable or benevolent purpose;
- the purpose of promoting or encouraging literature, science or the arts;
- the purpose of sport, recreation, tourism or amusement;
- the purpose of conserving or protecting the environment;
- the purpose of establishing, carrying on or improving a community, social or cultural centre;
- a political purpose; or
- the purpose of promoting the common interests of the community generally or of a particular section of the community.

²⁹⁰ [2005] VSCA 199.

²⁹¹ [2009] VSCA 101.

²⁹² *Wrongs Act 1958* (Vic) ss 34–42.

²⁹³ Pursuant to s 41, pt IX applies to incidents that occur on or after 15 March 2003.

However, the protections do not apply to a volunteer who knew, or ought reasonably to have known, that he or she was acting outside the scope of the community work organised by the community organisation, or regarding any claim to recover damages in respect of defamation.

A volunteer is also prohibited from providing a community organisation with an indemnity against, or making a contribution towards a community organisation in relation to civil liability the volunteer himself or herself would incur or which the community organisation incurs.

Food donors²⁹⁴

Where food is donated in good faith for a charitable or benevolent purpose with the intention that the consumer would not be required to pay for the food, and the food was safe to consume at the time it was donated, the donor is excluded from liability for bodily injury.²⁹⁵

Good Samaritans²⁹⁶

A ‘Good Samaritan’ is defined as a person who provides assistance, advice or care to another person in relation to an emergency or accident in circumstances where they expect no reward or payment and the person is assisted due to an apparent injury or risk of death or injury.²⁹⁷

A person is not liable in negligence where they have given assistance at the scene or by telephone or other means of communication to a person at the scene of the incident.

Liability for mental harm²⁹⁸

The Wrongs Act provides an avenue for the recovery of damages for economic loss resulting from mental harm in circumstances where the plaintiff has a recognised psychiatric illness.²⁹⁹ The provisions relating to mental harm limit liability for mental harm to incidents where the plaintiff was actually injured, the plaintiff was at the scene of the accident or the injured person was an immediate family member of the plaintiff.³⁰⁰

There will be no duty of care unless the defendant ought to have foreseen that a reasonable person in the plaintiff’s position might suffer a psychiatric illness.

It is important in cases involving mental harm of relatives, that there is a recognised psychiatric injury and the injury was caused either by physical injury or ‘shock’. In *Jaensch v Coffey*, Brennan J held:

‘A plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by “shock”. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant’s carelessness. The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child.’³⁰¹

²⁹⁴ Pursuant to *Wrongs Act 1958* (Vic) s 31G, the provisions apply to any incident on or after 23 October 2002.

²⁹⁵ *Wrongs Act 1958* (Vic) ss 31E–31H.

²⁹⁶ Pursuant to s 31C, the provisions apply to any incident on or after 23 October 2002.

²⁹⁷ *Wrongs Act 1958* (Vic) s 31B.

²⁹⁸ *Ibid* ss 67–78.

²⁹⁹ *Ibid* s 75.

³⁰⁰ *Ibid* ss 72–73.

³⁰¹ *Jaensch v Coffey* (1984) 155 CLR 549.

The case of *Kirkland-Veenstra v Stuart*³⁰² is also relevant. In that case, Mr Veenstra was discovered alone in a parked car by two police officers early one morning. The police officers noted what appeared to be tubing running from the car's exhaust to the cabin. When they approached the car, they found Mr Veenstra writing and considered that he appeared to be depressed but not mentally ill. Mr Veenstra told the officers that he had contemplated doing '*something stupid*'. The officers offered to contact his doctor or family, but Mr Veenstra declined, saying he would see his own doctor and that he wanted to return home to talk things over with his wife. Later that day Mr Veenstra was found dead having committed suicide by asphyxiation in his vehicle at home.

Mrs Veenstra sued the officers and the State of Victoria alleging she had developed a psychiatric illness as a result of her husband's suicide. At first instance, the trial judge found that neither defendant owed a duty of care to Mr Veenstra, and the claim therefore failed. However, in a split 2–1 decision, the Victorian Court of Appeal allowed the appeal. Warren CJ noted that Victoria's *Mental Health Act 1986* (Vic) specifically addressed the situation in which Mr Veenstra was found. It empowered the officers to either take him to a hospital or have a medical practitioner attend at the scene. They had not exercised either of those options. The officers were granted special leave to appeal to the High Court of Australia.

In three separate judgments, the High Court ruled that there was no legal duty of care to protect another from self harm. Gummow, Hayne, and Heydon JJ held that a duty of care failed to arise as the police officers did not have the requisite control over the source of risk. Their Honours emphasised the concept of personal autonomy and stated, '*the co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law.*' Citing with approval Dixon J in *Smith v Leurs*,³⁰³ the court held that

*'the general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third.'*³⁰⁴

Intoxication and illegal activity³⁰⁵

Unlike some other jurisdictions, the Wrongs Act does not automatically prevent recovery or mandate minimum reductions in damages in claims involving injury to plaintiffs who are intoxicated or are involved in illegal activity.

Instead, a number of considerations must be taken into account in determining whether a breach of duty of care has been established in matters involving intoxication and criminal conduct. These include where the plaintiff was intoxicated, the level of intoxication and whether the plaintiff was engaged in an illegal activity.

The Wrongs Act provides little guidance about how these provisions will operate in practice or whether and to what extent it will affect established common law principles. The second reading speech made at the time of the introduction of these sections records that they were introduced to address '*a perception in the community that the courts have been too quick to establish a duty of care owed by a defendant in some situations where the plaintiff should have exercised greater care for their own safety*'. This community concern was also said to exist with respect to claims where the plaintiff was engaged in illegal activity.

³⁰² (2008) 23 VR 36, [2008] VSCA 32.

³⁰³ (1945) 70 CLR 256 [262].

³⁰⁴ *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

³⁰⁵ *Wrongs Act 1958* (Vic) ss 14F–14H.

These provisions clearly grant the court significant scope to make findings against plaintiffs who are intoxicated or involved in illegal activities at the time they are injured. While the provisions stop short of imposing mandatory minimum reductions in the case of intoxication or precluding recovery in the case of plaintiffs involved in illegal activity, it is likely that a court will penalise plaintiffs making claims in those circumstances.

The onus is on a defendant to raise a plaintiff's intoxication or involvement in illegal activity to enjoy the benefit afforded by these provisions. To avoid a defendant's liability being excluded, the plaintiff must demonstrate that their state of intoxication was not a relevant factor.

Section 40 of the *Transport Accident Act 1986 (Vic)* deals with intoxication with respect to motor vehicle accidents.

Contributory negligence³⁰⁶

A plaintiff's damages must be reduced to account for the personal degree of liability attributed to their injuries. The same principles used to determine whether a person has been negligent apply in determining the degree of contributory negligence present in a plaintiff's action. The standard of care required of a plaintiff is that of a reasonable person in the position of the plaintiff, and is determined on the basis of what that person knew or ought to have known at the material time.

A claim will not be defeated purely because contributory negligence arises. However, a reduction of 100% of a damages award is possible in circumstances where it is just and equitable to do so, which would in effect defeat the claim. While each case turns on its own facts, a court is to rely on common law principles in assessing a plaintiff's conduct.

An example of a claim being defeated by contributory negligence is provided by *Bult & Anor v Lawrence (Vic) Pty Ltd (Civil Claims)*.³⁰⁷ In that case, the plaintiff was injured whilst standing on a hydraulic lift mounted on the rear of a truck used for removing furniture. The lift was operated by a five year old child. Deputy President Steele concluded that the risk was so obvious and the plaintiff took so little care for his own safety that the claim should be defeated.³⁰⁸

Any finding of contributory negligence on the part of the plaintiff will result in an apportionment of liability.³⁰⁹ The approach of the court is therefore twofold; firstly to determine that negligence on the part of the plaintiff occurred; and secondly to attribute a value or weight to such negligence, usually expressed as a percentage.

In determining whether negligence can be attributed to a plaintiff, the Court of Appeal distinguished conduct that was merely inadvertent or inattentive, from conduct that was negligent. In *Mayhew v Lewington's Transport Pty Ltd*,³¹⁰ the appellant was injured in the course of his employment while descending a ladder mounted on the back of his prime mover. The appellant had been on a truck between the rear of the cabin and the front of the first trailer for the purpose of hooking lines up between the truck and the trailers. While descending the steps, he fell. At first the plaintiff was found to have contributed to his own injuries and his claim was reduced by 30%. The plaintiff disagreed with the 30% reduction and appealed.

³⁰⁶ Ibid ss 25–28AA and 62–63.

³⁰⁷ [2008] VCAT 1286.

³⁰⁸ Ibid [47].

³⁰⁹ See 'Proportionate liability'. In considering apportionment, it is common place for courts to be guided by the leading authority of *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 [494].

³¹⁰ [2010] VSCA 202.

On appeal, the court said that the position and alignment of the ladder and size of the steps was patently deficient and said that the accident was inevitable. The Court of Appeal referred to the High Court's decision in *Podrebersek v Australian Iron and Steel Pty Ltd*,³¹¹ where Gibbs CJ, Mason, Wilson, Brennan and Deane JJ) said in the case of an employee:

'... the issue of contributory negligence had to be approached on the footing that the respondent [employer] had failed to discharge its obligations to take reasonable care, and that in considering whether there was contributory negligence on the part of the appellant [worker], the circumstances and conditions in which he had to do his work had to be taken into account. The question was whether in those circumstances and under those conditions the appellant's conduct amounted to mere inadvertence, inattention or misjudgement, or to negligence.'

The Court of Appeal held it was a 'classical' case of mere misjudgment not amounting to contributory negligence. It was said that the plaintiff's injury arose through inadvertence falling short of exposing himself to a risk where a reasonable and prudent man would not have done so. The Court of Appeal set aside the lower court's finding of contributory negligence.

Proportionate liability³¹²

The Victorian proportionate liability provisions apply to:

- claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care;³¹³ and
- claims for damage in contravention of s 18 of the Australian Consumer Law (Vic).³¹⁴

The provisions do not apply to claims arising out of an injury. The operative provision is in similar terms to the Queensland and New South Wales provisions, providing that the liability of a defendant, who is a concurrent wrongdoer in relation to that claim, is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the concurrent wrongdoer's responsibility for the loss or damage.³¹⁵

A 'concurrent wrongdoer' is defined as a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.³¹⁶ In considering the construction of s 24AH, in the decision of *Utility Services Corporation Ltd v SPI Electricity Pty Ltd*³¹⁷ Dixon AJA noted:

'To establish a tenable proportionate liability defence, a defendant must allege:

- a) that the claim against it is an apportionable claim;*
- b) that in relation to that claim the defendant is a concurrent wrongdoer;*
- c) that another defendant to the proceeding is a concurrent wrongdoer, or, that another person, not a party to a proceeding, who is dead or has been wound up, is a concurrent wrongdoer in relation to the plaintiff's claimed loss and damage; and (sic)*
- d) in relation to all of the apportionable claims in the proceedings for the same damage, the material facts by reference to which the court is to assess the extent of that defendant's responsibility for the plaintiff's damage, which can include regard to the comparative responsibility of other defendants for the plaintiff's damage; [and]*

³¹¹ 59 ALJR 493.

³¹² *Wrongs Act 1958* (Vic) ss 24AE–24AS.

³¹³ *Ibid* s 24AF(1)(a).

³¹⁴ *Ibid* s 24AF(1)(b).

³¹⁵ *Ibid* s 24AI(1)(a).

³¹⁶ *Ibid* s 24AH(1).

³¹⁷ [2012] VSCA 158.

e) if the plaintiff has not alleged a claim against a concurrent wrongdoer whose comparative responsibility is alleged by the defendant to be material, the material facts that establish the responsibility of that other concurrent wrongdoer for the loss and damage claimed by the plaintiff in the proceeding.³¹⁸

An important difference in the Victorian legislation is the provision stating that the court, when apportioning responsibility between defendants, must not have regard to the comparative responsibility of any person who is not a party to the proceedings, unless the person is dead or if a corporation, the corporation has been wound-up.³¹⁹ This differs from the provisions of the Queensland and New South Wales legislation, which specifically state that a court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.³²⁰

For more information on vicarious liability see the Queensland and New South Wales sections of this guide.

Vicarious liability

Victoria has not introduced any legislative reforms dealing with the concept of vicarious liability.

At common law an employer can be found vicariously liable for a wrongful, unauthorised or negligent act of an employee which is carried out in the course of his or her employment and is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court decision of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland*³²¹ in which three appeals were heard simultaneously.

An employer will not always be held responsible for the actions of his or her employees.³²² The act must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be held vicariously liable for the actions of his or her employee will depend upon the specific facts in each case.

In *Webster v Coles Myer Limited* and *Thompson v Coles Myer Limited*,³²³ the plaintiffs claimed that the defendant was vicariously liable for the actions of its employee where that employee falsely and maliciously identified the plaintiffs as credit card fraudsters to the police. The court cited with approval the finding of Gummow and Hayne JJ in *Lepore* that vicarious liability will be established where:

*‘ . . . the conduct of which complaint is made was done in the ostensible pursuit of the employer’s business or the apparent execution of the authority which the employer held out the employee as having’.*³²⁴

The court heard evidence on the system employed by the defendant for reporting potential criminal conduct and found that its employees’ vigilance and duty to report suspicious or dishonest conduct to the police was an integral part of that system. With this in mind, the defendant was found vicariously liable for the conduct of its employee. This decision was later affirmed by the New South Wales Court of Appeal.³²⁵

³¹⁸ *Ibid* [24].

³¹⁹ *Wrongs Act 1958* (Vic) s 24A(3).

³²⁰ *Civil Liability Act 2003* (Qld) s 31(3); *Civil Liability Act 2002* (NSW) s 35(3).

³²¹ (2003) 212 CLR 511.

³²² *Ibid*.

³²³ [2009] NSWDC 299.

³²⁴ *Ibid* [236].

³²⁵ *Coles Myer Ltd v Webster; Coles Myer Ltd v Thompson* [2009] NSWCA 299.

For more information on vicarious liability see the Queensland and New South Wales sections of this guide.

Non-delegable duties³²⁶

The term non-delegable duty is somewhat misleading. It does not mean that a party owing a duty cannot delegate the task to a third party, but rather that the liability cannot be delegated. Therefore, if the third party to whom the task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached.

The categories of non-delegable duties continue to evolve. The courts have struggled, however, to clearly define the parameters required to justify the existence of a non-delegable duty of care. The known criteria include the superior capacity of the defendant to bear the risk of the mishap, the special obligation which it is proper to attach to extra-hazardous activities, and the special dependence or vulnerability of the person to whom the duty is owed.³²⁷

Common known relationships in which non-delegable duties exist include:

- employer and employee;³²⁸
- host employer and labour hire employer;³²⁹
- school and student;³³⁰
- hospital and patient;³³¹ and
- owner of premises and licensee.³³²

Apology³³³

An apology is defined as ‘an expression of sorrow, regret or sympathy, but does not include a clear acknowledgement of fault’.

In a civil proceeding where the death or injury of a person is in issue, an apology does not constitute an admission of liability or an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance.

The Supreme Court of New South Wales has distinguished an expression of regret from an apology in the case of *David Michael Wilson v Nilepac Pty Ltd t/as Vision Personal Training (Crows Nest)*.³³⁴ In that case, a personal trainer was being sued by his client for an injury sustained during a training session. The plaintiff placed reliance on two statements made by the defendant after having suffered his injury that he ‘*shouldn’t have started [him] off so hard*’ and ‘*we should have done more core strengthening exercises first*’. The court construed these statements as being mere expressions of regret and not admissions of breach of the legal standard of care.³³⁵

For High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins*.³³⁶

³²⁶ *Wrongs Act 1958* (Vic) s 67.

³²⁷ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

³²⁸ *Kondis v State Transport Authority* (1984) 154 CLR 672.

³²⁹ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

³³⁰ *Commonwealth v Introvigne* (1982) 150 CLR 258.

³³¹ *Samios v Repatriation Commission* [1960] WAR 219.

³³² *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

³³³ *Wrongs Act 1958* (Vic) ss 141–14L.

³³⁴ [2009] NSWSC 1365.

³³⁵ It should be noted that this decision was overturned on appeal (*Wilson v Nilepac Pty Ltd (t/as Vision Personal Training) (Crows Nest)* [2011] NSWCA 63), however the trial judge’s findings in relation to these comments were left undisturbed.

³³⁶ (2003) 215 CLR 317.

Limitation periods³³⁷

Victoria has the following limitation provisions applying to negligence actions involving personal injury or death:

- the limitation period is three years starting from when the cause of the action is discoverable or 12 years starting from the occurrence that gives rise to the claim, whichever expires first (*Limitation of Actions Act 1958* (Vic) s 27D);
- the 12 year period is able to be extended at the discretion of the court but not beyond three years after the cause of action is discoverable (*Limitation of Actions Act 1958* (Vic) s 27); and
- the suspension of a limitation period during incapacity will not apply to a child who has a capable parent or guardian and discoverability of a cause of action by a minor will be assessed according to the knowledge of the parent or guardian (*Limitation of Actions Act 1958* (Vic) s 27D).

For claims where a Certificate of Assessment is served (which can be reviewed through the Medical Panel process), service of the certificate stops the limitation period running. The limitation period will resume three months after any one of the following occurs:

- the defendant accepts the Certificate of Assessment;
- the defendant is deemed to have accepted the Certificate of Assessment; or
- the defendant makes a referral to the Medical Panel (and the time to make the application has expired or the application has been finalised).

Generally speaking, the courts allow plaintiffs three years from the date their injury was recognisable. In the case of physical injury the exercise of determining that date is relatively simple, however where psychiatric injuries are involved the process is not so straight forward. In *Cavenett v Commonwealth*,³³⁸ it was held that the limitation period for psychiatric illnesses will not commence until the plaintiff knows that his or her mental condition is a mental illness which would be recognised by the medical profession.

Finally, recently on 1 September 2015, the Victorian Government legislated to remove the limitation period for victims of child abuse. This amendment came about after the various enquiries and Royal Commission into child abuse and the difficulties those victims faced in bringing claims within the three year time limit.

Damages Awards

Awards of damages in personal injuries claims in Victoria are regulated by the Wrongs Act.

Non-economic loss (pain and suffering / general damages)³³⁹

Damages for non-economic loss are awarded for pain and suffering, loss of amenities and loss of expectation of life. They are also known as general damages in some other jurisdictions.

Damages for non-economic loss is determined in accordance with the common law. In other words, courts rely on other similar cases to determine the level of damages to award for a particular injury.

However, non-economic loss claims under the Wrongs Act are restricted to 'significant injuries' and are capped.

³³⁷ *Limitation of Actions Act 1958* (Vic) s 23A and ss 27A–27N.

³³⁸ [2007] VSCA 88.

³³⁹ *Wrongs Act 1958* (Vic) ss 28G–28LF.

A ‘significant injury’ is one which is assessed in accordance with the AMA Guide to the Evaluation of Permanent Impairment (4th Edition) and results in:

- a 5% or more permanent impairment for spinal injuries;
- a 10% or more permanent impairment for psychiatric injuries; or
- more than a 5% permanent impairment for all other injuries.

The maximum amount recoverable for non-economic loss is capped by s 28G. The cap is currently \$577,050 (as at 1 December 2015) and is indexed annually in accordance with the consumer price index. In order to receive non-economic loss damages, a plaintiff must have their injuries assessed by an approved medical practitioner who will issue the plaintiff with a Certificate of Assessment. The certificate is served on the defendant who then has the option to either accept the certificate or to have the plaintiff’s injuries independently examined by a Medical Panel.

Economic loss³⁴⁰

A person is restricted to claiming damages for loss of earning capacity at a rate of three times the average net weekly wage in Victoria.

Up until amendments were introduced in December 2015, the cap applied so that a plaintiff who continued to earn more than 3 times average weekly earnings could not recover any amount for loss of income. For example, in *Tuohey v Freemasons Hospital*³⁴¹ the plaintiff was an engineer who earned \$10,548 per week prior to his injury, decreasing to \$6,442 after his injury (a loss of \$4,106 per week). The court found that because the plaintiff’s post injury earnings still exceeded the cap he was not entitled to any damages for loss of earnings.

The amendments introduced on 2 December 2015 now allow a court to award economic loss capped at three times average weekly earnings, notwithstanding that post injury earnings still exceed that amount. If these amendments applied at the time of Mr Tuohey’s case, he would have been entitled to loss of earnings of \$2,836.50 per week, which was the average weekly wage at the time of the trial of that matter.

These amendments will lead to higher awards for economic loss, but only in cases involving very high income earners.

Gratuitous care³⁴²

Damages for gratuitous care are the equivalent of the damages formerly known as *Griffiths v Kerkemeyer*³⁴³ damages under the common law. Damages for gratuitous care are not to be awarded to a plaintiff unless there is a reasonable need for the services, the need has arisen solely because of the injury and the care would not have been provided but for the injury. Further the care needs to have been (or will be) provided for six or more hours per week and for at least 6 months.

If damages for gratuitous services meets or exceeds 40 hours per week, they are capped at the average weekly wage for all employees in Victoria. Where the amount of care is less than 40 hours per week, damages per hour are awarded at 1/40 of the average weekly wage in Victoria. For example, if the average weekly wage in Victoria is \$1,000 then:

- where the care required meets or exceeds 40 hours per week, damages of \$1,000 per week are payable; and
- where six hours care per week is required, damages of \$150 are payable (equivalent to 6/40 of average weekly earnings).

³⁴⁰ *Wrongs Act 1958* (Vic) ss 28G–28LF.

³⁴¹ [2012] VSCA 80.

³⁴² *Wrongs Act 1958* (Vic) pt 5B.

³⁴³ *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

Loss of capacity to provide care for others

The Wrongs Act also provides for damages for loss of capacity to provide care for others. This is the equivalent of the damages formerly known as *Sullivan v Gordon* damages.³⁴⁴ The minimum requirements for this entitlement mirror that for gratuitous attendant care: the care must be required for six hours per week for six months. Identical caps also apply.

Interest rate and discount rate³⁴⁵

There are no restrictions on a claim for interest on damages awards for claims under the Wrongs Act. An interest rate of 4% should be used on all past losses, including on general damages.³⁴⁶ Where the loss has occurred evenly over the entire period of past loss, it is appropriate to half the rate of interest.

A discount rate of 5% applies to future losses.

Exemplary, punitive or aggravated damages

Exemplary damages have been abolished in respect of motor vehicle accidents. There are otherwise no restrictions on damages for exemplary, punitive or aggravated damages.³⁴⁷

Legal costs

There are no caps that apply to legal costs in Victoria under the Wrongs Act. The Civil Procedure Act provides an obligation³⁴⁸ that a person or practitioner must use reasonable endeavours to ensure that legal and other costs incurred are reasonable and proportionate to the complexity of the proceeding and the amount in dispute.

³⁴⁴ *Sullivan v Gordon* (1999) 47 NSWLR 319.

³⁴⁵ *Wrongs Act 1958* (Vic) s 28I.

³⁴⁶ See *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 and *Walker & Anor v Hamm & Ors (No 2)* [2009] VSC 290.

³⁴⁷ *Transport Accident Act 1986* (Vic) s 93.

³⁴⁸ *Civil Procedure Act 2010* (Vic) s 24.

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Australian Capital Territory



AUSTRALIAN CAPITAL TERRITORY

The *Civil Law (Wrongs) Act 2002* (ACT) (**Civil Law (Wrongs) Act**) imposes restrictions on the rights of persons suffering personal injury, both in relation to the scope of liability and the damages that may be awarded.

The provisions relating to negligence contained in ch 4 of the *Civil Law (Wrongs) Act* apply to all claims for damages for harm resulting from negligence whether brought in tort, contract or statute, with the exception of workers' compensation claims.

Chapter 5 of the *Civil Law (Wrongs) Act* which sets out the pre-proceedings steps, applies to all civil claims for damages, including compulsory third party motor vehicle accident claims, with the exception of some claims relating to children. Claims where there has been a claim for workers compensation are excluded from the operation of the *Civil Law (Wrongs) Act*, unless the claim is a compulsory third party claim or one of the respondents to the claim is not an employer or workers' compensation insurer, even if one of the other respondents to the claim is an employer or workers' compensation insurer.

Chapter 7 of the *Civil Law (Wrongs) Act*, which pertains to damages, applies to all civil claims for damages for harm, including compulsory third party claims, except claims under workers' compensation legislation.

Procedure³⁴⁹

The *Civil Law (Wrongs) Act* sets out various steps that are required to be completed prior to formal court proceedings being instituted. This is designed to encourage the economical and early resolution of personal injury damages claims without the need for litigation. However, these provisions do not apply to claims for compensation under the *Workers Compensation Act 1951* (ACT). Section 51 of the *Civil Law (Wrongs) Act* requires an injured person to serve a Notice of Claim and both parties and then co-operate in the full and early disclosure of documents. A party is not obliged to disclose a document or information protected by client legal privilege unless the document or information is an investigative report, medical report or report relevant to the claimant's rehabilitation.³⁵⁰

The *Civil Law (Wrongs) Act* also provides the respondent with the opportunity to request further information from the claimant about the claimant's medical condition and relevant treatment and rehabilitation, medical history, and information related to any claims for past or future economic loss and gratuitous care. The respondent can compel the claimant to verify this information by way of statutory declaration.

Non-compliance with the disclosure provisions provides a basis for a party to make an application to the court for an order remedying the non-compliance prior to proceedings being issued. Costs orders are available against the non-complying party as part of this procedure. If a party fails to disclose a document, they will require the court's leave to later use the document in the proceeding.³⁵¹

The pre-court procedures require the parties to participate in a compulsory conference and exchange mandatory final offers at the close of the conference. These offers are considered on the question of costs should the matter be adjudicated by a court.

³⁴⁹ *Civil Law (Wrongs) Act 2002* (ACT) ss 49–80.

³⁵⁰ *Ibid* s 72.

³⁵¹ *Ibid* s 75.

The courts have allowed court proceedings to be commenced despite a plaintiff's non-compliance with the requirement to serve a Notice of Claim and failure to complete the pre-court procedures. The courts in those cases have shown greater concern with ensuring the plaintiff's claim is not statute barred than the strict adherence to the legislative process.³⁵²

Negligence – Scope of Duty of Care³⁵³

The Act provides that the standard of care required of a 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.

A person will not be negligent for failing to take precautions against a risk of harm unless the risk was foreseeable, not insignificant and a reasonable person in that person's position would have taken precautions against the risk.

When considering whether a reasonable person would have taken precautions against the risk of harm, the court must consider the probability of harm, seriousness of harm, the burden of taking precautions to avoid the risk and concepts of social utility.³⁵⁴

The subsequent taking of action that would have avoided the risk of harm does not itself give rise to or affect liability in relation to the risk and is not to be taken as an admission of liability in relation to the risk.

Causation³⁵⁵

Once it is accepted that a defendant owes a duty of care and that duty of care has been breached, the plaintiff must prove that the breach of duty was causative of his or her injuries in order to recover damages.

To establish causation, there must be a finding of factual causation (the negligence was a necessary condition of the harm) and a finding that the harm comes within the scope of the negligent person's liability.

When determining the scope of liability, the court must consider whether or not and why the responsibility for the harm rests with the negligent party. Where more than one defendant has exposed a plaintiff to a similar risk of harm, the court can continue to apply established common law principles under which responsibility may be assigned to the defendants for causing harm, but must consider the position of each defendant separately and provide reasons for bringing each defendant within the scope of liability. A more detailed discussion of these principles appears under the discussion of 'Causation' in the New South Wales jurisdiction.

Obvious risk

The Australian Capital Territory has not specifically implemented any legislative reform to limit liability in respect to obvious risk or the duty to warn of an obvious risk.

³⁵² See *Brown v Haureliuk* (2011) 5 ACTLR 195 applying earlier decisions of *McGregor v Franklin* (2006) 201 FLR 303 and *Al-rawahi v Niazi* (2006) 203 FLR 94.

³⁵³ *Civil Law (Wrongs) Act 2002* (ACT) ss 42–44.

³⁵⁴ See *Hendricks v El-Dik (no 4)* (2016) 76 MVR 310 where it was held that the risk of a collision between the defendant's vehicle reversing out of a driveway and a cyclist crossing the driveway was foreseeable and not insignificant and a risk against which the defendant ought to have taken precautions; compare *Roberts v Westpac Banking Corp* [2015] ACTSC 397 where it was held that an armed robbery in a bank posed a foreseeable but unpredictable risk to a customer in the bank and the bank took reasonable steps to address the risk in circumstances where it could not control the offender's actions.

³⁵⁵ *Civil Law (Wrongs) Act 2002* (ACT) ss 45–46.

Dangerous recreational activities

The Australian Capital Territory has not enacted any provisions dealing specifically with obvious risks in relation to dangerous recreational activities. Similarly, the Australian Capital Territory has not implemented any general legislative reform to limit a service provider's liability when offering recreational activities.

Schedule 3 of the Civil Law (Wrongs) Act does, however, provide that an equine activity sponsor, an equine professional or anyone else is not liable for personal injury to a participant in an equine activity arising from the inherent risks of an equine activity. 'Equine' is defined to include a horse, donkey, mule or hinny and an 'equine activity' is defined to include such activities as shows, competition, riding, teaching, boarding or shoeing. 'Inherent risks' are defined as being dangers or conditions that are an integral part of equine activities, including the behaviour and movement of the equine itself, surface conditions, collisions with other equine or objects and other participants' actions. The schedule requires that, in order for the liability exclusion to be able to be relied upon, an equine professional display a warning notice at their premises regarding the relevant provisions of the Civil Law (Wrongs) Act and include the same notice in any contracts entered into in relation to the equine activity. The schedule also sets out the circumstances in which the section will not prevent or limit the defendant's liability such as where any injury is caused by faulty equipment or a latent condition of the land/facility of which the defendant ought to have known or where the defendant acted recklessly.³⁵⁶

Liability of professionals

The Australian Capital Territory has not consolidated the law relating to standard of care to be applied to professionals or medical practitioners. Whilst the Civil Law (Wrongs) Act provides a general standard of care to be applied in cases of negligence, it does not provide any direction on whether a special standard should be applied either to professionals generally, or to a doctor's duty to warn a patient of risks of medical treatment. Accordingly, it appears that the common law duty outlined in *Rogers v Whitaker*³⁵⁷ continues to govern the standard of care of professionals in the Australian Capital Territory.

In 2006, the Supreme Court of the Australian Capital Territory in the decision of *Haylock v Morris and Hugh*³⁵⁸ applied *Rogers v Whitaker*³⁵⁹ and confirmed that whilst it is ultimately a matter for the court, expert evidence of prevailing professional standards must be taken into account and will often prove decisive when determining the appropriate standard of care of a medical practitioner.³⁶⁰

Liability of public authorities³⁶¹

The liability of public authorities is governed by ch 8 of the Civil Law (Wrongs) Act. The legislation sets out the general principles to be used in determining whether a public authority owes or has breached a duty of care. The Civil Law (Wrongs) Act requires that consideration be given to the financial capacity and resources of the authority and specifies that the general allocation of resources by the authority is not open to challenge. A breach of statutory duty will only be established if the authority's act or omission was so unreasonable that no authority having the functions of the defendant authority could properly consider the act or omission to be a reasonable exercise of its functions.

The Civil Law (Wrongs) Act also includes a highway immunity or non-feasance rule in relation to road authorities meaning that an authority will not be liable for failing to maintain, repair or renew a road, or to consider doing so, unless at the time of that failure the authority knew, or ought to have known, of the particular risk of harm which materialised.

³⁵⁶ *Civil Law (Wrongs) Act 2002* (ACT) sch 3 ss 3.1–3.4.

³⁵⁷ (1992) 175 CLR 479.

³⁵⁸ [2006] ACTSC 86.

³⁵⁹ (1992) 175 CLR 479.

³⁶⁰ *Ibid* [57].

³⁶¹ *Civil Law (Wrongs) Act 2002* (ACT) ss 108–114.

In *Grierson v Australian Capital Territory*,³⁶² the defendant public authority responsible for maintenance of a footpath was precluded from relying on this immunity as it had knowledge of the hazard which contributed to the plaintiff's injuries due to the fact it had carried out a temporary repair at the site three years earlier. In light of evidence of the defendant's usual practice of following up a temporary repair with a permanent one within 12 months, it was concluded that the defendant either had knowledge of the hazard or, in the circumstances, ought reasonably to have known of it.

These provisions do not apply to a claim to which pt 10 of the *Road Transport (General) Act 1999* (ACT) applies or a claim under the *Workers' Compensation Act 1951* (ACT).

Liability of volunteers and Good Samaritans

The Civil Law (Wrongs) Act contains provisions that limit or exclude liability for volunteers, food donors and Good Samaritans for incidents arising out of their charitable actions.

Volunteers³⁶³

A 'volunteer' is defined in the Civil Law (Wrongs) Act as a person who performs 'community work' on a voluntary basis. 'Community work' focuses on the overall activity engaged in by the 'community organisation' (not the conduct of the volunteer) and includes work done for charitable, benevolent, educational or sporting purposes. The definition excludes work involving threats of violence or severe risk to the health or safety of the public or work that is declared by regulation not to be community work.

A 'community organisation' is defined as a corporation that directs or co-ordinates the carrying out of community work by volunteers. In the Australian Capital Territory a 'corporation' includes a body corporate and an incorporated association.

A volunteer will not incur personal civil liability for an act or omission made honestly and without recklessness while carrying out community work for a community organisation on a voluntary basis. Instead the liability transfers to the community organisation.

A volunteer will have no protection from liability if:

- the liability falls within the ambit of a scheme of compulsory third-party motor vehicle insurance;
- the liability is for defamation;
- the volunteer's ability to carry out the work is significantly impaired by a recreational drug;
- the volunteer was acting, and knew or ought to have known that he or she was acting, outside the scope of the activities authorised by the community organisation; or
- the volunteer was acting contrary to instructions given by the community organisation.

In cases where liability is transferred to the community organisation, the Civil Law (Wrongs) Act allows the Minister to assume the liability of that organisation if that community organisation carries out a recognised government responsibility.

Food donors³⁶⁴

A food donor is exempted from civil liability where the consumption of donated food results in personal injury provided the food was fit for human consumption when it left the possession or control of the donor and the donor made the person to whom the food was given aware of any handling requirements and limits on time for the consumption of the donated food.

³⁶² [2011] ACTSC 113.

³⁶³ *Civil Law (Wrongs) Act 2002* (ACT) ss 6–11.

³⁶⁴ *Ibid* ss 11A–11B.

Good Samaritans³⁶⁵

A Good Samaritan will not incur personal civil liability for an act or omission if they acted honestly and without recklessness. However, the protection from civil liability does not apply if the liability falls within the ambit of a scheme of compulsory third party motor vehicle insurance or if the Good Samaritan was impaired by a recreational drug at the time.

The definition of a ‘*Good Samaritan*’ includes not only persons acting without expectation of pay when coming to the aid of persons injured or in need of medical assistance but also medically qualified persons who, without expectation of payment, provide advice by telephone or another form of telecommunication concerning the treatment of injured persons.

Liability for mental harm³⁶⁶

Part 3.2 of the Civil Law (Wrongs) Act outlines the instances where damages for mental harm can be awarded.

The Civil Law (Wrongs) Act provides that a person does not owe a duty to another person to take care not to cause 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 suffer a recognised psychiatric illness if reasonable care was not taken.

The Civil Law (Wrongs) Act distinguishes between pure mental harm (impairment of a person’s mental condition) and consequential mental harm (mental harm consequential to a bodily injury to the person). The Act prohibits recovery of damages for pure mental harm and damages for economic loss in a claim for consequential mental harm unless the harm results in a recognised psychiatric illness.

The Civil Law (Wrongs) Act also includes those considerations that the court must take into account when determining an award for damages for pure mental harm. These considerations include whether or not the mental harm was suffered as a result of a sudden shock, whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger, the nature of the relationship between the plaintiff and the injured/deceased person and the existence of a pre-existing relationship between the plaintiff and defendant.

A person’s liability in relation to an injury caused by a wrongful act or omission by which someone is killed, injured or put in danger can extend to include liability for mental or nervous shock suffered by the injured/deceased’s parent, domestic partner or other family members if they are within sight or hearing of the incident.

Intoxication and illegal activity³⁶⁷

The Civil Law (Wrongs) Act provides restrictions on recovery in claims involving injury to plaintiffs who are intoxicated or who are involved in illegal activity.

There is a presumption of contributory negligence where the injured person was intoxicated at the time of the incident and the defendant claims contributory negligence. A person is intoxicated if they are under the influence of alcohol or a drug to the extent that the person’s capacity to exercise appropriate care and skill is impaired.

The presumption can be rebutted if the injured person can establish that the intoxication did not contribute to the incident or the intoxication was not self-induced. If the presumption is not rebutted, the court must reduce the damages by an amount the court considers just and equitable having regard to the injured person’s share in the responsibility for the injury.

³⁶⁵ Ibid s 5.

³⁶⁶ Ibid ss 32–36.

³⁶⁷ Ibid ss 92–97.

Contributory negligence is also presumed if the injured person relied upon the care and skill of an intoxicated person where they had knowledge of the intoxication. This presumption can be rebutted if the injured person can establish that the intoxication did not contribute to the accident or the injured person could not reasonably be expected to have avoided the risk.³⁶⁸ If the presumption is not rebutted, the court must reduce the damages by an amount the court considers just and equitable having regard to the injured person's share in the responsibility for the injury.

The Act also excludes liability for damages if the court is satisfied, on the balance of probabilities, that the injured person was engaged in conduct which amounts to an indictable offence which materially contributed to the risk of injury unless the application of the provision operates harshly or unjustly or the case is exceptional.

These provisions apply to all claims for damages for personal injuries including claims to which the *Road Transport (Third Party Insurance) Act 2008* (ACT) applies. Claims under the *Workers Compensation Act 1951* (ACT) are, however, excluded.

Contributory negligence³⁶⁹

A plaintiff's damages can be reduced by a court to the extent considered just and equitable in light of the plaintiff's own negligence.³⁷⁰ The Act does include express provision for a claim to be completely defeated on account of a plaintiff's contributory negligence if the court considers it is just and equitable to do so.³⁷¹ However, there will not be any reduction for contributory negligence if a person has died partly because of their failure to take reasonable care and partly because of someone else's wrong.³⁷² Similarly, no reduction will be made for contributory negligence if the claimant suffered personal injuries as a result of a breach of statutory duty.³⁷³

Proportionate liability³⁷⁴

Chapter 7A of the *Civil Law (Wrongs) Act* pertains to proportionate liability.

The provisions apply to claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, or claims for economic loss or damage to property in an action for damages under the *Australian Consumer Law* (ACT).³⁷⁵

³⁶⁸ See *Stafford v Carrigy-Ryan* (2014) 67 MVR 562 where the Court of Appeal upheld a reduction of 35% due to contributory negligence on the grounds that at the time the respondent commenced driving with the appellant, both parties were intoxicated and the appellant knew or ought to have known that the respondent was intoxicated. Compare with *Johnson v Rustenburg* [2014] ACTSC 386 where no reduction was made for contributory negligence on the grounds that the plaintiff did not have knowledge of the defendant's intoxication. The court held that the plaintiff's knowledge that the defendant had spent time on licensed premises was insufficient to establish the plaintiff ought to have known the defendant was intoxicated.

³⁶⁹ *Civil Law (Wrongs) Act 2002* (ACT) ss 101–105.

³⁷⁰ See *Hendricks v El-Dik (No 4)* (2016) 76 MVR 310 where the plaintiff who sustained injuries after his electric bike collided with a vehicle reversing out of a driveway was found 25% contributory negligent for failing to take reasonable care for his own safety. See also *Baker v Mackenzie* [2015] ACTSC 272 where an almost 14 year old high school student who sustained injuries after walking into the side of a vehicle driven by the defendant was found to be 80% contributory negligent as the degree of departure from a standard of reasonable care was found to have been significantly greater on the plaintiff's part.

³⁷¹ *Civil Law (Wrongs) Act 2002* (ACT) s 47.

³⁷² *Ibid* s 27.

³⁷³ *Ibid* s 102(2).

³⁷⁴ *Ibid* ss 107A–107K.

³⁷⁵ *Ibid* s 107B(1)–(2); *Fair Trading (Australian Consumer Law) Amendment Act 2010* (ACT).

Personal injury claims and consumer claims are specifically excluded from the operation of the Australian Capital Territory's proportionate liability legislation.³⁷⁶ This is similar to the Queensland legislation, whereas in New South Wales and Victoria the proportionate liability provisions do apply to consumer claims.³⁷⁷ The legislation does not apply to claims made under the *Discrimination Act 1991* (ACT), the *Road (General) Act 1999* (ACT) and the *Workers' Compensation Act 1951* (ACT).³⁷⁸

As with the proportionate liability provisions which apply in Queensland, New South Wales and Victoria, the Australian Capital Territory's operative provision allows for the liability of a defendant who is a concurrent wrongdoer for the claim to be limited to an amount reflecting the proportion of loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility. The definition of a concurrent wrongdoer is one of two or more people whose acts or omissions caused, independently of each other or jointly, the loss or damage the subject of the claim. This definition is in similar terms to that in the New South Wales legislation. Contrary to the Victorian proportionate liability legislation, the Australian Capital Territory's legislation allows the court to consider the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings when deciding on an apportionment of responsibility. This approach accords with the legislative provisions of Queensland and New South Wales.

Concurrent wrongdoers are required to assist the plaintiff in identifying other concurrent wrongdoers.³⁷⁹ A failure to do so can have adverse cost consequences for the offending concurrent wrongdoer.

As with the legislative provisions in other Australian jurisdictions, the Australian Capital Territory's proportionate liability provisions do not apply to those concurrent wrongdoers who intentionally or fraudulently cause loss or damage. Importantly, if the proceedings involve both an apportionable claim and a claim that does not fall within the definition of an apportionable claim, then liability for the non-apportionable part of the claim is to be determined in accordance with ordinary applicable legal rules. Therefore the principle of joint and several liability may still apply to non-apportionable parts of a plaintiff's claim. The Australian Capital Territory provisions prohibit recovery between concurrent wrongdoers by way of claims for contribution or requirements to indemnify. Further, provisions do not prevent the operation of vicarious liability, and the principles of joint and several liability in regards to partnership and agency relationships.

Vicarious liability

The Australian Capital Territory has not introduced any legislative reforms dealing with the issue of vicarious liability. An employer can be found vicariously liable for a wrongful, unauthorised or negligent act of an employee which is carried out in the course of his or her employment and is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court case of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland*,³⁸⁰ in which three appeals were heard simultaneously.

An employer will not always be held responsible for the actions of his or her employees.³⁸¹ The act must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be held vicariously liable for the actions of his or her employee will depend upon the specific facts in each case.

³⁷⁶ Ibid s 107B(3).

³⁷⁷ See *Civil Liability Act 2003* (Qld) s 28(3), compare *Civil Liability Act 2002* (NSW) s 34(1), *Wrongs Act 1958* (Vic) s 24AG(1).

³⁷⁸ *Civil Law (Wrongs) Act 2002* (ACT) s 107B(4).

³⁷⁹ Ibid s107G(1).

³⁸⁰ (2003) 212 CLR 511.

³⁸¹ Ibid.

Further case discussion on vicarious liability is contained in the equivalent New South Wales section.

Non-delegable duties

The term non-delegable duty is somewhat misleading. It does not mean that a party owing a duty cannot delegate the task to a third party, but rather that liability arising from the carrying out of that task cannot be delegated. As such, it is a duty to ensure that reasonable care is taken. Therefore, if the third party to whom the task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached.

The categories of non-delegable duties continue to evolve. The courts have struggled however to clearly define the parameters required to justify the existence of a non-delegable duty of care. The known criteria include the superior capacity of the defendant to bear the risk of the mishap, the special obligation which it is proper to attach to extra-hazardous activities, and the special dependence or vulnerability of the person to whom the duty is owed.³⁸²

Common known relationships in which non-delegable duties exist include:

- employer and employee;³⁸³
- host employer and contractor;³⁸⁴
- school and student;³⁸⁵
- hospital and patient;³⁸⁶ and
- owner of premises and licensee.³⁸⁷

Apology³⁸⁸

An apology is defined as ‘an oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion, in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident’.

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 (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 is not relevant to deciding fault or liability in relation to the incident. Such an apology is also not admissible in any civil proceeding as evidence of the fault or liability of the person in relation to the incident.³⁸⁹

These principles were reiterated in *Hutchinson v Fitzpatrick*,³⁹⁰ where Harper M, after considering these provisions, made clear that an apology is not admissible in a civil proceeding as evidence of fault or liability.

This provision applies to civil liability of any kind except claims for damages for defamation, or claims for damages or compensation under the *Discrimination Act 1991* (ACT), the *Victims of Crime (Financial Assistance) Act 1983* (ACT) or the *Workers Compensation Act 1951* (ACT).

³⁸² *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

³⁸³ *Kondis v State Transport Authority* (1984) 154 CLR 672.

³⁸⁴ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

³⁸⁵ *Commonwealth v Introvigne* (1982) 150 CLR 258.

³⁸⁶ *Samios v Repatriation Commission* [1960] WAR 219.

³⁸⁷ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

³⁸⁸ *Civil Law (Wrongs) Act 2002* (ACT) ss 12–14.

³⁸⁹ For High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317.

³⁹⁰ [2009] ACTSC 43.

Limitation periods³⁹¹

The Australian Capital Territory has the following limitation periods applying to negligence actions involving personal injury:

- Three years from the date of the occurrence of the injury or if the injury includes a disease or disorder, three years from the date of discovery of the injury. However, this limitation does not apply to causes of action that arose before 9 September 2003. Previously, the limitation period was six years;³⁹² or
- In respect of children under the age of 15, six years from the date of the accident or discovery of the injury. Parents or guardians of children under 15 years of age must give notice of a claim to the prospective defendant, but in cases involving medical malpractice and health services, there are more restrictive provisions relating to the children.³⁹³

An application can be made to the court to extend the limitation period for personal injuries.³⁹⁴ However, in exercising its powers to extend the limitation period, a court must have regard to the following:

- the length of and reasons for the delay on the part of the plaintiff;
- the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- the conduct of the defendant after the cause of action accrued to the plaintiff including the extent (if any) to which the defendant took steps to make available to the plaintiff means of ascertaining facts that were or might be relevant to the cause of action of the plaintiff against the defendant;
- the duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action;
- the extent to which the plaintiff acted promptly and reasonably once he or she knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages; and
- the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of the advice the plaintiff may have received.

An action for defamation is not maintainable if brought after the end of a limitation period of one year running from the date of the publication of the matter complained of.³⁹⁵ However, a court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of the publication, extend the limitation period to a period of up to three years running from the date of the publication.

Damages Awards

The Australian Capital Territory has not enacted any significant legislative reforms to regulate the assessment of damages in personal injury claims.

³⁹¹ *Limitation Act 1985* (ACT).

³⁹² *Ibid* s 16B.

³⁹³ *Ibid* s 16.

³⁹⁴ *Ibid* s 36(2).

³⁹⁵ *Limitation of Actions Act* (ACT) s 21B(1).

General damages³⁹⁶

There is no cap on general damages in the Australian Capital Territory. The Civil Law (Wrongs) Act provides the court with basis to refer to previous decisions when determining the appropriate award in a proceeding.³⁹⁷

Economic loss³⁹⁸

Damages for past and future economic loss are capped at three times the average weekly earnings. 'Average weekly earnings' is defined as the average weekly earnings seasonally adjusted for the ACT issued by the Australian Bureau of Statistics.

This limitation also applies to motor vehicle accident damages claims arising under ch 4 of the *Road Transport (Third Party Insurance) Act 2008* (ACT).

Gratuitous care / Gratuitous services³⁹⁹

The Civil Law (Wrongs) Act provides basis for a claimant to recover damages for impairment of loss of the injured person's capacity to perform domestic services that the injured person might reasonably have been expected to perform for his or her household but for the injury.

In calculating damages that are to be awarded, it is immaterial whether:

- the services would be performed for the benefit of the other members of the household or solely for the claimant's benefit;
- the claimant was not paid to perform the services;
- the claimant has not been and will not be, obliged to pay someone else to perform the service; or
- the services have been, or are likely to be, performed (gratuitously or otherwise) by other people (whether members of the household or not).

The Civil Law (Wrongs) Act does not provide any formula or cap on the calculation of damages for gratuitous services.

Interest

The civil court procedures are now contained in the *Court Procedures Rules 2006* (ACT) which provides for the interest up until judgment. In proceedings for damages the court may:

- a) order that interest be included in the amount for which judgment is given—
 - at the rate it considers appropriate; and
 - on all or any part of the money; and
 - for all or any part of the period beginning on the day the cause of action arose and ending on the day before the day judgment is entered; or
- b) order that a lump sum be included in the amount for which judgment is given instead of interest under paragraph (a).⁴⁰⁰

Discount rate

There are no provisions prescribing a discount rate in the Australian Capital Territory.

³⁹⁶ *Civil Law (Wrongs) Act 2002* (ACT) s 99.

³⁹⁷ *Ibid* s 99.

³⁹⁸ *Ibid* s 98.

³⁹⁹ *Ibid* s 100.

⁴⁰⁰ *Court Proceedings Rules 2006* (ACT) pt 2.16 Reg 1619.

Exemplary, punitive or aggravated damages⁴⁰¹

The Australian Capital Territory has not specifically legislated to exclude recovery of punitive damages other than to prohibit recovery of exemplary or punitive damages in defamation claims.

Legal costs⁴⁰²

The amount of costs that are recoverable in a claim for personal injuries will depend on the amount of damages awarded.

If damages are awarded for \$50,000 or less for a personal injury claim, then:

- a lawyer is not entitled to be paid;
- a court must not decide that a lawyer is entitled to be paid; and
- a court must not order anyone to pay to a lawyer;
- an amount for legal services in relation to the claim that is more than the maximum costs allowable, that is \$10,000 or 20% whichever is greater.

Also pursuant to s 183, if the court is satisfied that:

- the legal services provided to a party to a claim for personal injury damages were provided in response to action on the claim by or on behalf of the other party to the claim; and
- in the circumstance, the action was not necessary or reasonable for the advancement of the party's case or was intended, or was reasonably likely to unnecessarily delay or complicate determination of the claim;

then the court may order that the costs for the legal services are to be excluded from the operation of s 181 (maximum costs for claims of \$50,000 or less).

The court has the discretion to allow additional costs taking into consideration, the following:

- the complexity of the claim; and
- the behaviour of one or more of the parties to the claim.

The court may order that the lawyer who provided the services is entitled to stated additional costs and may state who is to pay the additional costs.

In the case of *Eggins v Knaus*,⁴⁰³ the Supreme Court considered the above sections of the legislation in an application under the Civil Law (Wrongs) Act for costs above \$10,000 where the damages amounted to \$40,000 plus costs 'as agreed or assessed'. The court considered the 'behaviour' of each party and in particular of the defendant unnecessarily commissioning an expert report which required the plaintiff to incur additional costs that would otherwise not have been necessary. It was held that these additional costs incurred by the plaintiff should be excluded from the application of s 181 of the Civil Law (Wrongs) Act.

⁴⁰¹ *Civil Law (Wrongs) Act 2002 (ACT)* s 139H.

⁴⁰² *Civil Law (Wrongs) Act 2002 (ACT)* ss 180–190.

⁴⁰³ [2007] ACTSC 17.

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Tasmania



TASMANIA

Section 4 of the *Civil Liability Act 2002 (Tas)* (**CLA (Tas)**) sets out the commencement of the provisions. In accordance with that section, the provisions relating to negligence and damages (with the exception of s 12 of the CLA (Tas) which deals with subsequent action taken after an event that would have avoided a risk) do not apply to causes of action that accrue before 4 July 2003. Section 12 applies whether the action accrued before or after 4 July 2003.

Section 3B provides that the CLA (Tas) does not apply to claims for injury or death resulting from smoking and or with respect to workers' compensation claims. The CLA (Tas) also excludes claims for an injury under pt III of the *Motor Accidents (Liabilities and Compensation) Act 1973 (Tas)*, except for the provisions relating to intoxication, criminal activity, structured settlements, negligence, damages and mental harm. Section 3B also expressly excludes intentional torts from the application of the CLA (Tas). However, there have been no cases directly testing the application of this exclusion.

Pre-court Procedures

There are no pre-court procedures for claims and no proposed legislative reforms in Tasmania. The stance is similar to that in New South Wales and Western Australia, but unlike Queensland, Victoria, South Australia, Australian Capital Territory and Northern Territory.

The Law of Negligence – Scope of Duty of Care

Standard of care⁴⁰⁴

Section 11(1) of the CLA (Tas) provides that a person does not breach a duty to take 'reasonable care' unless:

- 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
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the position of the person would have taken precautions to avoid the risk.⁴⁰⁵

Additionally, s 11(2) of the CLA (Tas) outlines the relevant factors a court must take into consideration when determining whether a reasonable person would have taken precautions against the risk which caused the harm. These factors are:

- the probability that the harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm; and
- the potential net benefit of the activity that exposes others to the risk of harm.⁴⁰⁶

⁴⁰⁴ *Civil Liability Act 2002 (Tas)* ss 11–12.

⁴⁰⁵ *Ibid* s 11(1).

⁴⁰⁶ *Ibid* s 11(2).

The CLA (Tas) is not a codification of the law of negligence. It is still open to the court to have regard to the common law principles as outlined in the decision of *Wyong Shire Council v Shirt*.⁴⁰⁷ A detailed discussion of *Wyong* appears under the discussion of this topic in the New South Wales jurisdiction. In the case of *Williams v Latrobe Council*,⁴⁰⁸ Underwood CJ applied the following passage from *Wyong*:

*'In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.'*⁴⁰⁹

In this case the court concluded that the council and two local football clubs had all breached their respective duties of care to a player who was injured in a game of AFL on an irrigation pit cover that was not flush with the ground.

Causation⁴¹⁰

To establish causation, the CLA (Tas) requires that there must be factual causation (the negligence was a necessary condition of the harm) and a finding that the harm comes within the scope of the negligent person's liability. When determining issues of causation, the court must consider whether or not, and why, the responsibility for the harm rests with the defendant. The provisions provide guidance in relation to when a court should permit the admissibility of evidence, which would normally be inadmissible.

Further, the plaintiff always bears the onus of proof in establishing causation. Tasmania has also introduced provisions to assist the court in determining what a plaintiff would have done had the defendant's negligent conduct not occurred. These provisions restrict the admissibility of statement evidence by the plaintiff regarding what that person would have done if no breach of duty had occurred. Only those statements that are adverse to the plaintiff are admissible. A more detailed discussion of these principles appears under the discussion of this topic in the New South Wales jurisdiction.

Obvious risks⁴¹¹

In Tasmania, liability to warn a person of an obvious risk is limited by s 17 of the CLA (Tas) which provides for 'no proactive duty' to warn of obvious risks, subject to certain exceptions including circumstances where the injured party expressly requests advice regarding risks. Section 15 defines an obvious risk as a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person who suffers harm.

⁴⁰⁷ (1980) 146 CLR 40.

⁴⁰⁸ [2007] TASSC 2.

⁴⁰⁹ Ibid [63].

⁴¹⁰ *Civil Liability Act 2002* (Tas) ss 13–14.

⁴¹¹ Ibid s 15 to 17.

Obvious risks can include:

- risks that are patent or a matter of common knowledge;
- risks of something occurring even though it has a low probability of occurring; and
- a risk (or a condition or circumstance that gives rise to the risk) that is not prominent, conspicuous or physically observable.

While a risk is not an obvious risk merely because a warning about the risk has been given, there is no liability for a failure to warn of obvious risks. For a defence of voluntary assumption of risk, pursuant to s 16, a person is deemed to be aware of obvious risks unless they can prove otherwise. Unlike some other jurisdictions (such as Queensland), there are no provisions in the Tasmanian legislation which limit liability for the materialisation of an ‘*inherent*’ risk.

Dangerous recreational activities⁴¹²

Tasmania has enacted provisions that deal specifically with obvious risks in relation to dangerous recreational activities. In accordance with s 20, no liability for harm will result from an obvious risk of a dangerous recreational activity, whether or not the plaintiff was aware of the risk. A ‘*recreational activity*’ is defined in s 19 as including any sport (whether or not the sport is an organised activity) or any pursuit or activity engaged in for enjoyment, relaxation or leisure. The term ‘*dangerous*’ is defined as meaning that the activity involves a significant degree of risk of physical harm to a person.

A case involving a sport-related injury that perhaps should have attracted the operation of the dangerous recreational activities provisions was *Williams v Latrobe Council*.⁴¹³ The claimant was participating in an Australian Rules football game in 2004 and was injured while attempting to mark an airborne ball after landing awkwardly on an irrigation pit cover plate that was not flush with the surrounding ground, with a recess of approximately 100 millimetres. The court determined issues of liability in *Williams* by reference to the common law principles in *Wyong Shire Council v Shirt*,⁴¹⁴ a decision which pre-dates the tort law reform in Tasmania. There is no explanation given in *Williams* as to why the court did not consider the provisions of the CLA (Tas) when considering liability and why no argument was raised at trial based on the dangerous recreational activities provisions contained in the CLA (Tas). On appeal, the decision was varied but little discussion of the CLA (Tas) was entered into.

In *Dodge v Snell*,⁴¹⁵ a jockey was injured in a horse race by the negligence of another jockey. The defendant sought to rely on the statutory immunity relating to dangerous recreational activities in s 20 of the CLA (Tas). After considering the definition of recreational activity in s 19, the Supreme Court concluded that, while the class of activities that fall within the section should be construed broadly, the section should be limited to activities that are recreational in nature. Her Honour held that the immunity did not extend to activities carried out in the course of employment or occupation.⁴¹⁶ As the jockeys were engaged in paid employment at the time of the injury, the defendant was not entitled to rely on s 20.

Liability of professionals⁴¹⁷

Pursuant to s 22, a professional is deemed not to have breached a duty of care if the person acted in a manner that, at the time the professional service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice. An exception will be made if the court considers that the peer professional opinion is irrational. There have not

⁴¹² *Civil Liability Act 2002* (Tas) ss 18–20.

⁴¹³ [2007] TASSC 2.

⁴¹⁴ (1980) 146 CLR 40.

⁴¹⁵ [2011] TASSC 19.

⁴¹⁶ *Ibid* [277]–[278].

⁴¹⁷ *Civil Liability Act 2002* (Tas) ss 21–22.

been any cases considering s 22 in Tasmania. However given the similarity between s 22 and equivalent provisions in New South Wales, the New South Wales Court of Appeal decision of *Dobler v Kenneth Halverson; Dobler v Kurt Halverson (by his tutor)*⁴¹⁸ may be instructive on how s 22 will be applied in Tasmania. The decision in that case confirmed that the New South Wales provision with respect to the liability of professionals operates as a defence and does not define the content of the duty of care owed by the professional.⁴¹⁹

Section 21 of the CLA (Tas) is similar to the legislative provisions in Queensland⁴²⁰ and provides that a medical practitioner does not breach their duty owed to a patient for failing to warn the patient of a risk of medical treatment, unless the medical practitioner fails to provide information about the risk (whether or not the patient requests the information) that:

- would be required by a reasonable person to make a reasonably informed decision; and
- the medical practitioner ought reasonably to know the patient would want to be given before deciding to undergo the treatment.

The CLA (Tas) exempts from this provision cases where a medical practitioner must act promptly in order to avoid serious risk to the life or health of the patient and:

- the patient is not able to hear or respond to a warning of the risk; and
- there is not sufficient time to contact a person responsible for making a decision for the patient.

There have been no recent cases considering s 21 in Tasmania (or its equivalent in Queensland). Similar to legislation enacted in other States, the *Professional Standards Act 2005* (Tas) (**PSA (Tas)**) provides schemes for the limitation of professional liability in similar terms to existing law in other States. The provisions of the PSA (Tas) allow, inter alia, for limited liability to members of occupational associations in certain circumstances and impose occupational standards and risk management strategies in associations. The PSA (Tas) does not limit liability in respect of claims arising out of acts involving death or personal injury, fraud, or intentional tort. As with the legislation that has been enacted in most Australian jurisdictions, this legislation has not had any noticeable impact on the courts' interpretation of the civil liability of professionals to date.

Liability of public authorities⁴²¹

Sections 36 to 43 of the CLA (Tas) set out the general principles to be applied in determining liability, providing that resource allocations by authorities are not open to challenge, and that the standard by which authorities are to be judged is that of a 'reasonable public authority'.

In the case of *Williams v Latrobe Council*,⁴²² the plaintiff suffered an injury during a football match when his left foot landed on a sprinkler head cover that was not set flush with the surface of the surrounding ground. The court held that the council had breached its duty of care to the plaintiff by failing to remove the risk posed by the sprinkler head cover. The court also held that the two football clubs were also liable as they had undertaken an inspection of the ground prior to the match. The court decided the council ought to bear 85% of the responsibility with the two football clubs sharing the remaining 15%. On appeal by all of the defendants, the full bench of the Supreme Court rejected the submission by the respondent's counsel that an inspection where club representatives get down on their hands and knees was not burdensome or unreasonable.

⁴¹⁸ [2007] NSWSC 335.

⁴¹⁹ *Ibid* [60]–[61].

⁴²⁰ Compare s 21 *Civil Liability Act 2003* (Qld).

⁴²¹ *Civil Liability Act 2002* (Tas) ss 36–43.

⁴²² [2007] TASSC 2.

In addition to the above provisions, Tasmania re-introduced the highway immunity or the non-feasance rule in relation to road authorities by virtue of s 42 of the CLA (Tas). This immunity provides that liability will not attach to road authorities in respect of the condition of roads due to the actions or inactions of the road authorities unless they have knowledge of the defect prior to the incident in which the plaintiff suffered loss and/or damage.

Liability of volunteers and Good Samaritans

Part 10 of the CLA (Tas) deals with the conduct of volunteers while doing community work for a community organisation. Pursuant to ss 4(3) and 46, the part applies to any incident on or after 4 July 2003.

Volunteers⁴²³

In Tasmania, a ‘volunteer’ is a person who does ‘community work’ on a voluntary basis. ‘Community work’ focuses on the overall activity engaged in by the ‘community organisation’ (not the conduct of the volunteer) and the four common types of activity across all State and Territory legislation is work done for charitable, benevolent, educational or sporting purposes.

The CLA (Tas) provides a definition of ‘community organisation’ but also includes a list of legal entities that can be considered ‘organisations’ and includes the words ‘body corporate’ or ‘corporation’. In Tasmania, as well as Western Australia, Queensland and Victoria, a community organisation includes local government entities.

In Tasmania, volunteers have been afforded protection from liability for damage that arises in the course of community work that has been performed in good faith.⁴²⁴ However, the protection does not apply to a volunteer who knew or ought to have reasonably known that at the relevant time he or she was acting outside the scope of the community work, contrary to instructions given by the community organisation or whose ability was significantly impaired by alcohol or drugs taken voluntarily (other than for therapeutic purposes).⁴²⁵

A community organisation incurs the liability of its volunteers in the performance of community work organised by the community organisation.⁴²⁶

Under the CLA (Tas), a volunteer is prohibited from providing a community organisation with an indemnity against (or to make contribution toward) a community organisation in relation to civil liability the volunteer himself or herself would incur or which the community organisation incurs.⁴²⁷

Tasmania is joined by the legislation of Victoria and Western Australia which have also incorporated similar prohibitions.

Food donors⁴²⁸

Under the CLA (Tas), a food donor who donates food does not incur any liability for any death or personal injury that results from the consumption of the food if the food donor donated the food in good faith, for a charitable purpose and the food was safe to consume at the time it left the possession or control of the food donor.

⁴²³ *Civil Liability Act 2002* (Tas) ss 44–49.

⁴²⁴ *Ibid* s 47.

⁴²⁵ *Ibid* s 47(3).

⁴²⁶ *Ibid* s 48.

⁴²⁷ *Ibid* s 49.

⁴²⁸ *Ibid* ss 35D to 35F.

Good Samaritans⁴²⁹

Part 8A of the CLA (Tas) provides that 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 in the provision of assistance or advice. However, this protection is not afforded if the Good Samaritan was significantly impaired due to the influence and voluntary consumption of alcohol or drugs, whether or not it was consumed for medication.

Liability for mental harm⁴³⁰

The CLA (Tas) allows for the recovery of damages for economic loss due to mental harm only in circumstances where the plaintiff has a recognised psychiatric illness. Liability for mental harm is limited to incidents where the plaintiff was actually injured or at the scene of the accident, or in circumstances where the injured person was an immediate family member of the plaintiff.

The provisions also provide guidelines for the assessment of mental harm and state there will be no duty of care unless the defendant ought to have foreseen that a reasonable person in the plaintiff's position might suffer a recognised psychiatric illness. These provisions are similar to those in New South Wales.⁴³¹

Intoxication and illegal activity⁴³²

In situations where the plaintiff is intoxicated at the time the harm occurs, a rebuttable presumption arises by virtue of s 5 of the CLA (Tas) to the effect that the plaintiff's award will be discounted by 25% for contributory negligence unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage. The court has discretion to impose a greater or lesser percentage of contributory negligence where it is felt this is appropriate.

Additionally, the CLA (Tas) specifies that a person is not to be awarded damages at all if the court finds that, on the balance of probabilities, the plaintiff was engaged in conduct that constitutes a serious offence and the conduct contributed materially to the risk of the death, injury or damage that was suffered. This provision takes the penalty against at-fault plaintiffs a step further than other jurisdictions, requiring courts to apply a 100% discount for contributory negligence in appropriate cases. South Australia has a similar provision.

The onus is on a defendant to raise a plaintiff's intoxication or involvement in illegal activity to enjoy the liability exemption afforded by these provisions. In turn, the exclusions to the presumption raised in light of these provisions must be raised by the plaintiff to avoid liability being excluded.

The High Court considered the issue of intoxication at the time of harm in the case of *CAL no 14 Pty Ltd v Motor Accidents Insurance Board*,⁴³³ which has recently been followed in *Chaplin v Lane*.⁴³⁴ In *CAL no 14* the plaintiff's husband, Mr Scott, was fatally injured in a motorcycle accident after leaving the Tandara Motor Inn on the evening of 24 January 2002. The deceased had been drinking and recorded a blood alcohol reading of 0.253g per 100mL of blood.

⁴²⁹ Ibid ss 35A–35C.

⁴³⁰ Ibid ss 29–35.

⁴³¹ For further discussion see the New South Wales section on 'Liability for Mental Harm'.

⁴³² Ibid ss 4A–5.

⁴³³ (2009) 239 CLR 390.

⁴³⁴ (2014) 67 MVR 54.

Proceedings were initiated against the hotel and the licensee of the hotel by the deceased's wife and, subsequently, by the Motor Accidents Insurance Board of Tasmania. The plaintiffs alleged that the defendants breached their duties to Mr Scott namely, their duty to take reasonable care to avoid Mr Scott riding his motorcycle whilst under the influence of alcohol. The deceased had previously arranged with the hotel operator to store his motorcycle at the hotel and that his wife would be contacted to collect him when he was ready to leave. As such, the plaintiffs alleged that the defendants' breach arose from a failure to:

- ring Mrs Scott and have her attend the premises;
- deflect, delay, stall or provide resistance to Mr Scott leaving the hotel;
- refuse to hand over the motorcycle; and
- drive Mr Scott home.

The High Court concluded that no duty of care was owed to the deceased in the circumstances of the case. The court reasoned that '*outside exceptional cases, persons in the position of the Proprietor and the Licensee owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume*'.⁴³⁵

Contributory negligence⁴³⁶

The CLA (Tas) specifies that the principles applicable to determine whether a person has been negligent also apply in determining whether the person who suffered harm has engaged in contributory negligence. The standard of care required of the person who suffered harm is that required of a reasonable person in that person's position. The issue is determined on the basis of what that person knew or ought to have known at the time.

The CLA (Tas) also allows the court to reduce a plaintiff's damages award by 100% in situations where it is just and equitable to do so.

It is important to note that contributory negligence is a concept that will turn on the facts of each case. However, there are guiding principles that courts rely upon in assessing a plaintiff's conduct.

Any finding of contributory negligence on the part of the plaintiff will result in an apportionment of liability.⁴³⁷ The approach of the court is therefore twofold; first to determine that negligence on the part of the plaintiff occurred, and secondly to attribute a value or weight to such negligence, usually expressed as a percentage.

In *Cook v Jennings*⁴³⁸ the court considered the need for there to be something more than a mere error of judgment, but a degree of negligence on the part of the plaintiff. The case concerned a motor vehicle accident where the plaintiff collided with a stationary vehicle on the side of the Bass Highway (after breaking down). The stationary vehicle was not displaying any hazard or warning lights to oncoming traffic.

At first instance the court considered the driver of the stationary vehicle to have solely caused the accident. On appeal, the court held that the plaintiff was contributory negligent by 20% for failing to keep a proper lookout, which had he done so would have assisted not so much in observing the stationary vehicle, but in being alert to driving patterns ahead of him that ought to have indicated that an obscured and unknown obstruction was affecting traffic flow in his lane.

⁴³⁵ Ibid [64].

⁴³⁶ *Civil Liability Act 2002 (Tas)* s 23.

⁴³⁷ See '*Proportionate Liability*'. In considering apportionment, it is commonplace for courts to be guided by the case of *Podrebeserk v Australian Iron and Steel Ltd* (1985) 59 ALJR 492.

⁴³⁸ (2007) 48 MVR 185.

Proportionate liability⁴³⁹

The proportionate liability provisions in the CLA (Tas) apply to causes of action arising after 1 June 2005.⁴⁴⁰

Tasmania has introduced proportionate liability provisions similar to those enacted in Queensland, New South Wales and Victoria.

The provisions apply only to ‘*apportionable claims*’, defined as a claim for economic loss or damage to property in an action for damages (whether in tort, contract or otherwise) arising from a failure to take reasonable care, or a claim for loss or damage arising from a breach of s 236 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas) for misleading and deceptive conduct.⁴⁴¹

An ‘*apportionable claim*’ does not include a claim arising out of personal injury⁴⁴² or where a wrongdoer intentionally or fraudulently caused the economic loss or damage.⁴⁴³

A more detailed discussion of proportionate liability principles appears in the New South Wales section of the Guide.

Unlike the Victorian proportionate liability legislation, the CLA (Tas) allows the court to consider the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings when deciding on an apportionment of responsibility.⁴⁴⁴ This is consistent with the legislative provisions of Queensland and New South Wales.

The CLA (Tas) prohibits recovery between concurrent wrongdoers by way of claims for contribution or requirements to indemnify.⁴⁴⁵ However, of considerable importance is a qualification of the limits imposed on recovery between concurrent wrongdoers, in that agreements between defendants to contribute to the damages recoverable from, or to indemnify other concurrent wrongdoers, remain unaffected.⁴⁴⁶ This qualification is not contained in the legislative provisions of Queensland, New South Wales,⁴⁴⁷ Victoria or the Australian Capital Territory but is similar to Western Australia and Northern Territory. The qualification present in the CLA (Tas) therefore raises doubts as to the ability of concurrent wrongdoers in other jurisdictions to rely on agreements providing for contribution or indemnity in respect of apportionable claims where there is no such explicit qualification.

Concurrent wrongdoers are required by the CLA (Tas) to assist the plaintiff to identify other concurrent wrongdoers.⁴⁴⁸ Failure to identify other known concurrent wrongdoers can have adverse cost consequences for the offending concurrent wrongdoer.⁴⁴⁹

⁴³⁹ *Civil Liability Act 2002* (Tas) ss 43A–43G.

⁴⁴⁰ Proclamation under the *Civil Liability Amendment (Proportionate Liability) Act 2005* (Tas).

⁴⁴¹ *Civil Liability Act 2002* (Tas) s 43A(1).

⁴⁴² *Ibid* s 43A(3).

⁴⁴³ *Ibid* s 43A(5).

⁴⁴⁴ *Ibid* s 43B(3). Compare the situation in Victoria, *Wrongs Act 1958* (Vic) s 24A(3).

⁴⁴⁵ *Ibid* s 43C(1).

⁴⁴⁶ *Ibid* s 43C(2).

⁴⁴⁷ There is no such section in the New South Wales legislation regarding agreements by defendants to contribute or indemnify remaining unaffected, however the same result can be achieved if the proportionate liability sections have been contracted out of; see *Civil Liability Act 2002* (NSW) s 3A(2).

⁴⁴⁸ *Civil Liability Act 2002* (Tas) s 43D.

⁴⁴⁹ *Ibid* s 43D(2).

Finally, the CLA (Tas) does not exclude the principles of vicarious liability, and the principles of joint and several liability in regard to partnership relationships.⁴⁵⁰ Of significance is the provision in the CLA (Tas) permitting all or any of the provisions dealing with proportionate liability to be excluded, modified or restricted by way of agreement (except for claims for personal injury or death).⁴⁵¹ This principle was considered in *Aquagenics Pty Ltd v Break O'Day Council*.⁴⁵² In this case, the Full Court of the Supreme Court of Tasmania determined that the proportionate liability provisions of the CLA (Tas) did not apply because the parties had contracted out of the proportionate liability legislation pursuant to s 3A.

In light of the similarity between the Tasmanian proportionate liability legislation and that of New South Wales, the decision of *Ucak v Avante Developments Pty Ltd*⁴⁵³ may be of further assistance in determining the judicial application of the proportionate liability provisions.

In that case, the New South Wales Supreme Court provided guidance for defendants intending to plead and rely on proportionate liability provisions. It was held that a defendant pleading proportionate liability must rely on the material facts pertaining to the causes of action by which it is alleged the claim is an 'apportionable claim'. Put simply, if a defendant intends to allege that other concurrent wrongdoers either caused or contributed to the plaintiff's loss, the defendant's pleading must allege the relevant facts that cause the defendant to make such assertions.

Vicarious liability

Tasmania has not introduced any legislative reforms dealing with the issue of vicarious liability. An employer can be vicariously liable for a wrongful, unauthorised or negligent act of an employee which is carried out in the course of his or her employment and is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court case of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland*,⁴⁵⁴ in which three appeals were held simultaneously.

An employer will not always be responsible for the actions of an employee.⁴⁵⁵ The act must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be vicariously liable for the actions of an employee will depend upon the specific facts in each case. The New South Wales case of *Webster v Coles Myer Limited; Thompson v Coles Myer Limited*⁴⁵⁶ is indicative of this approach.

Further case discussion on vicarious liability is contained in the equivalent New South Wales and Victorian sections of the Guide.

Non-delegable duties⁴⁵⁷

The term non-delegable duty is somewhat misleading. It does not mean that a party owing a duty cannot delegate the task to a third party, but rather that the liability for the breach of the duty cannot be delegated. As such, it is a duty to ensure that reasonable care is taken. Therefore, if the third party to whom the task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached.

⁴⁵⁰ *Ibid* s 43G.

⁴⁵¹ *Ibid* s 3A(3). New South Wales has a similar provision; see *Civil Liability Act 2002* (NSW) s 3A(2).

⁴⁵² (2010) 20 Tas R 239.

⁴⁵³ [2007] NSWSC 367.

⁴⁵⁴ (2003) 212 CLR 511.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ [2009] NSWDC 4. This case was confirmed on appeal; see *Coles Myer Ltd v Webster; Coles Myer Ltd v Thompson* [2009] NSWCA 299. Further discussion of this case can be found in *Vicarious Liability* (New South Wales).

⁴⁵⁷ *Civil Liability Act 2002* (Tas) s 3C.

The categories of non-delegable duty continue to evolve. The courts have struggled however to clearly define the parameters required to justify the existence of a non-delegable duty of care. The known criteria include the superior capacity of the defendant to bear the risk of the mishap; the special obligation which it is proper to attach to extra hazardous activities; and the special dependence or vulnerability of the person to whom the duty is owed.⁴⁵⁸

Common known relationships in which non-delegable duties exist include:

- employer and employee;⁴⁵⁹
- host employer and contractor;⁴⁶⁰
- school and student;⁴⁶¹
- hospital and patient;⁴⁶² and
- owner of premises and licensee.⁴⁶³

Exclusion clauses

Tasmania has not introduced any legislative reforms dealing with exclusion clauses. The common law principles will therefore remain applicable. Accordingly, in order to have any prospect of an exclusion clause being upheld, the person or entity including such a clause should ensure it is clearly incorporated into the contract, specifically drafted to cover the factual scenario encountered by the person or entity seeking to enforce it, and to the extent possible, brought to the attention of the other party to the contract.⁴⁶⁴

Where the claim is one captured by the Australian Consumer Law, there are certain guarantees which cannot be excluded or limited by contract. See div 2–3 of sch 2 of the *Competition and Consumer Act 2010* (Cth).

Apologies⁴⁶⁵

Section 7(3) of the CLA (Tas) defines an apology as:

‘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’.

Section 7(2) of the CLA (Tas) provides that 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. Nor does it constitute an express or implied admission of fault or liability. It is not relevant to the determination of fault or liability.

The provision applies to civil liability of any kind except civil liability excluded by s 3B which includes matters related to sexual offences or intentional acts, injuries related to the use of tobacco and claims made under pt III of the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas).

⁴⁵⁸ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

⁴⁵⁹ *Kondis v State Transport Authority* (1984) 154 CLR 672.

⁴⁶⁰ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

⁴⁶¹ *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁴⁶² *Samios v Repatriation Commission* [1960] WAR 219.

⁴⁶³ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

⁴⁶⁴ The New South Wales case of *Lormine Ltd and Anor v Xuereb* [2006] NSWCA 200 may be of some relevance when considering how an exclusion clause may be interpreted in Tasmania.

⁴⁶⁵ *Civil Liability Act 2002* (Tas) s 7.

For High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins*.⁴⁶⁶

Limitation periods

The *Limitation Act 1974* (Tas) provides that claims for damages for personal injury must be commenced within either three years from the date of discoverability (see definition below), or 12 years commencing from the date of the act or omission which it is alleged resulted in the personal injury or death that is the subject of the action.

The ‘*date of discoverability*’, in the case of an action for damages for personal injuries, means the date when the plaintiff knew or ought to have known that personal injury or death:

- had occurred;
- was attributable to the conduct of the defendant; and
- in the case of personal injury, was sufficiently significant to warrant bringing proceedings.

Section 5A(5) allows a judge to extend the limitation period in certain circumstances. The judge must have regard to the justice of the case and consider such things as:

- whether the passage of time has prejudiced a fair trial of the action;
- the nature and extent of the plaintiff’s loss; and
- the nature of the defendant’s conduct.

An example where the limitation period was not extended was in the case of *Kaye v Hoffman*.⁴⁶⁷

In that case an application was made under s 5A(5) of the *Limitations Act 1974* (Tas) to extend the limitation period to a claim for damages for personal injuries. The respondent was an endocrinologist who misdiagnosed the applicant with a tumour. Another endocrinologist advised the applicant that she had no tumour. The applicant asserted that the misdiagnosis resulted in side effects of the prescribed drugs, pregnancy termination, fear, stress, anxiety and depression.

The applicant’s solicitor issued and served a writ despite the expiration of the limitation period. The issue on the application was whether the applicant had constructive knowledge of the respondent’s wrongdoing. The application was dismissed as the court held that the applicant had constructive knowledge of the respondent’s wrongdoing because a reasonable person in the applicant’s position is expected to make detailed enquiries at an early stage of diagnosis and ought to have known of a misdiagnosis.⁴⁶⁸

As to applicants with a disability at the time an action arises, s 26 provides that an action may be brought at any time before the expiration of three years from the date when a person ceased to be under a disability or died whichever event first occurred notwithstanding that the period of limitation has expired.

Damages Awards

Awards of damages in personal injuries claims in Tasmania are regulated by the CLA (Tas).

⁴⁶⁶ (2003) 215 CLR 317.

⁴⁶⁷ (2009) 19 Tas R 357.

⁴⁶⁸ The decision was appealed but the application was dismissed; see *Kaye v Hoffman (No 2)* [2008] TASSC 2 and *Kaye v Hoffman* (2009) 19 Tas R 357.

General damages⁴⁶⁹

Tasmania does not impose a cap on general damages but applies an indexed threshold. Section 27 of the CLA (Tas) provides that if general damages are assessed at or below \$5,000 (Amount A) no award will be made. Section 27(4)(a)(ii) provides that Amount A is to be recalculated on 1 July each financial year by adjusting the sum to reflect the consumer price index figure for Hobart for the March quarter immediately preceding the financial year in which the threshold amount is to apply. Where the assessment lies between \$5,000 and Amount B (an amount five times Amount A or \$25,000) the amount awarded is calculated using the following formula:

$$\text{Award} = 1.25 \times (\text{amount assessed} - \text{Amount A}).$$

Where the assessment exceeds Amount B, the amount awarded is equal to the amount assessed. The courts are also able to refer to common law precedent for the purpose of establishing the appropriate award in the proceeding.

Economic loss⁴⁷⁰

Section 26(1) provides that where a person is entitled to damages for loss of earning capacity or where a claim for damages is made pursuant to the *Fatal Accidents Act 1934* (Tas), a court must not award those damages on the basis that the person was, or may have been capable of, earning income at greater than three times the adult average weekly earnings as published by the Australian Bureau of Statistics before damages are awarded.

In relation to an award for economic loss as a consequence of mental harm, under s 35 of the CLA (Tas), a court cannot make an award of damages resulting from breach of duty unless the harm consists of a recognised psychiatric illness.

Gratuitous care⁴⁷¹

Similarly worded to the New South Wales provision, s 28B(2) precludes awards of damages for gratuitous care unless:

- the services are necessary;
- the need for services arise solely out of the injury for which the damages are to be awarded; and
- the services have been provided, or are likely to be provided, to that person for more than six hours per week and for more than six consecutive months.

In calculating damages for gratuitous services, the hourly rate must not exceed 1/40 of adult average weekly earnings, and the weekly rate must not exceed adult average weekly earnings.⁴⁷² Under s 28C, an award for gratuitous services cannot be made for claims in relation to pt III of the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas).

Section 28BA provides that damages can only be awarded to an injured person for the loss of capacity to provide gratuitous services if such services have been provided for a period of more than six hours per week for six consecutive months after the person was injured.

⁴⁶⁹ *Civil Liability Act 2002* (Tas) ss 27–28.

⁴⁷⁰ *Ibid* ss 26 and 35.

⁴⁷¹ *Ibid* ss 28B and 28BA.

⁴⁷² *Ibid* s 28B(3).

Interest

Tasmania has not implemented any legislative reforms with respect to interest on civil liability damages awards.

Discount rate⁴⁷³

If an award of damages is to include any component assessed as a lump sum for future loss, the present value of that future loss is to be qualified by adopting a discount rate of 5%, or if another discount rate is prescribed, that other discount rate.

Exemplary, punitive or aggravated damages

Whilst there have been indications that Tasmania may implement legislative changes to remove a plaintiff's right to claim exemplary, punitive or aggravated damages, no legislation has yet been enacted in this regard.

Structured settlements⁴⁷⁴

Section 8 of the CLA (Tas) defines a structured settlement in the same terms as the Queensland, New South Wales and Victorian legislation. The relevant legislation provides for the courts to advise of a proposed award ahead of making the award to allow parties to negotiate (should they wish) a structured settlement. Pursuant to s 8(1), one or more parties to a claim for personal injury or death may apply to the court for an order approving of, or in the terms of, the structured settlements.

Legal costs

There are no caps that apply to legal costs in Tasmania under the CLA (Tas).

⁴⁷³ Ibid s 28A.

⁴⁷⁴ Ibid s 8.

***Carter
Newell***
LAWYERS

South Australia



SOUTH AUSTRALIA

Unlike other states, South Australia had its own statutory civil liability regime long before the Ipp report. Following the Ipp report, a number of statutory reforms were enacted to incorporate some of the recommendations.

Application of Statutory Reforms

South Australia introduced reforms through a number of amendments to the *Civil Liability Act 1936* (SA) (**CLA (SA)**). Section 4 provides that the CLA (SA) applies to the exclusion of inconsistent laws to the determination of liability and the assessment of damages for harm arising from accidents occurring in South Australia. The Act expressly excludes any application to rights to compensation under South Australian workers compensation legislation. Section 51 provides that the damages provisions apply to claims involving motor accidents, negligence, breach of contractual duties of care and wrongful death actions. Intentional torts, such as battery, assault or false imprisonment which result in injury are not covered by the CLA (SA). Instead, damages provisions apply only to accidents caused wholly, or in part, by negligence or some other unintentional tort on the part of a person other than the injured person.

The negligence provisions contained in pt 6 of the CLA (SA) only apply to causes of action arising after 1 May 2004. The damages provisions contained in the CLA (SA) only apply to injuries that occurred after 1 December 2002.

Pre-court Procedures

Pre-court procedures are governed by the *Supreme Court Rules 1987* (SA)⁴⁷⁵ (**rules**). The rules require a plaintiff to provide a defendant with a notice of claim at least 90 days prior to commencing legal action. The notice must contain sufficient information to enable the defendant to make an offer to settle and must include copies of any expert reports. The defendant is required to respond within 60 days, advising whether liability is admitted or denied and include copies of its expert reports. The court may penalise the parties for failing to comply with these requirements.

A settlement conference must be convened at an early stage to explore the possibility of a negotiated resolution of the claim. Either party may file an offer of settlement at any time. If a party chooses not to accept a filed offer and does not achieve a better outcome than that filed offer, there is a risk of an adverse costs order at trial.

The Law of Negligence – Scope of Duty of Care⁴⁷⁶

South Australia has clarified its position in relation to foreseeability of harm through the implementation of amendments to the CLA (SA).

Section 31(1) provides that in determining whether a defendant was negligent, the standard of care required is that of a reasonable person in the defendant's position who was in possession of all information that the defendant had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

⁴⁷⁵ Sections 6A.02 to 6A.09 of the *Supreme Court Rules 1987* (SA) applies to actions commenced on or after September 2000 but before 3 September 2006. Division 2 of the *Supreme Court (Civil) Rules 2006* (SA) apply to actions commenced on or after 4 September 2006. Both sets of rules contain similar provisions.

⁴⁷⁶ *Civil Liability Act 1936* s 31.

Section 32(1) provides that a person will not be liable for failing to take precautions against a risk of harm unless:

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.

Additionally, s 32(2) of the CLA (SA) outlines the relevant factors a court must consider when determining whether a reasonable person would have taken precautions against the risk which caused the harm. These factors are:

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

The CLA (SA) is not a codification of the law of negligence and it is open to the court to have regard to the common law test regarding foreseeability. As outlined in the decision of *Wyong Shire Council v Shirt*,⁴⁷⁷ a foreseeable risk is one that was 'not far-fetched or fanciful'. This approach was adopted by the South Australian Supreme Court in *Trevorrow v South Australia*⁴⁷⁸ when it held that the State knew or ought to have known at the relevant times that separating a child from its parents was likely to cause damage to the child.

In *Starick v Starick & Edwards, Starick v Edwards*,⁴⁷⁹ the defendant, a truck driver in control of a large, heavy, long vehicle capable of causing great damage, was held to have breached the duty of care he owed to the plaintiff. Tilmouth J thought that a driver in the position of the defendant was under not only the same duty expected of any other driver, but also a duty to keep a particularly careful look out.⁴⁸⁰ This duty was breached when the defendant failed to take note of the plaintiff's vehicle before manoeuvring his truck into its path.

Causation⁴⁸¹

The CLA (SA) provides guidance on apportioning liability amongst multiple tortfeasors, by considering the position of each defendant individually and applying the established principle under which responsibility may be assigned. Unlike other jurisdictions, South Australia has not implemented any provisions to assist the court in determining what a plaintiff would have done had the defendant's negligent conduct not occurred.

Section 35 provides that the plaintiff bears the onus of proof in relation to establishing issues of causation. A more detailed discussion of these principles appears under the discussion causation in the New South Wales part of the guide.

Causation was examined by the South Australian Supreme Court in *Queen Elizabeth Hospital v Curtis*.⁴⁸² In that case, the plaintiff presented to the Queen Elizabeth Hospital after experiencing dizziness, nausea and headaches. A medical officer diagnosed migraine. The plaintiff returned to the hospital the following morning complaining of ongoing symptoms and a diagnosis of

⁴⁷⁷ (1979) 146 CLR 40.

⁴⁷⁸ (2007) 98 SASR 136.

⁴⁷⁹ (2010) 170 LSJS 209.

⁴⁸⁰ *Ibid* [71].

⁴⁸¹ *Civil Liability Act 1936* (SA) ss 34–35.

⁴⁸² [2008] SASC 344.

bacterial meningitis was made. The defendant accepted that it had breached its duty of care by failing to diagnose the plaintiff at first instance. The primary issue on appeal was whether the plaintiff had established that her injuries were caused by the defendant's breach of its duty of care.

The Supreme Court held that a failure to promptly administer antibiotics materially contributed to the plaintiff's injuries, specifically, a loss of hearing. Accordingly, the appeal was dismissed.

Obvious risk⁴⁸³

Sections 38 and 39 provide that there is no duty to warn of an obvious risk and no liability in negligence for harm suffered as a result of the materialisation of an inherent risk. The term 'obvious risk' is defined in s 36 as a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

Pursuant to s 37, a person will be deemed to be aware of an obvious risk unless they can prove that they were not.

In the District Court decision of *Curzons v Motor Accident Commission*,⁴⁸⁴ the court held that retrieving a tyre iron from the middle of the road did not amount to an obvious risk even in circumstances where the vehicle that hit the claimant had been involved in a car chase with the vehicle in which the claimant had been a passenger prior to the incident.

In the case of *Neindorf v Junkovic*,⁴⁸⁵ the High Court of Australia considered an injury sustained by a woman attending a suburban garage sale when she tripped on an uneven concrete driveway. The Full Court of the South Australian Supreme Court had reduced the original award to the plaintiff by 30% for contributory negligence. At first instance the defendant argued that the gap in the concrete was an obvious risk so her duty of care as an occupier did not extend to the plaintiff's injuries. The High Court agreed, finding that the event should not be considered in hindsight and the plaintiff, a visitor at the time, should have taken care when visiting the property for the first time.

In *Fantis and Ors v Abi-Mosleh and Ors*⁴⁸⁶ the plaintiff sustained injuries after tripping on a metal cover to a large sump in an unsealed car park operated by the defendant. The defendant asserted that the exposed edge of the sump and its cover were obvious and it was therefore relieved of a duty to warn or protect. The court rejected this argument on a factual basis, finding that the danger posed by the sump and its cover was not obvious. The court noted that there was a 'degree of disguise or camouflage' and the danger, while not obvious to the plaintiff, was known or ought to have been known to the defendants.⁴⁸⁷

Dangerous recreational activities

The regime in South Australia reflects a similar position to that in the other states. In relation to recreational services, ss 60 and 61 of the *Australian Consumer Law* (SA) provides a statutory guarantee that those services will be:

- provided with due care and skill; and
- reasonably fit for the purpose for which the services are being acquired; and
- of such a nature, and quality, state or condition, that they might reasonably be expected to achieve the result that the consumer wishes to achieve so long as that wish is made known to the service provider.

⁴⁸³ *Civil Liability Act 1936* (SA) ss 36–39.

⁴⁸⁴ [2011] SADC 103.

⁴⁸⁵ (2005) 222 ALR 631.

⁴⁸⁶ (2007) 97 SASR 360; [2007] SASC 110.

⁴⁸⁷ *Ibid* 369.

Recreational services are defined as services that consist of the participation in a sporting activity or leisure time pursuit or any other activity that involves a significant degree of physical exertion or risk and is undertaken for the purposes of recreation, enjoyment or leisure.⁴⁸⁸

Section 42 of the *Fair Trading Act 1987 (SA)* (**Fair Trading Act**) allows the provider of recreational services to exclude, restrict or modify the guarantees that would otherwise have been implied into the contract for the provision of the recreational service. Depending on the terms of the waiver, providers of recreational services can reduce or even exclude their liability for personal injury. Should the consumer not agree to the terms of the waiver, the service provider is able to refuse the provision of services.⁴⁸⁹

This does not apply when a significant personal injury is sustained, if it is established that the reckless conduct of the service provider caused the injury.⁴⁹⁰ For this section, ‘*significant personal injury*’ is one that is not nominal, trivial or minor, and the recklessness of the conduct in question is to be determined by the general principles set out in s 34 of the CLA (SA). Importantly, a child under the age of 18 is not legally able to exclude or modify their own rights, nor is the parent of the child able to exclude or modify the child’s rights.⁴⁹¹ To date, these provisions have not been judicially interpreted.

Liability of professionals⁴⁹²

Section 41 of the CLA (SA) addresses the standard of care required of professionals and states that a person who provides a professional service incurs no liability in negligence 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. However, s 41(2) provides that professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational.

Section 41(5) limits the scope of s 41 in respect to liability arising in connection with the giving (or failure to give) a warning, advice or other information in relation to a risk of death or injury from the provision of health care service. Section 41(5) differs from similar provisions in New South Wales and Victoria as it specifically applies to the provision of health care services only. There have been no recent cases where s 41 has been considered in South Australia. However, the New South Wales Court of Appeal decision of *Dobler v Kenneth Halverson; Dobler v Kurt Halverson (by his tutor)*,⁴⁹³ may be instructive on how South Australia’s s 41 should be applied. The decision in that case confirmed that the New South Wales provision in respect to the liability of professionals operates as a defence and does not define the content of the duty of care owed by the professional.⁴⁹⁴

Similar to legislation enacted in other States, the *Professional Standards Act 2004 (SA)* (Professional Standards Act) allows limited liability to members of occupational associations in certain circumstances. The Act does not limit liability in respect of claims arising out of acts such as death or personal injury, fraud, or an intentional tort. The primary difference between South Australia and New South Wales, is that New South Wales has amended its legislation to include

⁴⁸⁸ *Fair Trading Regulations 2010 (SA)* sch 1; *Fair Trading Act 1987 (SA)* s 42.

⁴⁸⁹ *Fair Trading Regulations 2010 (SA)* sch 1.

⁴⁹⁰ *Fair Trading Act 1987 (SA)* s 42(3).

⁴⁹¹ *Ibid.*

⁴⁹² *Civil Liability Act 1936 (SA)* ss 40–41.

⁴⁹³ (2007) 70 NSWLR 151.

⁴⁹⁴ *Ibid* [60]–[61].

liability for damages arising out of any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim,⁴⁹⁵ whilst the South Australian legislation expressly excludes the operation of the Professional Standards Act to such liability. As with most Australian jurisdictions, the South Australian legislation has not had any noticeable impact on the courts' interpretation of the civil liability of professionals to date.

Liability of public authorities⁴⁹⁶

Legislative reforms in South Australia have restated the previous common law position with respect to the highway immunity rule under s 42 of the CLA (SA). Prior to the High Court decision in *Brodie v Singleton Shire Council*,⁴⁹⁷ which allowed for a finding of negligence against a road authority, the position in South Australia was that an authority responsible for a highway could not be held liable in tort for harm in respect of the use of that highway.

Liability of volunteers and Good Samaritans⁴⁹⁸

The *Volunteers Protection Act 2001* (SA) (**Volunteers Protection Act**) was implemented to exclude volunteers performing community work on behalf of the government or incorporated bodies from liability. The liability of Good Samaritans assisting people in need of emergency assistance is dealt with in pt 9 div 11 (s 74) of the CLA (SA).

Volunteers

Each jurisdiction (other than the Commonwealth) follows a basic framework for the exemption from liability for 'volunteers' who perform 'community work' for a 'community organisation'. Each element must be satisfied for the exemption to apply. In South Australia a 'volunteer' is a person who performs 'community work' on a voluntary basis. 'Community work' focuses on the overall activity engaged in by the 'community organisation' (not the conduct of the volunteer). The four common types of activity across all state and territory legislation is work done for charitable, benevolent, educational or sporting purposes. Each jurisdiction (other than the Commonwealth) provides that a 'community organisation' includes a 'body corporate' or 'corporation'.

As mentioned, the Volunteers Protection Act was introduced to limit and/or exclude volunteers from liability. The Volunteers Protection Act protects volunteers of government and incorporated bodies who perform community work in good faith. However, the protection from civil liability is limited by the following exceptions:⁴⁹⁹

- CTP liability;
- liability for defamation;
- impairment caused by recreational drugs;
- actions outside the scope of those authorised by the community organisation; and
- actions contrary to instructions received from the community organisation.

Food donors and distributors⁵⁰⁰

The *Civil Liability (Food Donors and Distributors) Amendment Act 2008* (SA) amended the CLA (SA) by introducing s 74A which provides that a food donor or distributor incurs no civil liability for loss of life or personal injury arising from consumption of food donated or distributed. It should be noted that, the immunity does not operate if the food donor or distributor knew or was recklessly indifferent to the fact that when the food left the possession or control of the food donor or distributor it was unsafe within the meaning of s 8 of the *Food Act 2001* (SA).

⁴⁹⁵ See *Professional Standards Act 1994* (NSW) s 5(3).

⁴⁹⁶ *Civil Liability Act 1936* (SA) s 42.

⁴⁹⁷ (2001) 206 CLR 512.

⁴⁹⁸ *Civil Liability Act 1936* (SA) s 74.

⁴⁹⁹ *Volunteers Protection Act 2001* (SA) s 4.

⁵⁰⁰ *Civil Liability Act 1936* (SA) s 74A.

Good Samaritans

Under s 74 of the CLA (SA) persons who come to the aid of a victim in an emergency are protected from civil liability. However, there are some limitations placed on the immunity from liability in relation to persons who were under the influence of drugs or alcohol. All other Australian jurisdictions maintain a similar position, with the exception of Queensland, which only affords protection to Good Samaritans associated with prescribed organisations.

Liability for mental harm⁵⁰¹

Section 33 of the CLA (SA) provides that a person does not owe a duty to take care not to cause mental harm to another unless it is reasonably foreseeable that a person of normal fortitude might, in the circumstances of the case, suffer a psychiatric illness. This follows the principles determined by the High Court in *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd*.⁵⁰²

Section 53 limits liability for mental harm to incidents where the plaintiff was actually injured, or physically present at the scene of the accident, or to circumstances in which the injured person was an immediate family member of the plaintiff. Furthermore, damages may only be awarded for pure mental harm if the harm consists of a recognised psychiatric illness, consistent with *Tame*.

In *Halech v State of South Australia*⁵⁰³ a claim for psychological injury arose after police had misidentified four victims of a fatal car accident and the mistake was only revealed after the funerals and cremations were held. The action was dismissed with the court reasoning that if the police were held to owe a duty of care, it would inhibit their ability to perform their primary responsibility of investigating incidents. This is also consistent with *Tame*.⁵⁰⁴

The High Court in the case of *King v Philcox*⁵⁰⁵ considered the comparative provisions of the *Civil Liability Act 2002* (NSW) which are equivalent to those in the CLA (SA).⁵⁰⁶

In *King*, a passenger in a motor vehicle was fatally injured. The brother had observed the accident scene, however was not at the time aware that his brother was involved in the accident. Upon later discovering that his brother had died in the accident, he states that he developed psychological injuries. This formed the basis of a claim for damages from the driver for mental harm.

It was found at first instance, and on appeal to the Full Court of the Supreme Court and in the High Court that the driver owed a duty of care not to cause pure mental harm to the brother, and that duty was breached by the driver's negligence. However the High Court unanimously held that the brother was not entitled to recover damages for mental harm because he was not present at the scene of the accident when it occurred. Despite the brother being in the same locale as the accident and present at the scene of the accident, he did not witness the victim being injured or killed. The principles from this decision are in keeping with the *Civil Liability Act 2002* (NSW) which requires a plaintiff to have witnessed the victim being killed at the scene in order to recover damages for pure mental harm.⁵⁰⁷

⁵⁰¹ Ibid ss 33 (standard of care) and 53 (damages).

⁵⁰² (2002) 211 CLR 317; Refer to the section in this guide on 'Liability for Mental Harm' in the New South Wales jurisdiction for further discussion of these provisions.

⁵⁰³ (2004) 234 LSJS 1; [2004] SADC 78.

⁵⁰⁴ (2002) 211 CLR 317.

⁵⁰⁵ (2015) 255 CLR 304.

⁵⁰⁶ *Civil Liability Act 1936* (SA) s 33 and s 53.

⁵⁰⁷ Ibid s 30(2)(a).

Intoxication and illegal activity⁵⁰⁸

Pursuant to s 46 of the CLA (SA), a rebuttable presumption of contributory negligence arises in cases where the plaintiff was intoxicated at the time of the injury. Where this presumption applies, damages are to be reduced by a minimum of 25%. Contributory negligence will be presumed in cases where the plaintiff relies on the skill and care of an intoxicated person, resulting in a minimum reduction of 25%.

Section 43 of the CLA (SA) excludes liability for damages if the accident in which the plaintiff sustained injury occurred while that person was committing an indictable offence. The provision is the only statutory illegality defence which requires proof of the commission of an indictable offence beyond reasonable doubt. A conviction or acquittal is conclusive evidence of guilt or innocence of the offence to which it relates. Further, the indictable offence must be conducted contemporaneously with the accident, that is to say, at the same time.⁵⁰⁹ There is also discretion to award damages even in the event of illegality if the case is exceptional and the operation of the principle would be harsh or unjust.

The onus is on a defendant to raise a plaintiff's intoxication or involvement in illegal activity to enjoy the liability exemption afforded by these provisions. The exclusions to the presumption raised in light of these provisions in turn must be raised by the plaintiff to avoid liability being excluded.

Contributory negligence⁵¹⁰

Following the Ipp report, South Australia amended the CLA (SA) to incorporate the recommendations made in relation to contributory negligence. There are specific provisions now in place outlining what principles and factors should be taken into account when determining whether or not a plaintiff has been contributorily negligent. Section 44 applies the same general standard of negligence when determining whether a person has been contributorily negligent.⁵¹¹ Section 46 establishes a rebuttable presumption that a person who is injured while intoxicated has been contributorily negligent to the extent of at least 25%.

The case of *Motor Accident Commission v Curzons*⁵¹² provides a good example of the application of s 46. At first instance the respondent successfully claimed damages for the appellant's negligence, reduced by 25% for contributory negligence attributable to the former's intoxication at the time of the incident. On appeal, the South Australian Supreme Court increased the apportionment of contributory negligence to 50%. It was the court's view that the respondent created the situation of danger when he was struck by a vehicle, and his was not a case of *mere* intoxication, but *extreme* intoxication: he had a blood alcohol reading in excess of 0.2g per 100mL of blood.⁵¹³

Section 47 outlines a similar presumption in relation to relying on the skill of a person who is known to be intoxicated. Section 49 imposes such a presumption on an individual who fails to wear a seatbelt. Although earlier versions of this provision required the defendant to establish the proper use of a seatbelt would have reduced or lessened the severity of the injury, there is no longer such a discretion or onus in the case of failing to wear a seatbelt. In such a case, the presumption of contributory negligence is '*irrefutable*'.⁵¹⁴ The methodology for calculation of damages where a contributory negligence percentage is a factor prescribed in s 50.

⁵⁰⁸ Ibid s 43 and ss 46–49.

⁵⁰⁹ *Curzons v Motor Accident Commission* (2011) 275 LSJS 40.

⁵¹⁰ *Civil Liability Act 1936* ss 44–50.

⁵¹¹ *Starick v Starick & Edwards, Starick v Edwards* (2010) 170 LSJS 209.

⁵¹² [2012] SASCFC 22.

⁵¹³ [2012] SASCFC 22, [45], [48] (per Gray J, with whom Sulan and David JJ agreed).

⁵¹⁴ Ibid [89].

Determination of contributory negligence will turn on the facts of each case. What is considered negligent conduct on the part of a plaintiff in respect of the cause of his or her own injuries is entirely circumstantial.

Section 7 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) also outlines the process for reducing an award for damages on account of contributory negligence. This section operates subject to any contradictory legislation, so in cases of overlap, the provisions of the CLA (SA) will prevail. Section 6 allows for apportionment through a contribution from a third person who is liable for the same harm if a claim is made within two years of the amount of damages being finally determined (or within the plaintiff's statutory limitation period if the remaining time exceeds two years).

Proportionate liability⁵¹⁵

The proportionate liability provisions in the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) apply to causes of action which arise after 1 October 2005.⁵¹⁶

In South Australia an apportionable liability is one for which the liability is for harm (but not derivative harm) consisting of economic loss (but not economic loss consequent on personal injury) or loss of, or damage to, property.⁵¹⁷

In the District Court decision of *Outback Health Screenings Pty Ltd v Gwam Investments Pty Ltd*,⁵¹⁸ Judge Tilmouth discussed the statutory scheme relating to apportionment liability in South Australia:

'Apportionate liability arises when the acts or omissions of "two or more wrongdoers" caused or contributed to the harm: s 8(2)(b). That end is achieved by determining the extent of the defendants' responsibility for the harm, then the extent of the responsibility for the harm caused or contributed to by "other wrongdoers" (whether parties to the proceedings or not): s 8(2). Next the court may limit a defendant's liability to the plaintiff in damages, to a percentage that is fair and equitable having regard for the extent of its responsibility: s 8(2). Still further, in the case of other wrongdoers who also happen to be defendants to the proceedings, the court is given the power to determine as against each, a proportion of the plaintiff's damages equivalent to the percentage representing the extent of each defendants respective contribution to the plaintiffs' harm: s 8(4).'

If the proceedings involve both an apportionable claim and a non-apportionable claim, liability for the non-apportionable portion will be determined first in accordance with ordinary applicable legal rules.⁵¹⁹ Therefore, the principle of joint and several liability may still apply to non-apportionable portions of a plaintiff's claim. This is consistent with legislation in New South Wales, Tasmania and the Australian Capital Territory. Contribution proceedings between wrongdoers are prohibited in respect of liability limited by the apportionment provisions.⁵²⁰ There is an exception to this rule as contribution proceedings between wrongdoers who are classed as being from the same group are permitted.⁵²¹ The South Australian legislation requires defendants to assist the plaintiff to

⁵¹⁵ *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001.*

⁵¹⁶ *Law Reform (Contributory Negligence Apportionment of Liability) (Proportionate Liability) Amendment Act 2005* (SA).

⁵¹⁷ *Ibid* s 3(2)(a).

⁵¹⁸ (2009) 262 LSJS 98.

⁵¹⁹ *Ibid* s 3(2)(a).

⁵²⁰ *Ibid* s 9.

⁵²¹ *Ibid* s 9(a).

identify other parties who may be liable in respect of the plaintiff's claim and the circumstances giving rise to the other party's liability.⁵²² A failure to identify other potential defendants can have adverse cost consequences for the offending defendant.⁵²³ This is consistent with the legislation in Tasmania, New South Wales, Queensland and the Australian Capital Territory.

The legislation is silent on the issue as to whether defendants whose liability is limited under the apportionment legislation can or cannot be required to indemnify other defendants. The general provisions applicable to contribution claims state that if it is fair and equitable to do so, the court may order that the contribution to be recovered is to amount to a complete indemnity or the court may exempt a person from liability to make contribution.⁵²⁴ However, an order providing a complete indemnity may be held to only operate between wrongdoers who are members of the same group, and not between wrongdoers whose liability has been limited as per the apportionment provisions for a claim, but who are not part of the same group. In absence of judicial determination on this issue, the operation of the legislative provisions remains unclear.

Additionally the legislation does not apply in respect of certain building works under s 72 of the *Development Act 1993* (SA). There have been limited decisions in South Australia which substantively address the judicial application of pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA).

However, with the South Australian proportionate liability legislation having a similar requirement to assist the plaintiff to that of New South Wales, the case law from New South Wales may assist in determining the application of the proportionate liability provisions.

In *Ucak v Avante Developments Pty Ltd*,⁵²⁵ the New South Wales Supreme Court provided guidance for defendants intending to plead and rely on proportionate liability provisions. It was held that a defendant, pleading and relying on proportionate liability, must plead and rely on the material facts pertaining to the causes of action by which it is alleged the claim is an 'apportionable claim'. Essentially this means that if a defendant intends to allege that other concurrent wrongdoers either caused or contributed to the plaintiff's loss, the defendants pleading the same must allege the relevant facts which cause the defendant to make such assertions.

Vicarious liability⁵²⁶

Under s 59 of the CLA (SA) despite any other law to the contrary, an employee is not required to indemnify their employer in respect of the vicarious liability incurred by the employer. Further, the employer will be liable to indemnify the employee for any liability incurred by the employee in respect of the tort unless the employee is otherwise entitled to an indemnity from another source.

Non-delegable duties

The term non-delegable duty is somewhat misleading. It does not mean that a party owing a duty cannot delegate the task to a third party, but rather that the liability for breach of the duty cannot be delegated. As such, it is a duty to ensure that reasonable care is taken. Therefore, if the third party to whom the task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached. The courts have struggled, however, to clearly define the

⁵²² Ibid s 10(1).

⁵²³ Ibid s 10(2).

⁵²⁴ Ibid s 6(7).

⁵²⁵ [2007] NSWSC 367.

⁵²⁶ *Civil Liability Act 1936* (SA) s 59.

parameters required to justify the existence of a non-delegable duty of care and the categories continue to evolve. The known criteria include the superior capacity of the defendant to bear the risk of the mishap; the special obligation which it is proper to attach to extra-hazardous activities; and the special dependence or vulnerability of the person to whom the duty is owed.⁵²⁷

Common known relationships in which non-delegable duties exist include:

- employer and employee;⁵²⁸
- host employer and contractor;⁵²⁹
- school and student;⁵³⁰
- hospital and patient;⁵³¹ and
- owner of premises and licensee.⁵³²

Exclusion clauses

The South Australian legislature has not introduced any reforms dealing with exclusion clauses. The common law principles therefore remain applicable. Accordingly in order to have any prospect of an exclusion clause being upheld, the person or entity including such a clause should ensure that same is clearly incorporated into the contract, specifically drafted to cover the factual scenario encountered by the person or entity seeking to enforce it, and to the extent possible, brought to the attention of the other party to the contract.⁵³³

Where the claim is one captured by the Australian Consumer Law, there are certain guarantees which cannot be excluded or limited by contract. See div 2–3 of sch 2 of the *Competition and Consumer Act 2010* (Cth).

Expressions of regret and apologies⁵³⁴

Section 75 of the CLA (SA) provides that in:

‘proceedings in which damages are claimed for a tort, no admission of liability or fault is to be inferred from the fact that the defendant or a person for whose tort the defendant is liable expressed regret for the incident out of which the cause of action arose’.

Basically, expressions of regret about an incident that do not admit liability are not admissible in a court proceeding if it was made prior to the commencement of the proceeding.

For High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins*.⁵³⁵

⁵²⁷ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

⁵²⁸ *Kondis v State Transport Authority* (1984) 154 CLR 672.

⁵²⁹ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

⁵³⁰ *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁵³¹ *Samios v Repatriation Commission* [1960] WAR 219.

⁵³² *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

⁵³³ The New South Wales Court of Appeal decision of *Lormine Pty Ltd & Anor v Xuereb* [2006] NSWCA 200 may be of some relevance when considering how an exclusion clause might be interpreted in South Australia.

⁵³⁴ *Civil Liability Act 1936* s 75.

⁵³⁵ (2003) 215 CLR 317.

Limitation periods

Section 36(1) of the *Limitation of Actions Act 1936* (SA) (**Limitation Act**) provides that a claim for personal injury must be commenced within three years after the cause of action accrued. An amendment has been included in s 36(1)(a) to provide that in the case of a personal injury that remains latent for some time after its cause, the period of three years begins to run when the injury first comes to the person's knowledge. Personal injuries under this Act include any disease and any impairment of a person's physical or mental condition.

A plaintiff may apply to the court for an extension of the limitation period under s 48. A court cannot extend a limitation period unless it is satisfied that:

- facts material to the plaintiff's case were not ascertained by him until some point of time occurring within 12 months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or
- that the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances; and
- that in all the circumstances of the case, it is just to grant the extension of time.

Furthermore, a fact is not considered material unless it forms an essential element of the plaintiff's cause of action or it would have major significance on an assessment of the plaintiff's loss.

Defamation claims

Section 37 of the Limitation Act provides that defamation claims are to be commenced within one year from the date of the publication of the matter complained of. However, if a court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of the publication, it must extend the limitation period mentioned in sub-s (1) to a period of up to three years running from the date of the publication (but no further extension is to be allowed under any other provision of the Limitation Act).

Further, where the time for bringing an action or proceeding is limited by the Limitation Act, and the person who is entitled to bring the action or proceeding is under a legal disability, the time for bringing that action or proceeding shall be extended by the period or periods for which the disability exists or continues after the time at which the right to bring the action or proceeding arose. Section 45(3) provides that no period of limitation shall be extended by this section to more than 30 years from the time at which the right to bring the action or proceeding arose.

If a child suffers personal injury and the time for bringing an action for damages is extended by the Limitation Act to more than six years from the date of the incident out of which the injury arose (the relevant date), then pursuant to s 45A(1)(b), a notice of an intended action must be given within six years after the relevant date by or on behalf of the child to the person alleged to be liable in damages (the defendant).

If the notice of intended action is not served within the six year time period, the plaintiff is not prevented from bringing an action for damages. However, if the court is satisfied that there is valid reason to excuse the non-compliance, no damages will be allowed to compensate for medical or gratuitous services provided before the date of action commenced, and no legal or other costs incurred in contemplation of the action or a possible action will be allowed.

Damages Awards

South Australia has introduced legislative reforms to regulate the assessment of damages in personal injury claims. The reforms impact on the assessment of general damages, gratuitous care and economic loss in relation to mental harm and lost earning capacity in relation to a claim for a deceased person.

The Civil Liability Act provides a cap on general damages of \$350,000 (calculated according to s 52(2)(c)–(d)). Section 52(1) provides that there will be no award of general damages unless the plaintiff's ability to lead a normal life was significantly impaired for a period of at least seven days, or medical expenses of at least the prescribed minimum have been incurred. In *Dighton v The Nominal Defendant*,⁵³⁶ Tilmouth J found that an assessment under this section requires the court to objectively 'make a comparison of the severity of the loss sustained with the most and least severe loss which anyone could suffer.'⁵³⁷

Additionally, s 52(2)(a) provides that the plaintiff is to be ascribed a numerical value from 0 to 60 reflecting 60 equal gradations of harm, depending on the type, nature and severity of their injury. Each point equates to a monetary value on a sliding scale up to \$350,000.

The operation of this scheme was demonstrated in the case of *Prentergast v Bulner*,⁵³⁸ where an appeal was heard against an award for loss of earning capacity. The plaintiff was an aged care worker who broke her foot. This injury required surgery and was attributed 15 points on the scale. Following ongoing problems, she was unable to fulfil her job requirements and her employment was terminated. An expert witness recommended further surgery at a cost of over \$12,000 and a further three months off work. The defendant argued that the amounts of \$115,000 for past loss of earning capacity and \$445,000 for future economic loss were manifestly excessive as the trial judge only reduced the award by 25% for contingencies. In dismissing the appeal, the Full Court of the Supreme Court held that the trial judge was entitled to take his assessment of the plaintiff's character and desire to continue to work into account. The operation of the scheme was also considered in the recent District Court decision of *Jaspers v Prospect City Council*⁵³⁹ where McIntyre J assigned a numerical value of 15 to the plaintiff's loss after being satisfied of the plaintiff's ability to lead a normal life was significantly impaired by the injury for at least seven days. The plaintiff was awarded \$23,840 for non-economic loss.

The newly inserted ss 52(3–8) prescribe the means for assessing damages for non-economic loss in relation to personal injury arising from a motor vehicle accident.

On 1 July 2013, the *Civil Liability Regulations 2007 (SA)* was replaced by the *Civil Liability Regulations 2013 (SA)*. The 2013 regulations incorporated rules regulating to the assessment of the ISV for motor vehicle accident cases, and included a schedule of ranges of ISV's for various injuries. The rules schedule appears directly based on Queensland rules and schedule for assessment of ISVs generally.

⁵³⁶ [2011] SADC 187.

⁵³⁷ *Ibid* [129]. Tilmouth J was quoting reasoning from the decision of *Percario v Kordysz* (1990) 54 SASR.

⁵³⁸ [2005] SASC 426.

⁵³⁹ [2012] SADC 6.

Economic loss⁵⁴⁰

Economic loss is only briefly addressed in the South Australian legislation. Section 3 of the *Civil Liability Act 1936* (SA) includes economic loss in the definition of 'harm'. Pursuant to s 53, damages may be awarded for economic loss that has resulted from mental harm. Section 54 prescribes limits on the amount of damages able to be awarded for economic loss in relation to loss of earning capacity of a deceased's representative action. Under s 55 an injured person is compensated by way of lump sum and an actuarial multiplier will be used for the purpose of calculating the present value of the future loss.

Gratuitous care⁵⁴¹

Section s 58(1) of the CLA (SA) provides that an award for gratuitous care can only be made where the services are provided by a parent, spouse, domestic partner or child of the injured person. In addition to this, gratuitous care may also be allowed for the reimbursement of expenses other than reasonable out-of-pocket expenses, voluntarily incurred, or to be voluntarily incurred by a person rendering gratuitous services to the injured person. Section 58(2) provides that damages are not to exceed an amount that is four times the state average weekly earnings.⁵⁴² Pursuant to s 58(3) the court may make an award in excess of the prescribed limit if it is satisfied that the services were reasonably required by the injured person and that the services were not provided by a family member (i.e. parent, spouse, or child). Further, the application of gratuitous care in South Australia is guided by the principles established at common law, but limited by the legislative provisions.⁵⁴³

Interest

Under s 56 of the CLA (SA), no interest may be awarded on damages for non-economic or future loss.

Discount rate⁵⁴⁴

The discount rate in South Australia was defined in line with the Ipp recommendations. Under s 3 of the CLA (SA) the discount rate is:

- if no percentage is fixed by regulation for the purposes of this definition – 5%; or
- if such percentage is fixed by regulation – the percentage so fixed.

Exemplary, punitive or aggravated damages⁵⁴⁵

Pursuant to s 70(6), exemplary, punitive or aggravated damages may be awarded in circumstances where a defendant is found to have unreasonably delayed in the resolution of a claim in circumstances where the defendant knew the plaintiff was at risk of dying before the claim was resolved. In the case of a deceased person's claim for workers compensation, damages cannot exceed the total amount of the compensation for non-economic loss to which the deceased person would have been entitled if the claim had been resolved immediately before his or her death. Such an award of damages is to be made to the deceased person's dependants or their estate. The section applies to a death after the commencement of the section, regardless of whether the circumstances out of which the injury arose occurred before or after the commencement date.

⁵⁴⁰ *Civil Liability Act 1936* (SA) pt 8 s 3, s 54, s 55, s 56.

⁵⁴¹ *Ibid* s 58.

⁵⁴² See *Perry v Diverse Barrel Solutions Pty Ltd* [2011] SAIRC 24 and *Terry v Leventeris* (2011) 109 SASR 358.

⁵⁴³ As discussed in the recent case of *Dighton v The Nominal Defendant* [2011] SADC 187, [151]. Tilmouth J referred to the established principles in the High Court cases of *Griffiths v Kerkemeyer* (1977) 139 CLR 161, *Van Gervan v Fenton* (1992) 175 CLR 327 and *Nguyen v Nguyen* (1990) 169 CLR 245 in respect of gratuitous care.

⁵⁴⁴ *Civil Liability Act 1936* (SA) pt 1 s 3.

⁵⁴⁵ *Ibid* s 70(6).

Structured settlements

South Australia has legislated to implement reforms to encourage and facilitate structured settlements and has amended each of its *Magistrate Court Act 1991 (SA) (s 33A)*, *District Court Act 1991 (SA) (s 38A)* and *Supreme Court Act 1935 (SA) (s 30BA)* Acts respectively.

In an action for damages for personal injury, the court may, with the consent of the parties, make an order for damages to be paid wholly or in part in the form of periodic payments, by way of an annuity or otherwise, instead of in a lump sum.

Legal costs

There is currently no legislation which restricts the amount of legal costs recoverable in South Australia as recommended by the Ipp report.

This is consistent with other jurisdictions including Victoria, Tasmania and Western Australia.

Practice and Procedure

Legal practitioners

Australian Solicitor Conduct Rules 2011 (ASCR) commenced on 25 July 2011.

South Australia implemented the Model Rules promulgated by the Law Council of Australia through the adoption of the ASCR. The adoption ensures that solicitors are bound by a set of professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners and other persons. However, no Legal Profession Act has to date been enacted or introduced as a bill in South Australia to implement the Ipp recommendations and Model Laws Project.

Legal advertising

The regulation of legal service advertising in South Australia is governed by the relevant Law Society. Specific guidelines in relation to the advertisement of personal injury legal services are yet to be implemented.

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Application of Statutory Reforms⁵⁴⁶

The *Civil Liability Act 2002* (WA) (**CLA (WA)**) applies to any claim for damages for harm caused by the fault of a person, including motor vehicle accident claims.⁵⁴⁷

'Harm' is defined to include personal injury, economic loss and property damage.⁵⁴⁸

The CLA (WA) applies to all awards of personal injury damages regardless of whether the action is founded in tort, breach of contract or another legal basis. However, it does not apply to claims falling within the operation of the *Motor Vehicle (Third Party Insurance) Act 1943* (WA), the *Workers Compensation and Rehabilitation Act 1981* (WA), the *Civil Aviation (Carriers' Liability) Act 1961* (WA) and awards relating to death or injury caused by asbestos inhalation or smoking. It also expressly excludes damages relating to unlawful intentional acts.⁵⁴⁹

Pre-court Procedures

There are no pre-court procedures for civil claims and no proposed legislative reforms in relation to substantive pre-litigation procedures in Western Australia. This is similar to that in New South Wales and Tasmania, but is unlike Queensland, South Australia, Australian Capital Territory, Victoria and Northern Territory.

The Law of Negligence – Scope of Duty of Care**Standard of care⁵⁵⁰**

The existence and content of any duty of care of a person is determined according to common law principles as modified by applicable legislation, including the CLA (WA).

The seminal case in this area is *Donoghue v Stevenson*,⁵⁵¹ in which it was held a duty of care would be owed in circumstances where a reasonable person in the defendant's position would foresee that carelessness on his or her part would cause some damage to the plaintiff. The decision of *Wyong Shire Council v Shirt*⁵⁵² clarified that a 'foreseeable' risk was one that was not 'far-fetched or fanciful'.

Wyong also provides principles for the determination of the standard of care required by a person owing a duty of care. That is, what a reasonable person in the position of the defendant would do to respond to a foreseeable risk after considering the magnitude of the risk, probability of the risk occurring, the expense of alleviating the risk, and any other conflicting responsibilities.

⁵⁴⁶ *Civil Liability Act 2002* (WA) pt 1 s 3A and pt 1A s 5A.

⁵⁴⁷ *Ibid* s 5A.

⁵⁴⁸ *Ibid* s 3.

⁵⁴⁹ *Ibid* s 3A.

⁵⁵⁰ *Ibid* pt 1A div 2 s 5B.

⁵⁵¹ [1932] AC 562.

⁵⁵² (1980) 146 CLR 40.

The CLA (WA) essentially replicates these common law principles. Section 5B(1) of the CLA (WA) provides that a person is not liable for harm caused by that person's failure to take precautions against a risk of harm unless:

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.

Section 5B(2) of the CLA (WA) outlines the relevant factors a court must take into consideration when determining whether a reasonable person would have taken precautions against the risk which caused the harm. These include:

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

The assessment of the existence and content of a duty of care is to be undertaken prospectively, that is, before the occurrence of the injury giving rise to the claim, rather than with the benefit of hindsight.⁵⁵³

Other legislation may further modify when a duty of care may be found and the standard of care in specific circumstances. It is beyond the scope of this document to discuss all of the various legislative instruments that may impact upon the assessment of a duty of care. However, one common example is the *Occupier's Liability Act 1985 (WA)*, which specifically addresses the duty of care owed by occupiers, the negligence of independent contractors, and duties owed by landlords.

Causation⁵⁵⁴

If it is held a defendant has breached his or her duty of care, the plaintiff must still prove the breach was causative of the harm suffered by the plaintiff. Causation is determined according to common law principles as modified by relevant legislation.

To prove causation, the plaintiff must establish the negligence of the defendant was a necessary condition of the occurrence of the plaintiff's harm (factual causation) and, secondly, that the scope of the defendant's liability extends to that particular harm (scope of liability).⁵⁵⁵ The plaintiff bears the onus of proof as to matters of causation⁵⁵⁶ and must satisfy both requirements for causation to be established.⁵⁵⁷

The test for factual causation is essentially the '*but for*' test at common law. That is, the plaintiff's harm would not have occurred '*but for*' the breach of duty of the defendant. A breach does not have to be the sole or predominant cause of the plaintiff's harm for causation to be established. It may be one of multiple causes of the plaintiff's harm, but nevertheless a cause of the harm.⁵⁵⁸

⁵⁵³ (2005) 223 CLR 422.

⁵⁵⁴ *Civil Liability Act 2002 (WA)* pt 1A div 3 s 5C.

⁵⁵⁵ *Ibid* s 5C(1).

⁵⁵⁶ *Ibid* s 5D.

⁵⁵⁷ *Marsh v Baxter* [2014] WASC 187.

⁵⁵⁸ *Strong v Woolworths Limited* [2012] 246 CLR 182; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

In appropriate cases where the ‘*but for*’ test can not be satisfied, the court may still find that factual causation has been established.⁵⁵⁹ This may apply where there are multiple causes of harm such that the contribution of each cause does not satisfy the ‘*but for*’ test individually. Further, it may apply to cases where negligent conduct has materially increased the risk of harm but the current state of scientific or medical knowledge makes it impossible to prove the cause of the plaintiff’s harm,⁵⁶⁰ such as cases requiring the analysis of the causation of mesothelioma. Where the court finds factual causation is established despite the ‘*but for*’ test not being met, the court must articulate whether and why the defendant should be held responsible for the harm.

Where the determination of causation requires a consideration of what the plaintiff would have done had the negligent act not occurred, any evidence provided by the plaintiff as to what he or she would have done is inadmissible.⁵⁶¹

When considering the ‘*scope of liability*’ under the second limb, s 5C(4) CLA (WA) states the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the defendant. The District Court of Western Australia in *Lines v Workfocus Australia Pty Ltd*⁵⁶² highlighted that this requirement can involve a consideration of common law policy considerations.⁵⁶³

Obvious risk⁵⁶⁴

An ‘*obvious risk*’ is defined as a risk that would have been obvious to a reasonable person in the position of that person.⁵⁶⁵ Obvious risks include risks that are patent or a matter of common knowledge. A risk can be an obvious risk even if the risk is not prominent, conspicuous or physically observable. A risk can also be obvious even where the probability of the risk materialising is low.

In *Kerslake v Shire of Northam*⁵⁶⁶ the court considered whether the risk of serious injury suffered by a motorist who failed to take the bend at a safe speed was an obvious risk. It was held the risk presented by the bend in the road was not obvious to a person in the position of the plaintiff due to the bend being concealed when approaching from a distance, the lack of speed signage and the lack of guide posts.

Where the relevant risk is of harm being occasioned by the negligent conduct of a person, the risk might be obvious in some circumstances. However the risk of a person being grossly negligent is often not obvious.⁵⁶⁷

A person will be deemed to be aware of an obvious risk unless they can prove otherwise.⁵⁶⁸

There is no duty to warn of an obvious risk,⁵⁶⁹ except where the plaintiff requested advice or information about the risk, the defendant is required by law to warn about the risk, or the defendant is a professional and the risk of harm is a risk from the provision of a professional service by the plaintiff.

⁵⁵⁹ *Civil Liability Act 2002* (WA) s 5C(2).

⁵⁶⁰ *Strong v Woolworths Limited* (2012) 246 CLR 182.

⁵⁶¹ *Civil Liability Act 2002* (WA) s 5D.

⁵⁶² (2009) 68 SR (WA) 192.

⁵⁶³ See also *Strong v Woolworths Limited* [2012] HCA 5 at [19].

⁵⁶⁴ *Civil Liability Act 2002* (WA) div 4 ss 5E–5F and div 6 ss 5M–5P.

⁵⁶⁵ *Ibid* s 5F.

⁵⁶⁶ [2009] WADC 129.

⁵⁶⁷ *Fallas v Mourlas* [2006] NSWCA 32.

⁵⁶⁸ *Civil Liability Act 2002* (WA) s 5N.

⁵⁶⁹ *Ibid* s 5O.

There is no liability in negligence for harm suffered as a result of the materialisation of an inherent risk.⁵⁷⁰ ‘*Inherent risk*’ is defined as a risk of something occurring that cannot be avoided by the exercise of reasonable skill and care.⁵⁷¹

Recreational activities⁵⁷²

Western Australia has implemented provisions in the *Civil Liability Act 2002* (WA) which deal specifically with obvious risks and recreational activities which limit the liability of service providers.

Section 5H provides that no liability will arise from harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity, except where the plaintiff requested advice or information about the risk from the defendant, or the defendant is required by law to warn the plaintiff of the risk.

A ‘*dangerous recreational activity*’ is defined as an activity that involves a significant risk of physical harm.⁵⁷³ The activity may be a sport (whether organised or not), or any activity or pursuit engaged in for enjoyment, relaxation or leisure and includes any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.⁵⁷⁴

In *Kerslake v Shire of Northam*⁵⁷⁵ the issue was whether the activity of motorcycle riding was a dangerous recreational activity was considered. While the court accepted that the activity in which the plaintiff was engaged was for enjoyment, relaxation or leisure, it held that in order to satisfy the requirement of being a ‘*dangerous recreational activity*’, the activity needed to involve a significant risk of harm.

The court applied the series of principles outlined by Ipp JA in *Fallas v Mourlas*⁵⁷⁶ in determining whether an activity is dangerous:

1. *The test as to whether a recreational activity is “dangerous” is objective.*
2. *The word “significant”, in the expression “significant risk of physical harm”, lays down a standard lying somewhere between a trivial risk and a risk likely to materialise.*
3. *A significant risk that converts a recreational activity into a dangerous recreational activity may be an entirely different risk from the risk (which may be obvious or not) that materialises. Thus, s 5L may be held to apply where the significant risk (converting a recreational activity into a dangerous one) differs from the obvious risk that materialises.*
4. *The question of whether a particular activity may be dangerous should be determined by reference to the particular activities engaged in by the plaintiff at the relevant time and to the actual circumstances giving rise to the harm. This could require segmenting the particular activities the plaintiff was engaged in.’*

In *Kerslake* the plaintiff was riding his motorcycle on a country road in broad daylight, complying with all road signs and driving under the speed limit. The court was not satisfied that the activity involved a significant risk of harm and accordingly the activity was held not to be dangerous in the circumstances.

⁵⁷⁰ Ibid s 5O.

⁵⁷¹ Ibid s 5O.

⁵⁷² Ibid pt 1A div 4 ss 5E–5J.

⁵⁷³ Ibid s 5O.

⁵⁷⁴ Ibid s 5E.

⁵⁷⁵ (2009) 66 SR (WA) 157.

⁵⁷⁶ [2006] NSWCA 32.

In recreational activities that are not deemed dangerous, no duty of care arises with respect to risks for which a specific warning has been provided in accordance with s 5I CLA (WA).

The participant and provider of recreational services are entitled to enter into a contract which limits the liability of the provider.⁵⁷⁷

Liability of professionals⁵⁷⁸

Sections 5PA and 5PB of the CLA (WA) relate to the standard of care of health professionals.

'Health professional' is defined to include registered practitioners under *Health Practitioner Regulation National Law (Western Australia)* in specific health professions, and more widely, any other person who practises a discipline or profession in the health area that involves the application of a body of learning.⁵⁷⁹

An act or omission of a health care professional will not be negligent if, at the time of the act or omission, it accorded with peer professional opinion as '*competent professional practice*'.⁵⁸⁰ A practice does not have to be universally accepted as competent practice to be considered widely accepted as competent professional practice.⁵⁸¹

- However, this exclusion of liability does not apply where the act or omission of the health care professional relates to informing the patient of a risk of injury or death associated with the treatment proposed for a patient or a foetus being carried by a pregnant person; or
- a procedure proposed for the purpose of diagnosing a condition of a patient or foetus being carried by a pregnant person.⁵⁸²

Further, a health professional will not escape liability if the practice in accordance with which the health professional acted or omitted to do something is so unreasonable that no reasonable health care professional could have acted or omitted to do something in accordance with that practice.⁵⁸³

The plaintiff bears the onus of proving that the applicable standard of care has been breached by a health professional.⁵⁸⁴

It is important to note that these provisions only apply to health care professionals, rather than professionals generally. In Western Australia, the standard of care of professionals other than health care professionals is not a special standard.⁵⁸⁵

Liability of public authorities⁵⁸⁶

When considering whether a public body or officer has a duty of care or has breached that duty of care, the following principles apply.⁵⁸⁷

⁵⁷⁷ *Civil Liability Act 2002* (WA) s 5J.

⁵⁷⁸ *Ibid* pt 1A div 7 ss 5PA–5PB.

⁵⁷⁹ *Ibid* s 5PA.

⁵⁸⁰ *Ibid* s 5PB.

⁵⁸¹ *Ibid* s 5PB(5).

⁵⁸² *Ibid* s 5PB(2).

⁵⁸³ *Ibid* s 5PB(4).

⁵⁸⁴ *Ibid* s 5PB(6).

⁵⁸⁵ *Fitzpatrick v Robert Norman Job and Wendy Barbara Job t/as Jobs Engineering & Ors* (2007) 14 ANZ Ins Cas 61–731.

⁵⁸⁶ *Civil Liability Act 2002* (WA) pt 1C ss 5U–5Z.

⁵⁸⁷ *Ibid* s 5W.

- The functions of the public body or officer are limited by the financial and other resources available to it.
- The general allocation of those resources by the public body or officer is not open to challenge.
- The functions required to be exercised by the public body or officer are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate).

The standard by which authorities are to be judged is that of a ‘*reasonable public authority*’. A policy decision of a public body or officer cannot be used to support a finding of fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant’s position could have made it.⁵⁸⁸

The public policy defence was recently considered in the case of *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*⁵⁸⁹ where it was held the Department of Conservation and Land Management was not liable for its policy for prescribed burns in close proximity to a land owner’s grape vines that made the grapes unfit for winemaking.

Western Australia has also re-introduced the ‘*highway immunity nonfeasance rule*’ in relation to the State’s respective road authorities. This immunity provides that liability will not attach to road authorities in respect of the condition of roads due to action or inaction, unless they have ‘*actual knowledge*’ of the defect which caused the harm.⁵⁹⁰

In *Kerslake v Shire of Northam*⁵⁹¹ the court considered the operation of s 5Z which provides special protection for road authorities in carrying out road work. The immunity will operate unless the authority had actual knowledge of the particular risk that caused the harm. In determining the applicability of s 5Z the court considered:

- whether ‘*road work*’ as defined in the CLA (WA) included work done in relation to signage, guideposts and chevrons; and
- whether the council had actual knowledge of the particular risk that caused the plaintiff’s harm.

On the first issue the court held that the definition of ‘*road work*’ should be interpreted as relating to things which road users travel over, under, across or through. Signage, chevrons and guideposts were held to be of a different character and thus outside the ambit of ‘*road work*’.

As to the second issue, the court held that the council had actual knowledge of the risk on the basis that the council had a system which included reports and monthly meetings where signage was discussed. Therefore the immunity did not apply. It is worth noting that this finding was based on inference as opposed to direct evidence.

⁵⁸⁸ *Civil Liability Act 2002 (WA)* s 5X.

⁵⁸⁹ [2010] WASC 45.

⁵⁹⁰ *Civil Liability Act 2002 (WA)* s 5Z.

⁵⁹¹ [2009] WADC 129.

Liability of volunteers and Good Samaritans⁵⁹²

Volunteers

Similar to South Australia, Western Australia has separate legislation pertaining to the liability of volunteers. The *Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA)* (**VFODA (WA)**) applies to the actions of volunteers doing community work for community organisations only.

'Community work' is defined in VFODA (WA) to be work organised by a community organisation for specified purposes including religious, charitable, benevolent, environmental, educational or sporting purposes.

'Community organisation' is defined in VFODA (WA) to be:

- a State agency or instrumentality or a department of the Public Service; or
- an incorporated association under the *Associations Incorporation Act 1987 (WA)*, a local government or other body corporate;

that organises the doing of community work by volunteers.

Under VFODA (WA), a volunteer does not incur civil liability for anything done in good faith when doing community work. This protection does not apply to a volunteer who knew or ought reasonably to have known that they were acting outside the scope of the 'community work' or outside the instructions given by the 'community organisation' or if they were significantly impaired by drugs or alcohol.⁵⁹³

A volunteer is prohibited from providing a 'community organisation' with an indemnity against (or from making contribution towards) a 'community organisation' in relation to civil liability the volunteer himself would incur or which the 'community organisation' incurs.⁵⁹⁴

Food donors

VFODA (WA) provides protection to persons who donate food and grocery products for charitable purposes against civil liability for personal injury resulting from the consumption of food.⁵⁹⁵ Such protection is only extended where the food or grocery product is donated in good faith, without a requirement for payment, is fit for human consumption and/or safe to use, and all instructions with respect to consumption, handling requirements and/or time limits on the food and groceries were given to the consumer.

Good Samaritans

The liability of Good Samaritans is dealt with under pt 1D of the CLA (WA) and provides a Good Samaritan with immunity from personal civil liability in respect of an act or omission done or made at the scene of an emergency so long as the act or omission was made in good faith and without recklessness. The CLA (WA) seems to limit the protection to emergency situations only, as it provides no other scenarios for such protection.

There is a separate provision for medically trained personnel who volunteer their services, however it should be noted medical practitioners do not have a duty to render medical assistance at the site of an accident.⁵⁹⁶

⁵⁹² *Civil Liability Act 2002 (WA)* pt 1CA and 1D (ss 5AB–5AE); *Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA)*.

⁵⁹³ *Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA)* s 6(3).

⁵⁹⁴ *Ibid* s 8.

⁵⁹⁵ *Ibid* s 8A.

⁵⁹⁶ *Dekker v Medial Board of Australia* [2014] WASCA 216.

Indemnity also extends to teachers and staff of child care in circumstances where they are providing emergency medical treatment to a child under their care.⁵⁹⁷

Liability for mental harm⁵⁹⁸

In Western Australia, a person does not owe a duty of care not to cause a plaintiff mental harm unless the person ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness, in the circumstances of the case, if reasonable care was not taken.⁵⁹⁹ The ‘*circumstances of the case*’ include:

- whether or not the mental harm was suffered as the result of a sudden shock;
- whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
- the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
- whether or not there was a pre-existing relationship between the plaintiff and the defendant; and
- for cases involving consequential mental harm, the personal injury suffered by the plaintiff.

This issue was recently considered in the case of *Kent v Mullally* [No. 2].⁶⁰⁰ In that case the defendant contended that it did not owe the plaintiff a duty of care not to cause mental harm because the plaintiff could not prove on the balance of probabilities that the defendant knew or ought to have known that its failure to remove a hazard would result in a recognised psychiatric injury to the plaintiff. The District Court of Western Australia rejected the submission and held the psychiatric harm suffered by the plaintiff in reaction to physical injuries suffered as a result of the defendant’s failure to clean up a hazard was reasonably foreseeable in the circumstances.

Intoxication and illegal activity⁶⁰¹

Intoxication

If the plaintiff is found to be intoxicated at the time the incident occurred, and the intoxication was self-induced, contributory negligence will be presumed⁶⁰² unless the plaintiff establishes on the balance of probabilities that the person’s intoxication did not contribute in any way to the cause of the harm.

The defendant must raise a plaintiff’s intoxication in order to invoke the statutory presumption of contributory negligence.

In *D’Vorak v Hiscox*⁶⁰³ the court considered contributory negligence in circumstances of intoxication. The plaintiff was rendered a quadriplegic after the defendant, engaging in apparent ‘horse-play’, seized him in a bear hug at a party and thrust him onto a trampoline. The plaintiff’s friend was on the trampoline at the time and inadvertently landed on the plaintiff’s head, breaking his neck. The defendant argued for a finding of contributory negligence against the plaintiff in relation to his consumption of alcohol leading to the ‘horse-play’. The court concluded that even if it was satisfied that the plaintiff was intoxicated, it would reject the proposition that the plaintiff’s consumption of alcohol contributed in any way to the cause of harm. Once seized by the defendant the plaintiff was powerless to control what happened.

⁵⁹⁷ *Civil Liability Act 2002* (WA) pt 1CA.

⁵⁹⁸ *Ibid* pt 1B ss 5Q–5T.

⁵⁹⁹ *Ibid* s 5S.

⁶⁰⁰ [2016] WADC 37.

⁶⁰¹ *Civil Liability Act 2002* (WA) pt 1A div 5 s 5L.

⁶⁰² *Ibid* s 5L.

⁶⁰³ [2008] WADC 152.

Illegal activity

Unlike most other jurisdictions the Act does not expressly prevent recovery of damages or reduce the amount of damages in the event the plaintiff is injured while involved in illegal activity. Defendants are left with illegality defences available at common law.⁶⁰⁴

The recent decision in *Miller v Miller*⁶⁰⁵ has further consolidated and clarified the law surrounding illegality and intoxication in negligence. The case involved a 16 year old girl who, after being refused entry to a nightclub and having missed the last train home, decided to steal a car. The appellant was unlicensed and had been drinking. The appellant's second cousin and respondent in the matter took responsibility for driving the car. After initially driving safely the respondent commenced driving in a dangerous and reckless manner. The appellant asked the respondent to drive more sensibly and later asked to be let out of the vehicle. The respondent refused. The respondent subsequently lost control of the vehicle and the car struck a pole. The appellant was seriously injured and rendered a tetraplegic. The central issue at trial was whether or not the respondent owed a duty of care to the appellant.

At first instance the District Court of Western Australia held that a duty of care was owed to the appellant. On appeal however, the Western Australia Court of Appeal held that no duty of care was owed on the basis that the appellant and the respondent had jointly engaged in illegal conduct. The appellant appealed to the High Court.

In a joint opinion, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ determined that immediately prior to the accident, the appellant and the respondent were no longer engaged in a joint illegal enterprise because the appellant had terminated her complicity in the respondent's illegal acts when she requested to be allowed to exit the vehicle. Consequently, the respondent was deemed to have owed the appellant a duty of care and the appeal was allowed.

Contributory negligence⁶⁰⁶

The CLA (WA) provides that the principles that apply in determining primary liability also apply in determining whether there has been any contributory negligence.⁶⁰⁷

The standard of care required of the person who has suffered harm is that of a reasonable person in the position of that person and the matter is to be determined on the basis of what that person knew or ought to have known at the time.

Section 4 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) states that where the court is satisfied there has been contributory negligence on the part of the plaintiff, the court shall reduce the amount of damages awarded to the plaintiff accordingly. This is typically done in terms of percentages.

Unlike the legislative changes in Queensland, New South Wales, South Australia and Tasmania, there is no minimum reduction for contributory negligence in Western Australia. However, unlike other jurisdictions, Western Australia has no express provision that contributory negligence can defeat the claim. This was noted in *Hutch v Ryan*⁶⁰⁸ where the District Court of Western Australia held the legislation did not permit a finding of contributory negligence to the extent of 100%, so a finding of 90% contributory negligence was made. However, findings of 100% contributory negligence in Western Australia have been made in the past.⁶⁰⁹

⁶⁰⁴ For a helpful analysis of the available common law defences, see the article 'A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort.' [2007] 29 *Sydney Law Review* 445.

⁶⁰⁵ (2011) 275 ALR 611.

⁶⁰⁶ *Civil Liability Act 2002* (WA) pt 1A div 5 ss 5K–5L.

⁶⁰⁷ *Ibid* s 5K.

⁶⁰⁸ [2015] WADC 16.

⁶⁰⁹ *Markey v Scarboro Surf Life Saving Club Inc & Anor* [2007] WADC 194.

It is important to note contributory negligence is a concept that will turn on the facts of each case. What is considered negligent conduct on the part of a plaintiff in respect of the cause of his or her own injuries is entirely circumstantial. However, there are guiding principles that courts rely upon in assessing a plaintiff's conduct. Any conclusion of contributory negligence on the part of the plaintiff will result in an apportionment of liability. The approach of the court is therefore twofold. Firstly, to determine negligence on the part of the plaintiff, and secondly, to attribute a value or weight to such negligence, usually expressed as a percentage. The principles involved when exercising a judicial discretion to apportioning liability for contributory negligence was considered by the Court of Appeal in *Gorman v Scofield*⁶¹⁰ and subsequently applied in *Beydoun v Burswood Nominees Ltd.*⁶¹¹

'An assessment of the culpability of a plaintiff and a defendant, for the purposes of apportionment, requires a consideration of the relative importance of the conduct of each party in causing the damage. The whole conduct of each negligent party in relation to the circumstances of the accident must be subjected to comparative examination.'

A finding on a question of apportionment, as between a defendant who has been found to be negligent and a plaintiff who has been found guilty of contributory negligence, is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds": British Fame (Owners) v MacGregor (Owners) [1943] AC 197 at 201. It is well-established that such a finding, if made by a Judge, is not lightly reviewed.'

In *Gorman v Scofield*⁶¹² it was held that where a plaintiff motorcyclist collided with the rear of the defendant's vehicle, the plaintiff's manner of driving was so reckless and conducted with such 'blatant disregard' for his own safety or his pillion passenger and other road users, that he was more culpable than the defendant. In the appeal, the court increased the contributory negligence from 50% to 65%.

In *Town of Port Hedland v Hodder (No. 2)*⁶¹³ the Western Australian Court of Appeal considered at length the case for adopting a more flexible standard in determining whether the mentally disabled can be contributory negligent. In that case, the respondent was born with cerebral palsy and intellectual disability. He was blind, deaf and virtually unable to speak. He attended a public swimming pool accompanied by family members where he proceeded to mount a diving block (one of eight placed on the edge of the shallow end of the pool). He entered the water head first, striking his head on the bottom of the pool and fracturing his cervical spine. The accident rendered him quadriplegic. Despite dissent by Martin CJ, the court ultimately determined that a finding of contributory negligence should be made without reference to disability, confirming the generally objective standard of care by which contributory negligence is assessed.

As discussed above, s 5L CLA (WA) provides for a presumption of contributory negligence in circumstances where a person who suffers harm is intoxicated, unless they can prove the intoxication did not contribute in any way to the cause of the harm.

⁶¹⁰ [2008] WASCA 78.

⁶¹¹ [2009] WADC 64.

⁶¹² [2008] WASCA 78.

⁶¹³ [2012] WASCA 212.

Proportionate liability⁶¹⁴

The proportionate liability provisions in the CLA (WA) apply to causes of action that arise after 1 December 2004.

The Western Australian provisions provide in proceedings involving an apportionable claim, the liability of a defendant who is a concurrent wrongdoer is limited to an amount reflecting the proportion of the damage or loss claimed, or that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.⁶¹⁵

An apportionable claim is defined as meaning 'a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care or a claim for economic loss or damage to property in an action for damages under the Fair Trading Act 2010 (WA) based on misleading or deceptive conduct'.⁶¹⁶

The definition of a 'concurrent wrongdoer' is 'a person who is one of two or more persons whose act or omission caused, independently of each other or jointly, the damage or loss that is the subject of the claim'.⁶¹⁷ A court can have regard to the responsibility of concurrent wrongdoers who are not party to the proceedings; it does not matter that the concurrent wrongdoer is insolvent, being wound up, or has ceased to exist or died.

In the Western Australian decision of *Orchard Holdings Pty Ltd v Paxhill Pty Ltd (as trustee for Paxhill Trust t/as Property People)*,⁶¹⁸ Allanson J stated that 'proportionate liability legislation was designed to alleviate the perceived injustice in the growing number of actions against parties whose culpability was low, but who were singled out for action because of their capacity to pay large damages awards'. As with the legislative provisions in other Australian jurisdictions, the Western Australian proportionate liability provisions do not apply to concurrent wrongdoers who intentionally or fraudulently cause loss or damage. These parties are known as 'excluded concurrent wrongdoers'.

If proceedings involve an apportionable claim and a non-apportionable claim, liability for the non-apportionable aspect of the claim will be determined in accordance with ordinarily applicable legal rules.⁶¹⁹ The principle of joint and several liability may apply to non-apportionable parts of a plaintiff's claim. This is consistent with the legislation in South Australia, New South Wales, Tasmania and the Australian Capital Territory.

The Western Australian legislation provides the court is to consider the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings when deciding on an apportionment of responsibility,⁶²⁰ in line with the legislative provisions of Queensland and New South Wales.

Additionally a court is also required to appropriately reduce a plaintiff's overall claim in respect of the proportion of the loss attributable to the plaintiff's contributory negligence as part of the overall apportionment process.⁶²¹

⁶¹⁴ *Civil Liability Act 2002* (WA) pt 1F ss 5AI–5AO.

⁶¹⁵ *Ibid* s 5AK.

⁶¹⁶ *Ibid* s 5AI. Note that personal injury claims are specifically excluded from the application of the Western Australian provisions.

⁶¹⁷ *Ibid* s 5AI.

⁶¹⁸ [2012] WASC 271.

⁶¹⁹ Goudkamp, 'A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort', (2007) 29 *Sydney Law Review* 445.

⁶²⁰ *Miller v Miller* (2011) 275 ALR 611.

⁶²¹ *Hodder by his next friend Elaine Georgina Hodder v Town of Port Headland* [2012] All ER (D) 367.

Of significance in the Western Australian legislation is the provision for all or any of the sections under the part dealing with proportionate liability to be excluded, modified or restricted.⁶²² This result can be affected by a written agreement signed by the relevant parties.⁶²³

Concurrent wrongdoers are required to assist the plaintiff in identifying other concurrent wrongdoers⁶²⁴ and failure to do so can have adverse cost consequences for the offending concurrent wrongdoer.⁶²⁵ The court may otherwise give leave for the joinder of other concurrent wrongdoers to the proceedings, even where the plaintiff has not joined that person as a defendant.⁶²⁶

There is no onus on the plaintiff to make a claim against all persons the plaintiff reasonably considers to be liable (which differs from the position in Queensland).

The Western Australian provisions prohibit recovery between concurrent wrongdoers by way of claims for contribution or requirements to indemnify.⁶²⁷ Of considerable importance is a qualification to the limits imposed on recovery between concurrent wrongdoers, whereby agreements between defendants to contribute to damages recoverable from or to indemnify other concurrent wrongdoers remain unaffected. This qualification does not appear in the legislative provisions of Queensland, New South Wales, Victoria or the Australian Capital Territory, but is similar to Tasmania and the Northern Territory. The clear qualification present in the Western Australian legislation raises doubts as to the ability of concurrent wrongdoers in other jurisdictions to rely on agreements providing for contribution or indemnity in respect of apportionable claims where there is no such explicit qualification.

Finally, in relation to apportionable claims, the Western Australian provisions do not prevent the principles of vicarious liability from operating, nor do they prevent the principles of joint and several liability applying to partnership relationships.⁶²⁸

In *Curtin University of Technology v Woods Bagot Pty Ltd*,⁶²⁹ the Western Australian Supreme Court held that proportionate liability provisions of the CLA (WA) do not, as a matter of legislative force, apply to commercial arbitrations. The parties' dispute arose from a construction contract, requiring all disputes to be determined by arbitration. At the arbitration, the respondent sought to invoke the proportionate liability legislation on the basis that there were other concurrent wrongdoers responsible for the losses alleged by the claimant Curtin University. The court found that the proportionate liability regime was inapplicable in arbitral proceedings. An arbitrator's jurisdiction was sourced from the agreement between the parties of the arbitration, and thus an arbitrator is unable to join other wrongdoers to an arbitration absent their consent (s 5AN CLA (WA)). The court left open the possibility that the proportionate liability provisions may be expressly or impliedly adopted by the parties in their arbitration agreement.

Vicarious liability

It is well recognised that an employer will be found vicariously liable for a wrongful, unauthorised or negligent act or omission of an employee which is carried out in the course of his or her employment and which is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act.⁶³⁰

⁶²² *Gorman v Scofield* [2008] WASCA 78.

⁶²³ *Beydoun v Burswood Nominees Ltd & Anor* [2009] WADC 64.

⁶²⁴ *Gorman v Scofield* [2008] WASCA 78 [20] – [21].

⁶²⁵ *Markey v Scarborough Surf Life Saving Club Inc & Anor* (2007) 55 SR (WA) 130

⁶²⁶ *Civil Liability Act 2002* (WA) s 5AN.

⁶²⁷ *Hart v JGC Accounting & Financial Services Pty Ltd* (2015) 47 WAR 582.

⁶²⁸ *Civil Liability Act 2002* (WA) s 5AKA (2).

⁶²⁹ [2012] WASC 449.

⁶³⁰ The principles governing vicarious liability were endorsed in the High Court case of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland* (2003) 195 ALR 412 in which three appeals were held simultaneously.

An employer will not always be held responsible for the actions of his or her employees.⁶³¹ The act must be closely connected with his or her employment for vicarious liability to attach. Whether an employer will be held vicariously liable for the actions of his or her employee will also depend upon the specific facts in each case.

The Western Australia Court of Appeal in *Kelly v Bluestone Global Ltd and Anor*⁶³² considered the question of whether there had been sufficient transfer of control from the employer (a labour hire company) to a host employer – and whether the host employer, as opposed to the actual employer, was vicariously liable for the negligent acts of a labour hire employee.

The plaintiff was a mine employee. During the course of his employment, the plaintiff reversed a dump truck into an area directly underneath the fully loaded excavator bucket driver by Mr Scanlan. Mr Scanlan dropped the bucket onto the tray of the plaintiff's truck, causing the truck to shake violently, and causing neck and back injuries to the plaintiff.

Mr Scanlan was employed by a labour hire company and worked for the mine operator. The plaintiff claimed the labour hire company was vicariously liable for the actions of Mr Scanlan.

The plaintiff was unsuccessful at first instance and on appeal. On appeal, the court held that Mr Scanlan operated the excavator within the usual and accepted practice to which he was trained. As such, there was no breach of duty of care owed to the plaintiff on the part of Mr Scanlan. Further, the court determined that control over Mr Scanlan had been completely transferred to the host employer (the mine owner) and accordingly, the labour hire company could not be found vicariously liable for Mr Scanlan's negligence (if any).

In finding that there had been a transfer of control to the host employer, the court noted that host employer provided all inductions and training, coordinated all works, safety inspections and arranged transport and onsite accommodation for Mr Scanlan. The terms of the employment contract also expressly stated that Mr Scanlan submit to the directions of the host employer. Finally, the labour hire company had no involvement in the day to day operations on site.

Western Australia does not currently have any legislative provisions which abrogate the common law position on vicarious liability.

Non-delegable duties

Where a person owes a 'non-delegable duty' to take reasonable care in completing a task, that person is still required to fulfil the duty even where the task is delegated to a third party. Where the third party to whom a task has been delegated fails to exercise reasonable care, the person's non-delegable duty will have been breached and they may bear liability.

Existing categories of non-delegable duties continue to evolve. The known criteria include the superior capacity of the defendant to bear the risk of the mishap; special obligations attaching to extra-hazardous activities; and the special dependence or vulnerability of the person to whom the duty is owed.⁶³³

⁶³¹ *New South Wales v Lepore, Samin v Queensland, Rich v Queensland* (2003) 212 CLR 515.

⁶³² [2016] WASCA 90.

⁶³³ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

Common established relationships in which non-delegable duties exist include:

- employer and employee;⁶³⁴
- host employer and contractor;⁶³⁵
- school and student;⁶³⁶
- hospital and patient.⁶³⁷

Western Australia does not currently have any legislative provisions which abrogate the common law position on non-delegable duties of care.

Exclusion clauses⁶³⁸

Section 5J of the CLA (WA) expressly allows a contract for the supply of recreational services to exclude, restrict or modify any liability that results from a breach of an express or an implied warranty that the services will be rendered with reasonable care and skill. To be upheld the exclusion clause needs to abide by common law principles and the person or entity including such a clause should ensure that the clause is clearly incorporated into the contract. The contract needs to be specifically drafted to cover the factual scenario encountered by the person or entity seeking to enforce it, and to the extent possible, brought to the attention of the other party to the contract.⁶³⁹

To date, there have been no cases which have considered s 5J of the CLA (WA).

Where the claim is one captured by the Australian Consumer Law there are certain guarantees which cannot be excluded or limited by contract. See div 2–3 of sch 2 of the *Competition and Consumer Act 2010* (Cth).

Expressions of regret and apologies⁶⁴⁰

An apology made in connection with any matter alleged to have been caused by the fault of a person does not amount to an admission and is not admissible in any civil proceedings as evidence of fault or liability.⁶⁴¹ This applies to civil liability of any kind except to those situations as excluded by CLA (WA) s 3A.

An ‘apology’ is defined as ‘an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgement of fault by that person’.⁶⁴²

In *Blythe v Hamblin*⁶⁴³ the plaintiff asserted the defendant’s failure to apologise for negligently removing vegetation from his land was a basis for an award of aggravated damages. The court distinguished the significance of an apology in an action for defamation (where the absence of an apology is an important factor in assessing aggravated damages), from an action in negligence, where an apology is inadmissible.

⁶³⁴ *Kondis v State Transport Authority* (1984) 154 CLR 672; Also see *Fraser v Burswood Resort (Management) Ltd* [2014] WASCA 130.

⁶³⁵ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Limited v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* [2003] NSWCA 47.

⁶³⁶ *Commonwealth v Introvigne* (1982) 150 CLR 258; Affirmed in *Gugiatti v Servite College Council Inc* (2004) Aust Torts Reports 81–724.

⁶³⁷ *Samios v Repatriation Commission* [1960] WAR 219.

⁶³⁸ *Civil Liability Act 2002* (WA) pt 1A div 4 s 5J.

⁶³⁹ As the Western Australian provisions are similar to the provisions in New South Wales, the decision of *Lormine Pty Ltd & Anor v Xuereb* [2006] NSWCA 200 may be relevant.

⁶⁴⁰ *Civil Liability Act 2002* (WA) pt 1E ss 5AF and 5AH(1).

⁶⁴¹ *Ibid* s 5AH.

⁶⁴² *Ibid* s 5AF.

⁶⁴³ (2009) 68 SR (WA) 20.

For High Court guidance on the distinction between admissions and apologies see *Dovuro Pty Ltd v Wilkins*.⁶⁴⁴

Limitation periods⁶⁴⁵

Under the *Limitation Act 2005 (WA)*, which applies to causes of action arising after 15 November 2005, Western Australia has the following relevant limitation periods:

1. An action for damages relating to personal injury or death cannot be commenced if three years has elapsed since the cause of action accrued.⁶⁴⁶
2. A cause of action for damages relating to personal injuries accrues when a person becomes aware they have sustained a not insignificant injury or where the first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a not insignificant personal injury occurs.⁶⁴⁷
3. A court will have power to extend time beyond the initial three year period in circumstances where the victim was unaware of the cause of injury, identity of the person responsible or was unable to establish that person's identity.⁶⁴⁸
4. On application a court may extend the time in which the action can be commenced if the court is satisfied the failure to commence the action was attributable to fraudulent or other improper conduct by the defendant or a person for whom the defendant is vicariously liable.⁶⁴⁹
5. An action for contribution under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1974 (WA)* s 7 cannot be commenced if two years have elapsed since the cause of action accrued.⁶⁵⁰
6. If a child is under 15 years of age when a cause of action accrues an action cannot be commenced if 6 years have elapsed since the cause of action accrued.⁶⁵¹
7. If a child is 15, 16 or 17 years of age when a cause of action accrues, an action cannot be commenced if the person has reached 21 years of age.⁶⁵²
8. If a child is under 18 years of age when a cause of action accrues and during any time after the accrual, but before the child turns 18, the child is without a guardian, the time during which the child is without a guardian does not count in considering the limitation period for commencing an action, although the cause of action must be commenced before the person reaches 21 years of age.⁶⁵³
9. If a child is under 18 years of age when a cause of action accrues, and during any time after accrual, but before the child turns 18, a defendant is a person in a close relationship (as defined in s 35) with the child, an action on that cause of action cannot be commenced once the child has reached 25 years of age.⁶⁵⁴
10. If a person is suffering a mental disability at any time after a cause of action accrues and during the time in which the person is suffering the mental disability he or she is without a guardian, the time during which the person is without a guardian does not count in the reckoning of a limitation period for commencing an action. It should be noted that an action cannot be commenced in these circumstances if 12 years have elapsed since the cause of action accrued.⁶⁵⁵

⁶⁴⁴ (2003) 215 CLR 317.

⁶⁴⁵ *Limitation Act 2005 (WA)*.

⁶⁴⁶ *Ibid* s 14.

⁶⁴⁷ *Ibid* s 55(1).

⁶⁴⁸ *Ibid* s 39(3).

⁶⁴⁹ *Ibid* s 38(2).

⁶⁵⁰ *Ibid* s 17.

⁶⁵¹ *Ibid* s 30(1).

⁶⁵² *Ibid* s 31(1).

⁶⁵³ *Ibid* s 32.

⁶⁵⁴ *Ibid* s 33(1).

⁶⁵⁵ *Ibid* ss 35(1) and 35(2).

11. If a person is suffering a mental disability at any time after a cause of action accrues to the person and during the time in which the person is suffering the mental disability a defendant is a person in a close relationship with the person, an action cannot be commenced if three years have elapsed since the relationship ceased but an action on the cause of action cannot be commenced if three years have elapsed since the cause of action accrued.⁶⁵⁶

The limitation period can also be shortened in the same way as it can be extended if the court considers it is just and reasonable.⁶⁵⁷

Damages Awards

General damages⁶⁵⁸

Western Australia does not apply a cap on an award of general damages for non-pecuniary loss but applies an indexed threshold. The threshold amounts for assessments of damages occurring in the financial year ending 30 June 2003 are specified in s 9 CLA (WA). For subsequent years, the threshold amounts are calculated pursuant to formulae present in s 4 CLA (WA). The figures for Amount A and Amount C for the 2017 financial year are set out in the table below:

Date	Amount A	Amount C
1 July 2016 – 30 June 2017	\$20,500	\$61,500

Where general damages are assessed at or below Amount A, no award will be made.⁶⁵⁹ Where the assessment falls between Amount A and Amount C, the amount assessed is reduced by Amount A.⁶⁶⁰ Where the assessment is more than Amount C, but not as much as the sum of Amount A and Amount C, the assessed damages must be reduced by the following amount:⁶⁶¹

$$\text{Amount A} - (\text{damages assessed} - \text{Amount C})$$

For example, if a judge assessed damages on 2 July 2016, Amount A would be \$20,500 and Amount C would be \$61,500. If the judge assessed general damages at \$70,000, s 9 CLA (WA) requires that the assessment be reduced by:

$$\$20,500 - (\$70,000 - \$61,500) = \$12,000.$$

Thus, the general damages award would be \$58,000.

On or before each 1 July, the Minister is required to publish a notice in the *Gazette* specifying the amounts for Amount A and Amount C for the financial year commencing on that date. Those notices can be accessed electronically at <https://www.slp.wa.gov.au/gazette>.

The court may refer to earlier decisions of that court or other courts for the purpose of establishing an appropriate award in a proceeding.⁶⁶²

⁶⁵⁶ Ibid s 36(1) and (3).

⁶⁵⁷ Ibid pt 3.

⁶⁵⁸ *Civil Liability Act 2002* (WA) pt 2 div 2 ss 9–10A.

⁶⁵⁹ Ibid s 9(1).

⁶⁶⁰ Ibid s 9(2).

⁶⁶¹ Ibid s 9(3).

⁶⁶² *Pitchen v Cado Metal Design Pty Ltd* (2008) 57 SR (WA) 106.

Economic loss⁶⁶³

The *Civil Liability Act 2002* (WA) provides that in assessing damages for economic loss (including a dependency claim), the court is to disregard earnings in excess of three times the average weekly earnings at the date of the award.⁶⁶⁴ Aside from the cap, there are no provisions that relate specifically to the calculation of future economic loss or economic loss.

Gratuitous care⁶⁶⁵

No damages are to be awarded for gratuitous services if the services required would have been provided to the person even if the person had not suffered the personal injury.⁶⁶⁶

For damages for gratuitous care required because the person has suffered the personal injury, Western Australia has implemented a minimum threshold.⁶⁶⁷ The threshold is described as Amount B.⁶⁶⁸ The minister specifies Amount B in the same Gazette in which Amount A and Amount C are specified each financial year.

Where the services provided are 40 or more hours per week, the weekly allowance for care is not to exceed the average weekly earnings (as estimated by the Australian Statistician) for the relevant quarter in which the services were provided.⁶⁶⁹

Where the services are less than 40 hours per week, the allowance is to be made according to an hourly rate not exceeding one fortieth of the average weekly earnings for the relevant quarter in which the services were provided.⁶⁷⁰ The case of *Churchill v Brown*⁶⁷¹ demonstrates the difficulties involved in determining causation and applying principles of gratuitous attendant care where several accidents occurred and the damage from each was required to be isolated.

Interest

The CLA (WA) does not contain any restrictions on a claim for interest on damages awards for civil liability claims. Interest is payable at the interest rate fixed by the *Supreme Court Act 1935* (WA).

Discount rate⁶⁷²

Section 5 provides that the present value of the future loss shall be quantified by adopting a discount rate of the percentage fixed by the Governor by order; or, where no percentage is fixed, a discount rate of 6%.⁶⁷³

⁶⁶³ *Civil Liability Act 2002* (WA) pt 2 div 2 (s 11).

⁶⁶⁴ This amount is estimated by reference to the average weekly total earnings of a full-time adult employee in Western Australia as calculated by the Australian Statistician for the quarter ending most recently before the date of the award.

⁶⁶⁵ *Civil Liability Act 2002* (WA) pt 2 div 3 (s 12).

⁶⁶⁶ *Ibid* s 12(2).

⁶⁶⁷ *Ibid* s 12(3).

⁶⁶⁸ Amount B is defined in CLA (WA) s 13. For the financial year ending June 2003, Amount B was \$5,000. For subsequent years, Amount B is varied according to the formulae in CLA (WA) s 4.

⁶⁶⁹ *Civil Liability Act 2002* (WA) s 12(5).

⁶⁷⁰ *Ibid* s 12(7).

⁶⁷¹ (2004) 35 SR (WA) 319 and on appeal (2006) 31 WAR 246.

⁶⁷² *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 5.

⁶⁷³ *Ibid* s 5(d) and (e).

Exemplary, punitive or aggravated damages

The ability of the courts to make awards for acts of intentional wrongdoing including punitive, exemplary and/or aggravated damages has not been restricted by the Western Australian legislative reform and there has been no stated intention to do so.

Structured settlements⁶⁷⁴

Western Australia has included provisions in the *Civil Liability Act 2002 (WA)* to encourage and facilitate structured settlements. 'Structured settlement' is defined in s 14 as 'an agreement that provides for all or part of the damages agreed or awarded to be paid in the form of periodic payments funded by annuity or other agreed means'.

Practice and Procedure

Legal costs

There are no legislative caps upon legal costs incurred in personal injury proceedings in Western Australia.

⁶⁷⁴ *Civil Liability Act 2002 (WA)* pt 2 div 4 ss 14–15.

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Northern Territory



NORTHERN TERRITORY

Application of Statutory Reforms

The *Personal Injuries (Liabilities and Damages) Act 2003* (NT) (**Personal Injuries Act**) applies to all civil claims for damages for personal injuries from 1 May 2003. The *Personal Injuries (Civil Claims) Act 2003* (NT) provides pre-proceeding steps to be taken before an action is commenced. The Act does not apply to actions resulting from motor vehicle accidents, workers compensation and dust related conditions.⁶⁷⁵

The *Motor Accident (Compensation) Act 1979* (NT) applies to motor vehicle injuries, the *Return to Work Act 2015* (NT) applies to workplace injuries.

Pre-court Procedures

The *Personal Injuries (Civil Claims) Act 2003* (NT) outlines the various steps that must be completed prior to court proceedings being instituted for applicable personal injury claims. The provisions are modelled on the *Personal Injuries Proceedings Act 2002* (Qld) and have been designed to encourage the early resolution of claims.⁶⁷⁶

A claimant is required to provide written notice ('*notice of claim*') of his or her claim to the respondent within 12 months of the incident.⁶⁷⁷ If written notice is not served within this time, the claimant must either provide a reasonable reason for the delay or seek an order from the court.⁶⁷⁸ A respondent must, by way of response to the notice of claim, confirm whether they are a proper respondent.⁶⁷⁹

Both the claimant and the respondent are required to provide all information and documents that will enable the parties to identify any other potential parties to the claim, and assess liability and damages.⁶⁸⁰ Similarly to Queensland, legal professional privilege does not extend to medical reports.⁶⁸¹

Before formal proceedings are commenced and once all relevant pre-court steps have been taken, the parties are obligated to participate in a resolution conference.⁶⁸² If the claim does not resolve at the resolution conference, the parties are required to exchange written final offers⁶⁸³ which remain open for acceptance for 14 days. Should the claim fail to resolve within this period, each party must lodge with the court a copy of their written final offer in a sealed envelope.⁶⁸⁴

The Law of Negligence – Scope of Duty of Care

Unlike the other States and the Australian Capital Territory, the Northern Territory has not attempted to re-define in legislation concepts of negligence, duty of care, breach of duty, and causation. Accordingly, the common law position set out in *Wyong Shire Council v Shirt*,⁶⁸⁵ and more recently in *Roads and Traffic Authority of New South Wales v Dederer*,⁶⁸⁶ applies.

⁶⁷⁵ *Personal Injuries (Liability and Damages) Act 2003* s 4.

⁶⁷⁶ *Personal Injuries (Civil Claims) Act* s 3.

⁶⁷⁷ *Ibid* s 8.

⁶⁷⁸ *Ibid* s 8(3).

⁶⁷⁹ *Ibid* s 9.

⁶⁸⁰ *Ibid* s 10.

⁶⁸¹ *Ibid* s 15(2).

⁶⁸² *Ibid* s 11(1).

⁶⁸³ *Ibid* s 11(3).

⁶⁸⁴ *Ibid* s 11(5).

⁶⁸⁵ (1980) 146 CLR 40.

⁶⁸⁶ (2007) 238 ALR 761; [2007] HCA 42.

The most recent application of *Wyong* in the Northern Territory can be found in the decision of *Cook v Modern Mustering Pty Ltd*.⁶⁸⁷ The plaintiff suffered injuries in a helicopter accident while working at a cattle station and commenced proceedings against the owner of the helicopter, the company under which the helicopter was operating and the pilot, claiming that the pilot had breached the duty of care owed to the plaintiff in flying below 500 feet. The plaintiff was unsuccessful in establishing the pilot was in breach of his duty of care, and even if he had, the plaintiff failed to establish causation. This finding prevented the plaintiff from claiming under vicarious liability to the other respondents.

Obvious risks and dangerous recreational activities

The Northern Territory has not enacted any provisions dealing with liability in relation to obvious risks or dangerous recreational activities and continues to rely upon the common law.

Liability of professionals

While some jurisdictions have provisions defining the standard of care for professionals, the common law position in *Rogers v Whitaker*⁶⁸⁸ continues to govern the standard of care of professionals in the Northern Territory.

The Supreme Court of the Northern Territory in the decision of *Jaensch v Campbell*⁶⁸⁹ and more recently in *Young v Central Australian Aboriginal Congress Inc*⁶⁹⁰ applied *Rogers* and confirmed that a medical practitioner has a duty to warn a patient of a material risk inherent in the proposed treatment. The Australian Capital Territory Supreme Court decision in *Dixon v Foote & Calvary Health Care Ltd*⁶⁹¹ which also applied *Rogers* may give further guidance as to the standard to be applied in the Northern Territory.

Similar to legislation enacted in other States, the *Professional Standards Act 2004* (NT) enables the creation of schemes to limit the civil liability of professionals, facilitates the improvement of occupational standards of professionals, protects the consumer of services provided by professionals, and constitutes the Professional Standards Council to supervise the preparation and application of schemes to assist in the improvement of occupational standards and protection of consumers.

Liability of public authorities

With the exception of the Northern Territory, all other Australian jurisdictions with road maintenance responsibilities have enacted some legislative response to the decision of *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council*⁶⁹² and the recommendation contained in the Ipp Report.⁶⁹³

All roads in the Northern Territory are the property of and vested in the Northern Territory and under the care, control and management of the Minister subject to pt 12.3 of the *Local Government Act* (2008) (NT), which relevantly provides that the Northern Territory may by *Gazette notice* place roads or a road reserve under the care, control and management of a council.⁶⁹⁴

While a road remains under the care, control and management of a council, the council will bear responsibility for the maintenance of the road, and will bear liability for any breach of the requisite standard of care in maintaining the road.

⁶⁸⁷ (2015) 304 FLR 176.

⁶⁸⁸ (1992) 175 CLR 479.

⁶⁸⁹ [2001] NTSC 87.

⁶⁹⁰ [2008] NTSC 47.

⁶⁹¹ [2012] ACTSC 101.

⁶⁹² (2001) 206 CLR 512.

⁶⁹³ Final Report of the Review of the Law of Negligence, September 2002.

⁶⁹⁴ *Control of Roads Act 1953* (NT) s 7; *Local Government Act 2008* (NT) s 185.

Pursuant to the *Motor Accidents (Compensation) Act 1979 (NT)*⁶⁹⁵ the issue of fault does not arise in relation to personal injuries or deaths arising from a motor vehicle accident in the Northern Territory. The term ‘*motor accident*’ is defined with the legislation as an occurrence caused by or arising out of the use of a motor vehicle, the motor vehicle moving out of control, or a collision with the motor vehicle (whether stationary or moving). Therefore, the liability of road authorities in negligence is largely irrelevant in the Northern Territory.

Liability of volunteers and Good Samaritans⁶⁹⁶

The Personal Injuries Act limits or excludes liability for volunteers, food donors and Good Samaritans for incidents which arise out of charitable actions.

Volunteers⁶⁹⁷

The Personal Injuries Act stipulates that volunteers will not incur any personal civil liability for a personal injury caused by acts done in good faith and without recklessness, or while doing ‘*community work*’ for a community organisation.⁶⁹⁸

The term ‘*community work*’ is defined within the section to mean any work that is done for the following purposes:

- for a religious, educational, charitable or benevolent purpose;
- for promoting or encouraging literature, science or the arts;
- for the purposes of sport, recreation or amusement;
- for conserving or protecting the environment;
- for establishing, carrying on or improving a community, social or cultural centre;
- for promoting the interests of a local community; or
- for a political purpose.

It does not include work performed under a community work order made under the *Sentencing Act 1995 (NT)*, *Youth Justice Act 2005 (NT)* or *Fines and Penalties (Recovery) Act 2001 (NT)*.

The protections do not however apply to a volunteer who 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 did the act while intoxicated.

A ‘*community organisation*’ incurs the civil liability that would have been incurred by the volunteer doing work for that organisation and is liable for the personal injury caused by the act of the volunteer as if the volunteer were an employee of the community organisation.⁶⁹⁹

Any 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 make a contribution to a community organisation in relation to civil liability the volunteer himself or herself would incur or which the community organisation incurs.⁷⁰⁰

⁶⁹⁵ *Motor Accidents (Compensation) 1979 (NT) Act* s 5.

⁶⁹⁶ *Personal Injuries (Liabilities and Damages) Act 2003 (NT)* ss 7, 7A and 8.

⁶⁹⁷ *Ibid* s 7.

⁶⁹⁸ *Ibid* s 7.

⁶⁹⁹ *Ibid* s 7(3)

⁷⁰⁰ *Ibid* s 7(5).

Donors of food and grocery products⁷⁰¹

Where food or grocery products are donated in good faith for a charitable or benevolent purpose with the intention that the consumer would not be required to pay, and the food or grocery product was safe for consumption and/or use at the time it was donated, the donor is excluded from civil liability caused by the consumption of the food or use of the grocery product.⁷⁰²

Good Samaritans⁷⁰³

Good Samaritans (both generally and medically trained personnel) who are acting in good faith and without recklessness while giving emergency assistance to a person will not incur civil liability for personal injury caused by their actions.⁷⁰⁴ This provision does not apply if the Good Samaritan was intoxicated while giving the assistance or advice.⁷⁰⁵

Liability for mental harm⁷⁰⁶

Liability for mental or nervous shock in respect of injury is extended to include a parent, spouse or defacto partner of the person '*killed, injured or put in peril*' and to other family members where the person was '*killed, injured or put in peril within the sight or hearing*' of them.

Intoxication and illegal activity⁷⁰⁷**Intoxication**⁷⁰⁸

The Personal Injuries Act creates a presumption of contributory negligence if the injured person is found to have been intoxicated.⁷⁰⁹ '*Intoxicated*' is defined within the Personal Injuries Act to mean '*under the influence of alcohol or a drug to the extent that the capacity to exercise proper care and skill is significantly impaired*'.⁷¹⁰ The presumption can only be rebutted if it can be established on the balance of probabilities that the injured person's intoxication did not materially contribute to the incident, or was involuntary.⁷¹¹

Similarly, this presumption arises where an injured person suffers personal injury relying on the care and skill of another person who was intoxicated or were aware or ought to have been aware, was intoxicated.⁷¹² Again, this presumption can be rebutted.⁷¹³

A finding of intoxication will be made by a court if at or about the time of the incident a person had in his or her breath a concentration of 0.08 or more grams of alcohol in 210 litres of exhaled breath; or in his or her blood a concentration of 0.08 or more grams of alcohol in 100 millilitres of blood.⁷¹⁴

If contributory negligence is established, the court must assess damages on the basis that the damages to which the claimant would be entitled in the absence of contributory negligence are to be reduced, because of contributory negligence, by 25% or a greater percentage determined by the court to be appropriate in the circumstances.⁷¹⁵

⁷⁰¹ Ibid s 7A.

⁷⁰² Ibid ss 7A (1) and (2).

⁷⁰³ Ibid s 8.

⁷⁰⁴ Ibid s 8(1) and (2).

⁷⁰⁵ Ibid s 8(3).

⁷⁰⁶ *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 25.

⁷⁰⁷ *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 14–17.

⁷⁰⁸ Ibid ss 14–17.

⁷⁰⁹ Ibid s 14.

⁷¹⁰ Ibid s 3.

⁷¹¹ Ibid s 14(2).

⁷¹² Ibid s 15(1).

⁷¹³ Ibid s 15(2).

⁷¹⁴ Ibid s 16.

⁷¹⁵ Ibid s 17.

Illegal activity⁷¹⁶

The Personal Injuries Act prohibits the recovery of damages for injured persons who are engaged in conduct constituting an offence punishable by imprisonment, and the person's conduct contributed materially to the risk of that injury.⁷¹⁷ This exclusion will not apply if the Court is satisfied that the circumstances of the particular case are exceptional and that to exclude liability in those circumstances would be harsh and unjust.⁷¹⁸

Specific provision is also made to protect occupiers of premises from civil liability for personal injury to a person who is entering or has entered premises with the intention of committing an offence punishable by imprisonment.⁷¹⁹

Contributory negligence⁷²⁰

A person who suffers damage as the result partly of their own failure to take reasonable care and partly of the wrong of another, then the reduction of damages for contributory negligence is by reference to what '*the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage*'.⁷²¹

The issue of contributory negligence under the *Law Reform Act 2016* (NT) (**Law Reform Act**) was considered by the Northern Territory Court of Appeal in the decision of *Preti v Sahara Tours Pty Ltd and Anor.*⁷²² The deceased plaintiff was a Swiss tourist who dived into a waterhole, fatally striking his head on a submerged obstacle. The court⁷²³ in a joint judgment addressed the appropriate test for determining whether the deceased plaintiff was contributory negligent and if so the amount for which damages ought to be reduced on account of it.

In doing so, the court considered the process of apportioning damages as outlined by the High Court in *Pennington v Norris*,⁷²⁴ which requires a comparison of the culpability of each party (culpability being the degree of departure from the standard of care of a reasonable person).

A significant factor in determining any negligence on the part of the deceased plaintiff was evidence of his knowledge of the dangers of his actions. Amongst other things, he was aware of the risk of diving head first into the waterhole, as he might strike his head on the submerged obstacles, because he was previously warned by the tour guide at other similar waterholes of such risks.

While all the risks and dangers known to the deceased plaintiff were commonly known to the defendant, the court ultimately concluded that the combined fault of the respondents significantly outweighed that of the deceased plaintiff and a reduction of only 20% was made for contributory negligence (noting at first instance the trial judge had made a reduction of 50%).

Although the Law Reform Act leaves the assessment of contributory negligence to the discretion of the court, it would appear that in circumstances where contributory negligence is established by intoxication, the Personal Injuries Act provides damages are to be reduced by at least 25%.⁷²⁵

⁷¹⁶ Ibid s 10.

⁷¹⁷ Ibid s 10.

⁷¹⁸ Ibid s 10(2).

⁷¹⁹ Ibid s 9.

⁷²⁰ *Law Reform (Miscellaneous Provisions) Act 1956* (NT) pt V (ss 15–21A).

⁷²¹ Ibid s 16.

⁷²² [2008] NTCA 2.

⁷²³ Mildren, Thomas & Riley JJ.

⁷²⁴ (1956) 96 CLR 10 at 16.

⁷²⁵ *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 17.

Proportionate liability⁷²⁶

The proportionate liability provisions in the *Proportionate Liability Act 2005* (NT) (**PLA (NT)**) apply to claims where the loss occurs after 1 June 2005.⁷²⁷

The long title to the Northern Territory's PLA (NT) succinctly defines the Act's purpose as:

'an Act to replace the common law rule that imposes joint and several liability for economic loss or damage to property caused by concurrent wrongdoers with rules that limit the liability of each concurrent wrongdoer to reflect the extent of the wrongdoer's responsibility for the loss or damage, and for related purposes'.

The Northern Territory legislation applies in relation to an apportionable claim if the loss or damage that is the subject of the claim occurred wholly or partly after the commencement of the PLA (NT).⁷²⁸ Apportionable claims are defined as those concerning a claim for damages (in tort, contract or statute) arising from a failure to take reasonable care, or a claim for loss or damage from a contravention of certain provisions of the *Australian Consumer Law*, by its application under Part 4 of the *Consumer Affairs and Fair Trading Act 1990* (NT).⁷²⁹ Apportionable claims do not include claims arising from personal injury.⁷³⁰

In a proceeding to which the Northern Territory provisions apply, the liability of a defendant who is a concurrent wrongdoer is limited to an amount reflecting the proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage.⁷³¹

The definition of a concurrent wrongdoer is one of two or more persons whose acts or omissions caused (either jointly or independently) the loss or damage that is the subject of the claim.⁷³² In apportioning responsibility for loss and damage between the defendants a court can have regard to the responsibility of concurrent wrongdoers who are not party to the proceedings.⁷³³ Further, it does not matter that the concurrent wrongdoer is insolvent, being wound up, or has ceased to exist or died.⁷³⁴

As with the legislative provisions in other Australian jurisdictions, the Northern Territory proportionate liability provisions do not apply to those concurrent wrongdoers who intentionally or fraudulently cause loss or damage.⁷³⁵

Importantly, if the proceedings involve both an apportionable claim and one that does not fall within the definition of an apportionable claim, then liability for the non-apportionable part of the claim is to be determined in accordance with ordinary applicable legal rules.⁷³⁶ Therefore the principle of joint and several liability may still apply to non-apportionable parts of a plaintiff's claim.

⁷²⁶ *Proportionate Liability Act 2005* (NT).

⁷²⁷ *Ibid* s 2.

⁷²⁸ *Ibid* s 4(1).

⁷²⁹ *Ibid* s 4(2).

⁷³⁰ *Ibid* s 4(3)(a).

⁷³¹ *Ibid* s 13(1)(a).

⁷³² *Ibid* s 6(1).

⁷³³ *Ibid* s 13(2)(b).

⁷³⁴ *Ibid* s 6(2).

⁷³⁵ *Ibid* s 7(1).

⁷³⁶ *Ibid* s 9.

Concurrent wrongdoers are required to assist the plaintiff in identifying other concurrent wrongdoers if they have reasonable grounds to believe that another person may be a concurrent wrongdoer in relation to the apportionable claim.⁷³⁷ A failure to identify other known concurrent wrongdoers can have adverse cost consequences for the offending concurrent wrongdoer.⁷³⁸ There is no onus on the plaintiff to make a claim against all persons who the plaintiff reasonably considers are liable, which differs from the Queensland legislation.⁷³⁹

The Northern Territory legislation allows the court to consider the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings when deciding on an apportionment of responsibility.⁷⁴⁰ This is in line with the legislative provisions of Queensland and New South Wales. A court is required to reduce a claimant's overall claim in respect of the proportion of the loss attributable to the claimant's contributory negligence.⁷⁴¹

The Northern Territory provisions prohibit recovery between concurrent wrongdoers by way of claims for contribution or requirements to indemnify.⁷⁴² However, of considerable importance, is a qualification to the limits imposed on recovery between concurrent wrongdoers, whereby agreements between defendants to contribute to the damages recoverable from, or to indemnify, other concurrent wrongdoers, remain unaffected.⁷⁴³ This qualification does not appear in the legislative provisions of Queensland, New South Wales,⁷⁴⁴ Victoria or the Australian Capital Territory but is similar to Tasmania and Western Australia.

The clear qualification present in the Northern Territory legislation therefore raises doubts as to the ability for concurrent wrongdoers in other jurisdictions to rely on agreements providing for contribution or indemnity in respect of apportionable claims where there is no such explicit qualification. Finally, the Northern Territory provisions do not prevent from operation the principles of vicarious liability, and the principles of joint and several liability in regards to partnership relationships.⁷⁴⁵

There have been no substantive decisions in the Northern Territory which address the judicial application of the PLA (NT). However, in the Federal Court decision of *Shrimp v Landmark Operations Limited*⁷⁴⁶ Besanko J confirmed that the provisions in the PLA (NT) should be construed in the same way as the proportionate liability provisions in the since superseded *Trade Practices Act 1974* (Cth).⁷⁴⁷ Although the *Trade Practices Act 1974* (Cth) has been replaced by the *Competition and Consumer Act 2010* (Cth) the provisions regarding proportionate liability for misleading and deceptive conduct are codified exactly as they were under pt VIA of the *Trade Practices Act 1974* (Cth) under pt VIA of the new Act.

⁷³⁷ Ibid s 12.

⁷³⁸ Ibid s 12(2).

⁷³⁹ *Civil Liability Act 2003* (Qld) s 32(1).

⁷⁴⁰ *Proportionate Liability Act 2005* (NT) s 13(2)(b).

⁷⁴¹ Ibid s 13(2)(a).

⁷⁴² Ibid s 15(1).

⁷⁴³ Ibid s 15(2).

⁷⁴⁴ There is no such section in the New South Wales legislation regarding agreements by defendants to contribute or indemnify remaining unaffected, however the same result can be achieved in New South Wales if the Proportionate Liability sections have been contracted out of. See *Civil Liability Act 2002* (NSW) s 3A(2).

⁷⁴⁵ *Proportionate Liability Act 2005* (NT) s 14.

⁷⁴⁶ (2007) 163 FCR 510.

⁷⁴⁷ See the Commonwealth section of 'Proportionate Liability' for further information on pt VIA of the *Trade Practices Act 1974* (Cth).

The issue before Besanko J in *Shrimp*, was whether the proportionate liability provisions in the *Trade Practices Act 1974* (Cth) can apply in circumstances where a person is liable for damage, but does not have any liability to the plaintiff for the damage. The claim related to grass seeds supplied to the plaintiff by the first defendant, which, as a result of the incorrect grass seeds being supplied, resulted in substantial losses to the plaintiff. The plaintiff pleaded the defendant was in breach of the express and implied contractual terms, negligence and the defendant engaged in misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth). Various cross-claims were issued between the defendant and third parties that were involved in the supply of the grass seeds, and the testing of the grass seeds. The plaintiff applied to the Federal Court for orders that the principal proceedings (the plaintiff's claim against the defendant) should be heard separately from the cross-claim proceedings with the third parties. This application was opposed by the defendant and various third parties.

The application was then amended to have the court order that all matters of law and fact decided in the severed action be binding on all parties to the various cross claims in the matter. The cross defendants argued that the claim as between the plaintiff and the defendant was an 'apportionable' claim within the meaning of pt VIA of the *Trade Practices Act 1974* (Cth). It was considered that if a separate trial between the plaintiff and the defendant went ahead, the court would be required by pt VIA to make a determination on each of the cross defendants' liability and if the application had succeeded, the various cross defendants would not be given the opportunity to be heard at the primary trial on matters of law and fact relevant to each of the cross defendants' liability.

The plaintiff contended that the definition of a 'concurrent wrongdoer' in s 87CB(3) of the *Trade Practices Act 1974* (Cth) includes other persons whose acts or omissions caused the loss or damage. The defendant and third parties submitted that a 'concurrent wrongdoer' should include another category of persons, being persons responsible for the damage but that are not liable to the plaintiff for the damage. This was not accepted by Besanko J as the purpose behind the proportionate liability provisions in the *Competition and Consumer Act 2010* (Cth). In dismissing the plaintiff's application, Besanko J stated that the proportionate liability provisions would not apply in these proceedings, as there was no legal cause of action between the plaintiff and the third parties with respect to the loss and damage.

Vicarious liability

The Northern Territory has not introduced any legislative reforms dealing with the concept of vicarious liability.

At common law an employer can be found vicariously liable for a wrongful, unauthorised or negligent act of an employee which is carried out in the course of his or her employment and is so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court decision of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland*⁷⁴⁸ in which three appeals were heard simultaneously.

An employer will not always be held responsible for the actions of his or her employees;⁷⁴⁹ the act must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be held vicariously liable for the actions of his or her employee will depend upon the specific facts in each case.

For more information on vicarious liability see the Queensland, New South Wales and Victorian sections of this guide.

⁷⁴⁸ (2003) 212 CLR 511.

⁷⁴⁹ *Ibid.*

Non-delegable duties

The Northern Territory has not enacted any legislation concerning non-delegable duties.

For further information regarding non-delegable duties, please refer to the Queensland section of this guide.

Exclusion clauses

The Northern Territory legislature has not introduced any reforms dealing with the issue of exclusion clauses. Common law principles therefore apply.

For discussion concerning common law principles, please refer to the Queensland section.

Expressions of regret⁷⁵⁰

An expression of regret is an oral or written statement by a person which expresses regret for an incident alleged to have caused personal injury, and does not contain an acknowledgment of fault.⁷⁵¹

An expression of regret about a personal injury made at any time before the commencement of a proceeding is not admissible as evidence.⁷⁵² For High Court guidance on the distinction between admissions and apologies, see *Dovuro Pty Ltd v Wilkins*.⁷⁵³

Limitation periods⁷⁵⁴

In the Northern Territory, a three year limitation period applies for personal injury claims from the date when the cause of action first accrues.⁷⁵⁵

A court has the power to extend or limit the limitation period upon such terms as it thinks fit.⁷⁵⁶ However, a court can only extend the limitation period if it is satisfied that:⁷⁵⁷

- facts material to the plaintiff's case were not ascertained by him or her until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or
- the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances; and
- that in all the circumstances of the case, it is just to grant the extension of time.

⁷⁵⁰ *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 2 div 2 ss 11–13.

⁷⁵¹ *Ibid* s 12.

⁷⁵² *Ibid* s 13.

⁷⁵³ (2003) 215 CLR 317.

⁷⁵⁴ *Limitation Act 1981* (NT).

⁷⁵⁵ *Ibid* s 12(1)(b).

⁷⁵⁶ *Ibid* s 44.

⁷⁵⁷ *Ibid* s 44(3)(b)

In *May v Competitive Foods Pty Ltd*⁷⁵⁸ the Northern Territory Supreme Court had to determine whether the plaintiff was entitled to an extension of time for a personal injury claim after injuring her shoulder as a result of a fall at a fast food outlet in 2002.⁷⁵⁹ The plaintiff subsequently made a claim outlining the circumstances of the incident to the defendant, which the defendant investigated and in doing so, obtained witness statements.

Although the plaintiff sought medical attention contemporaneously with the incident the injury gradually worsened and in 2010 the plaintiff was advised she would require shoulder surgery. It was held this advice from an orthopaedic surgeon constituted a material fact as it was not available before the expiration of the limitation period.⁷⁶⁰ Consequently the discretion available to the court was enlivened and the court had to be satisfied that it was just in all the circumstances that the discretion be exercised. After considering the arguments made by both parties it was held that the evidence of alleged prejudice against the defendant if the claim was to be allowed was inconclusive and speculative at best and as such an extension of time was granted to the plaintiff.

With respect to persons with a disability, if that person has a cause of action and the limitation period fixed by the Act for the cause of action has commenced to run, then the running of the limitation period is suspended for the duration of the disability.⁷⁶¹ A 'disabled person' includes a minor.⁷⁶²

Damages Awards

Damages awarded in personal injury claims in the Northern Territory are regulated by the Personal Injuries Act.

General damages⁷⁶³

The maximum amount of damages for non-pecuniary loss is provided by annual Ministerial declarations gazetted in October each year.⁷⁶⁴ The current applicable cap is \$585,000.

The common law principles relating to the assessment and award of non-pecuniary damages are abolished.⁷⁶⁵ A court must award damages for non-pecuniary damages as follows:

- If the determined degree of permanent impairment exceeds 85%, the maximum amount must be awarded.⁷⁶⁶
- If the determined degree of permanent impairment is not less than 15% and no more than 84% of the whole person, the relevant percentage of the maximum amount.⁷⁶⁷
- If the determined degree of permanent impairment falls within column 1 of the table below, the amount specified in column 2.⁷⁶⁸

⁷⁵⁸ [2011] NTSC 79.

⁷⁵⁹ *Limitation Act 1981* (NT) s 44.

⁷⁶⁰ *Ibid* s 44(3)(b)(i).

⁷⁶¹ *Ibid* s 36.

⁷⁶² *Ibid* s 4.

⁷⁶³ *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 24–28.

⁷⁶⁴ *Ibid* s 28.

⁷⁶⁵ *Ibid* s 27.

⁷⁶⁶ *Ibid* s 27(3)(a).

⁷⁶⁷ *Ibid* s 27(3)(b).

⁷⁶⁸ *Ibid* s 27(3)(c).

Degree of permanent impairment – As percentage of whole person	Amount of general 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

A court is not permitted to award damages for non-pecuniary damages if it is determined the degree of whole person impairment is less than 5%.⁷⁶⁹

In determining the degree of permanent impairment both the plaintiff and defendant may adduce evidence by a medical practitioner who assesses impairment in accordance with the prescribed guides and regulations.⁷⁷⁰

Pecuniary loss⁷⁷¹

A court will award damages for future pecuniary loss if it is satisfied the plaintiff's future earning capacity accords with their most likely circumstances had the personal injury not occurred.⁷⁷² The damages awarded for future pecuniary loss is to be adjusted to take account are the possibility that the events might have occurred regardless of the personal injury.⁷⁷³

A person is restricted to claiming damages for loss of earning capacity at a rate of three times the 'Average weekly earnings'.⁷⁷⁴ 'Average weekly earnings' is defined to mean 'the Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory as estimated and published by the Australian Statistician'.⁷⁷⁵

Gratuitous services⁷⁷⁶

The Northern Territory regulates an injured person's entitlement to claim damages for gratuitous services. Damages for gratuitous services are not to be awarded to a plaintiff unless there is a reasonable need for the services, the need has arisen solely because of the injury and the care would not have been provided but for the injury.⁷⁷⁷ Furthermore, the services need to have been (or will be) provided for 6 or more hours per week and for at least six months.⁷⁷⁸

Where the services required meet or exceed 40 hours per week damages are capped at the average weekly earnings in the Northern Territory.⁷⁷⁹ Where the services have been or are to be provided for less than 40 hours per week, damages per hour are awarded at one-fortieth of the average weekly earnings in the Northern Territory.⁷⁸⁰

⁷⁶⁹ Ibid s 27(2).

⁷⁷⁰ Ibid ss 26(2)–26(3).

⁷⁷¹ Ibid ss 20–23.

⁷⁷² Ibid s 21(1).

⁷⁷³ Ibid s 21(2).

⁷⁷⁴ Ibid s 20.

⁷⁷⁵ Ibid s 18.

⁷⁷⁶ Ibid s 23.

⁷⁷⁷ Ibid s 23(1).

⁷⁷⁸ Ibid s 23(2).

⁷⁷⁹ Ibid s 23(3).

⁷⁸⁰ Ibid s 23(4).

Interest rate⁷⁸¹ and discount rate⁷⁸²

The award of interest on damages for non-pecuniary loss or gratuitous services is prohibited.⁷⁸³

The discount rate for awards for damages for future losses in the Northern Territory is 5%.⁷⁸⁴

Exemplary, punitive or aggravated damages⁷⁸⁵

Courts are prohibited from awarding aggravated or exemplary damages in respect of a personal injury.

Structured settlements⁷⁸⁶

Upon consent of the parties to a proceeding, a court can make an order for a structured settlement.⁷⁸⁷

A 'structured settlement' is defined as 'an order providing for the payment of all or part of an award of damages by one or both of the following means:

- a) *periodic payments funded by an annuity or other agreed means;*
- b) *periodic payments in respect of future reasonable expenses for medical, hospital, pharmaceutical or attendant care services, payable as those expenses are incurred.*⁷⁸⁸

⁷⁸¹ Ibid ss 29–30.

⁷⁸² Ibid s 22.

⁷⁸³ Ibid s 29.

⁷⁸⁴ Ibid s 22.

⁷⁸⁵ Ibid s 19.

⁷⁸⁶ Ibid ss 31–32.

⁷⁸⁷ Ibid s 32.

⁷⁸⁸ Ibid s 31(a)–(b).

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COMMONWEALTH

The *Competition and Consumer Act 2010* (Cth) (**CCA**) (commonly referred to as the Australian Consumer Law (ACL)) replaced the *Trade Practices Act 1974* (Cth) (effective 1 January 2011) and now serves as a law of the Commonwealth and of each State and Territory in respect of product defect claims and consumer protection.

Application of Statutory Reforms⁷⁸⁹

In accordance with pt VIB div 2 s 87E of the CCA, the damages provisions contained in pt VIB of the CCA apply to proceedings under the CCA that relate to pts 2-2, 3-3, 3-4, 3-5 or div 2 of pt 5-4 in which the plaintiff is seeking a damages award, where the proceedings do not concern death or personal injury related to smoking.

The *Commonwealth Volunteers Protection Act 2003* (Cth) protects volunteers from civil liability for acts that the volunteer has done in good faith in doing work for the Commonwealth or a Commonwealth authority and was enacted on 24 February 2003. In accordance with s 5, the CCA applies to civil liability for a thing done by an individual after the commencement of the CCA in good faith, on a voluntary basis and organised by the Commonwealth or a Commonwealth authority. The CCA does not apply to claims involving compulsory third party insurance or defamation, or if the individual was affected by a recreational drug or acting outside the scope of their authority.

Pre-court Procedures

There are no pre-court procedures in the federal jurisdiction.

The Law of Negligence – Scope of Duty of Care

Standard of care

There have been no legislative reforms at a federal level that have an impact on the foreseeability of harm as the test for the standard of care.

Causation

There have been no legislative reforms at a federal level that have an impact on determination of causation.

Obvious risk

There have been no legislative reforms at a federal level regarding the defence of 'obvious risk'.

Dangerous recreational activities⁷⁹⁰

Part XI div 9 s 139A of the CCA adopts the operative language formerly included within s 68B of the *Trade Practices Act 1974* (Cth) and allows suppliers of recreational services to exclude, restrict or modify (i.e. contract out of) their contractual liability for the provision of recreational services under s 64 of the CCA.

⁷⁸⁹ *Competition and Consumer Act 2010* (Cth) pt VIB div 2 s 87E; *Commonwealth Volunteers Protection Act 2003* (Cth) s 5.

⁷⁹⁰ *Competition and Consumer Act 2010* (Cth) pt XI, div 9 s 139A.

Unlike s 68B of the *Trade Practices Act 1974* (Cth), pt XI div 9 s 139A of the CCA now does not apply if the significant personal injury suffered by a person is caused by the recreational service provider's reckless conduct.

This section applies to:

- a sporting activity or a similar leisure-time pursuit; or
- any other activity that involves a significant degree of physical exertion or physical risk.

Liability of professionals⁷⁹¹

Section 18 of sch 2 of the CCA effectively replaces s 52 of the *Trade Practices Act 1974* (Cth) providing consumers with protection against misleading or deceptive conduct, with one distinction – the misleading or deceptive conduct in s 18 of sch 2 of the CCA is applicable to persons, not just corporations [as in s 52 of the *Trade Practices Act 1974* (Cth)].

Liability of public authorities

There have been no legislative reforms at the federal level with regard to the liability of public authorities.

Liability of volunteers and Good Samaritans⁷⁹²

The conduct of volunteers acting for the Commonwealth government, or a Commonwealth authority, is dealt with under the *Commonwealth Volunteers Protection Act 2003* (Cth). Pursuant to s 5, it applies only to incidents that occur after the commencement of the Act. It appears the exemption will only apply to incidents occurring on or after 24 February 2003.

Volunteers

Each State and Territory jurisdiction follows a basic framework for the exemption from civil liability for 'volunteers' who perform 'community work' for a 'community organisation'. Each element must be satisfied for the exemption to apply. However, the Commonwealth legislation provides that an individual does not incur liability for anything done in good faith merely while doing work (which is not a defined term and potentially has a wide application) for the Commonwealth or a Commonwealth authority on a voluntary basis.⁷⁹³ This will result in a wider range of conduct potentially being included within the Commonwealth provisions. However, it will remain necessary to investigate whether the work is being done for the appropriate 'organisation' and that it is being done voluntarily.

Each of the Commonwealth, Queensland, Victoria and New South Wales legislation specifically require a link between the actual work, the subject of the claim and the community organisation, while other jurisdictions do not. The protection does not extend to individuals who act outside the scope of their authority or are under the influence of recreational drugs. The Act states that an individual must cooperate with the Commonwealth in any action, claim or demand relating to a civil liability that it may assume in respect of a volunteer's work for the Commonwealth.⁷⁹⁴

Food donors

There is no protection afforded under the Commonwealth legislation in respect of food donations.

⁷⁹¹ *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

⁷⁹² *Commonwealth Volunteers Protection Act 2003* (Cth).

⁷⁹³ *Ibid* s 6.

⁷⁹⁴ *Ibid* s 7.

Good Samaritans

There is no protection afforded under the Commonwealth legislation in respect of Good Samaritans.

Liability for mental harm⁷⁹⁵

There have been no substantive legislative reforms at the federal level with regard to liability for mental harm. Under pt I s 4 of the CCA (formerly s 4KA of the *Trade Practices Act 1974* (Cth)) personal injury does not include mental harm unless it is a recognised psychiatric illness.

Intoxication and illegal activity

While there have been no legislative reforms at the federal level with regard to liability for intoxication and illegal activity, the exemptions in each jurisdiction, except Queensland and South Australia, are not worded so as to limit the circumstances of breach of duty to claims for personal injuries. Therefore, the exemption, as it applies in each State and Territory, may be raised in relation to a range of actions including a claim for breach of contract or terms implied by the CCA.

Contributory negligence⁷⁹⁶

Subsection 82(1B) introduced by *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (**CLERP 9**) allows for a court to reduce the damages awarded to a plaintiff where:

- the plaintiff has sustained economic loss or property damage as a result of the defendant's misleading or deceptive conduct;
- the defendant did not intend and did not fraudulently cause that loss or damage; and
- the loss or damage was partly caused by the plaintiff's own negligence.

Proportionate liability⁷⁹⁷

The proportionate liability provisions in pt VIA of the *Competition and Consumer Act 2010* (Cth) apply to incidents that occur on or after 1 January 2011. Part VIA of the CCA imposes a proportionate liability regime for claims arising from a contravention of pt 2-1 s 18 of the CCA (formerly s 52 of the *Trade Practices Act 1974* (Cth)) as a result of a party engaging in misleading and deceptive conduct (apportionable claims).

*Selig v Wealthsure*⁷⁹⁸ considered a situation where a claim was made under a number of provisions of the Corporations Act 2001 (Cth), including a claim involving section 1041H (misleading and deceptive conduct). The question for the court was whether claims for damages pursuant to section 1041H as well as other sections are to be treated as apportionable claims. The High Court concluded that an 'apportionable claim' based upon a contravention of section 1041H does not extend to claims based upon conduct of a different kind even if a claim includes a breach of section 1041H and another section. The result was that the claim was not apportioned and the plaintiffs were able to recover the entirety of their loss from the defendants.

That interpretation likely applies to the CCA in circumstances where the definition of 'apportionable claim' is largely identical.

⁷⁹⁵ *Competition and Consumer Act 2010* (Cth) pt I s 4.

⁷⁹⁶ *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (CLERP 9).

⁷⁹⁷ *Competition and Consumer Act 2010* (Cth) pt VIA ss 87CB–87CI.

⁷⁹⁸ (2015) 255 CLR 661.

These proportionate liability provisions are aimed at ensuring that a person who is jointly responsible for loss or damage with other persons will be liable only to the extent of their actual responsibility for the loss or damage.⁷⁹⁹

Prior to the introduction of the provisions, the principle of joint and several liability applied to such actions, which meant that a plaintiff could recover the full amount of its loss from a defendant even though that defendant only partially contributed to the plaintiff's loss. Furthermore, a plaintiff could recover its entire loss even though its own negligence may have contributed to the loss. This situation has now changed. The operative provision provides that liability of a defendant who is a concurrent wrongdoer⁸⁰⁰ in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just, having regard to the extent of the defendant's responsibility for the damage or loss.⁸⁰¹

Further operative provisions in the CCA allow a court to have regard to the responsibility of concurrent wrongdoers who are not party to the proceedings,⁸⁰² and require a court to appropriately reduce a claimant's overall claim in respect of the proportion of the loss attributable to the claimant's contributory negligence.⁸⁰³ It is irrelevant whether the concurrent wrongdoer is insolvent, being wound up, or has ceased to exist or died.⁸⁰⁴

Importantly, if the proceedings involve both an apportionable claim and a claim that does not fall within the definition of an apportionable claim, then liability for the non-apportionable part of the claim is to be determined in accordance with ordinary legal rules.⁸⁰⁵ Therefore the principle of joint and several liability may still apply to non-apportionable parts of a plaintiff's claim.

Concurrent wrongdoers are required by the CCA to assist the plaintiff in identifying other concurrent wrongdoers.⁸⁰⁶ A failure to identify other known concurrent wrongdoers can have adverse cost consequences for the offending concurrent wrongdoer.⁸⁰⁷ There is no onus on the plaintiff to make a claim against all persons who the plaintiff reasonably considers are liable, which differs from the Queensland legislation.⁸⁰⁸

Concurrent wrongdoers cannot pursue contribution from other concurrent wrongdoers toward the determination of their apportionment of liability in respect of an apportionable claim.⁸⁰⁹ Similarly, concurrent wrongdoers cannot be required to indemnify other concurrent wrongdoers.⁸¹⁰ Controversy exists as to whether the prohibition against concurrent wrongdoers indemnifying each other extends to contractual indemnity agreements entered into between two or more concurrent wrongdoers. One view is that in the absence of clear legislative intent, such a prohibition was not the purpose of the legislation.

Finally, the CCA provisions do not prevent from operation the principles of vicarious liability, and the principles of joint and several liability in regard to partnership relationships.⁸¹¹

⁷⁹⁹ *Competition and Consumer Act 2010* (Cth) pt VIA s 87CD.

⁸⁰⁰ Defined by pt VIA s 87CB(3) of the *Competition and Consumer Act 2010* (Cth) as a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

⁸⁰¹ *Competition and Consumer Act 2010* (Cth) s 87CD(1)(a).

⁸⁰² *Ibid* s 87CD(3)(b).

⁸⁰³ *Ibid* s 87CD(3)(a).

⁸⁰⁴ *Ibid* s 87CB(5).

⁸⁰⁵ *Ibid* s 87CD(2).

⁸⁰⁶ *Ibid* s 87CE(1).

⁸⁰⁷ *Ibid* s 87CE(2).

⁸⁰⁸ *Civil Liability Act 2003* (Qld) s 32(1).

⁸⁰⁹ *Competition and Consumer Act 2010* (Cth) s 87CF(a).

⁸¹⁰ *Ibid* s 87CF(b).

⁸¹¹ *Ibid* s 87CI.

It should also be noted that proportionate liability regimes commensurate with the CCA regime outlined above, have been enacted for contraventions of s 1041H of the *Corporations Act 2001* (Cth)⁸¹² and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth).⁸¹³

The Commonwealth proportionate liability provisions were considered in the Supreme Court of Victoria decision of *Woods v De Gabriele*.⁸¹⁴ This decision related to an application by the defendants to amend their pleadings to allege a party not presently joined to the proceedings, should be regarded as a concurrent wrongdoer and so joined as a defendant, and that liability in respect of the plaintiff's claim should therefore be apportioned. The plaintiff sought to avert this by amending the statement of claim in a way that attempted to render the claim against the defendants as one that could not be considered apportionable. Of importance was the fact that the party the defendants were seeking to have regarded as a concurrent wrongdoer was in liquidation. Hollingworth J found for the defendants, holding that the plaintiff's narrow construction would permit the objects of the legislation to be defeated in many cases simply by the plaintiff changing the legal label attaching to the contravening conduct.

Therefore, if the facts supporting the cause of action pleaded against a defendant either specifically or as a matter of construction also make out a claim against a defendant which is apportionable, the relevant apportionment legislation will apply.

In the Federal Court decision of *Shrimp v Landmark Operations Limited*,⁸¹⁵ the issue before Besanko J was whether the proportionate liability provisions in the *Trade Practices Act 1974* (Cth) could apply in circumstances where a person is liable for damage, but does not have any liability to the plaintiff for the damage. The claim related to grass seeds supplied to the plaintiff by the first defendant, which, as a result of the incorrect grass seeds being supplied, resulted in substantial losses to the plaintiff. The plaintiff pleaded the defendant was in breach of the express and implied contractual terms, negligence and the defendant engaged in misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth). Various cross-claims were issued between the defendant and third parties that were involved in the supply of the grass seeds, and the testing of the grass seeds. The plaintiff applied to the Federal Court for orders that the principal proceedings (the plaintiff's claim against the defendant) should be heard separately from the cross-claim proceedings with the third parties. This application was opposed by the defendant and various third parties.

The application was then amended to have the court order that all matters of law and fact decided in the severed action be binding on all parties to the various cross-claims in the matter. The cross-respondents argued that the claim as between the plaintiff and the defendant was an 'apportionable' claim within the meaning of pt VIA of the *Trade Practices Act 1974* (Cth). Therefore it was considered that if a separate trial between the plaintiff and the defendant went ahead, the court would be required by pt VIA to make a determination on each of the cross-respondents' liability and if the application had succeeded, the various cross-respondents would not be given the opportunity to be heard at the primary trial on matters of law and fact relevant to each of the cross-respondents' liability.

⁸¹² A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

⁸¹³ A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

⁸¹⁴ [2007] VSC 177.

⁸¹⁵ (2007) 163 FCR 510.

The plaintiff contended that the definition of a ‘concurrent wrongdoer’ in s 87CB(3) of the *Trade Practices Act 1974* (Cth) includes other persons whose acts or omissions caused the loss or damage. The defendant and third parties submitted that a ‘concurrent wrongdoer’ should include another category of persons, being persons responsible for the damage but who are not liable to the plaintiff for the damage.

This was not accepted by Besanko J as the purpose behind the proportionate liability provisions in the *Trade Practices Act 1974* (Cth). In dismissing the plaintiff’s application, Besanko J stated that the proportionate liability provisions would not apply in these proceedings, as there was no legal cause of action between the plaintiff and the third parties with respect to the loss and damage.

Although the above-referenced decisions pre-date the CCA and apply *Trade Practices Act 1974* (Cth) provisions, pt VIA of the CCA was adopted from pt VIA of the *Trade Practices Act 1974* (Cth) and the operative provisions of pt VIA of the CCA are identical to the pt VIA of the *Trade Practices Act 1974* (Cth). Therefore, the above-referenced decisions serve as valid precedent for proportionate liability.

Vicarious liability

The Commonwealth has not introduced any legislative reforms dealing with the issue of vicarious liability. An employer will still therefore be held vicariously liable for a wrongful, unauthorised or negligent act of an employee that is carried out in the course of his or her employment and so closely connected with an authorised act that it may be regarded as a mode of doing the authorised act. This principle was endorsed in the High Court case of *New South Wales v Lepore, Samin v Queensland, Rich v Queensland*,⁸¹⁶ in which three appeals were held simultaneously. An employer will not always be held responsible for the actions of an employee.⁸¹⁷ The employee’s wrongful/harmful act must be closely connected with his or her employment for vicarious liability to attach. Therefore, whether an employer will be held vicariously liable for the actions of an employee will depend upon the specific facts in each case.

Non-delegable duties

The term non-delegable duty is somewhat misleading. It does not mean that a party owing a duty cannot delegate the task to a third party, but rather that the liability cannot be delegated. As such, it is a duty to ensure that reasonable care is taken. Therefore, if the third party to whom the task has been entrusted fails to exercise reasonable care, the non-delegable duty will have been breached.

The categories of non-delegable duty continues to evolve. However, the courts have struggled to clearly define the parameters required to justify the existence of a non-delegable duty of care. The known criteria include the superior capacity of the defendant to bear the risk of the mishap, the special obligation which it is proper to attach to extra-hazardous activities, and the special dependence or vulnerability of the person to whom the duty is owed.⁸¹⁸

⁸¹⁶ (2003) 212 CLR 511.

⁸¹⁷ Ibid.

⁸¹⁸ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

Common known relationships in which non-delegable duties exist include:

- employer and employee;⁸¹⁹
- host employer and contractor;⁸²⁰
- school and student;⁸²¹ and
- hospital and patient.⁸²²

The Ipp report recommended that the relevant civil liability legislation should ensure that plaintiffs could not circumvent the application of the civil liability legislation by pleading their action based upon breach of a non-delegable duty of care.

The Commonwealth legislature has not enacted any legislation in response to the Ipp report recommendation.

Exclusion clauses⁸²³

Section 67 of the CCA establishes that parties cannot contractually substitute or exclude the consumer guarantee provisions of sch 2 ch 3 of the CCA.

Apology

There have been no legislative reforms at the federal level with regard to apologies. For High Court guidance on the treatment of apologies see *Dovuro Pty Ltd v Wilkins*.⁸²⁴

Limitation periods⁸²⁵

Regarding personal injury claims, legal proceedings must be commenced within three years from the date of discoverability of the injury or death and no later than 12 years after the event on which the claim is based. The 'date of discoverability' is defined as meaning the date:

- when the plaintiff knew or ought to have known that the death or personal injury had occurred; and
- was attributable to a contravention of the CCA; and
- the injury was significant enough to justify bringing an action.

If the plaintiff would have ascertained the fact had the plaintiff taken all reasonable steps before the date in question to ascertain the fact, this will be sufficient to consider the plaintiff 'ought to have known'.

Pursuant to pt 1 s 4 of the CCA, personal injury includes:

- pre-natal injury;
- impairment of a person's physical or mental condition; or
- disease;

but does not include an impairment of a person's mental condition unless the impairment consists of a recognised psychiatric illness.

⁸¹⁹ *Kondis v State Transport Authority* (1984) 154 CLR 672.

⁸²⁰ *TNT Australia Pty Ltd v Christie & 2 Ors; Crown Equipment Pty Ltd v Christie & 2 Ors; Manpower Services (Aust) Pty Ltd v Christie & 2 Ors* (2003) 65 NSW LR1.

⁸²¹ *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁸²² *Samios v Repatriation Commission* [1960] WAR 219.

⁸²³ *Competition and Consumer Act 2010* (Cth) sch 2 s 67.

⁸²⁴ (2003) 215 CLR 317.

⁸²⁵ *Competition and Consumer Act 2010* (Cth) pt VIB div 2 ss 87F–87K.

In regard to plaintiff minors, facts that a capable parent or guardian of the plaintiff knows or ought to know are taken to be facts that the plaintiff knows or ought to know. The same applies to incapacitated persons pursuant to pt VIB div 2 s 87G(5) of the CCA.

Furthermore, pursuant to pt VIB div 2 s 87J of the CCA, in working out whether the period of three years after the date of discoverability has expired, the court should disregard any period during which the plaintiff has been:

- a minor who is not in the custody of a capable parent or guardian; or
- an incapacitated person in respect of whom there is no guardian, and no other person to manage all or part of the person's estate, under a law of a State or Territory relating to the protection of incapacitated persons.

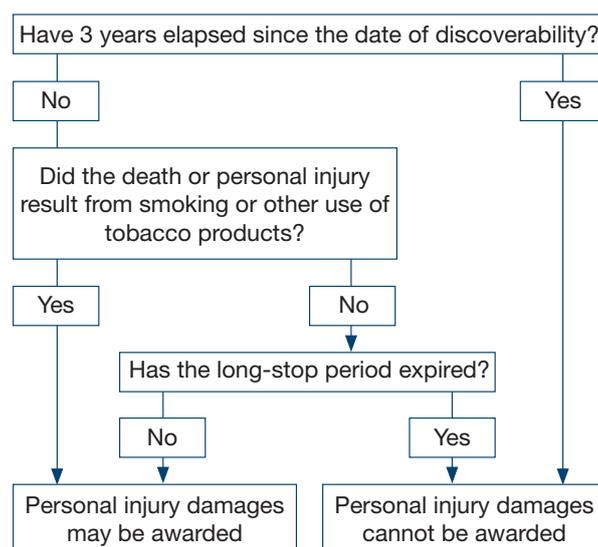
Also, pursuant to pt VIB div 2 s 87H of the CCA, '*long stop period*' is described as:

- the period of 12 years following the act or omission alleged to have caused the death or the injury; or
- that period as extended by the court.

When extending the limitation period, the court must not extend the period by more than three years beyond the date of discoverability for the death or injury. Furthermore, in considering whether to extend the period, the court must have regard to the justice of the case, and in particular, the following:

- whether the passage of time has prejudiced a fair trial;
- the nature and extent of the person's loss or damage;
- the nature of the defendant's conduct alleged to have caused the death or injury; and
- the nature of the defendant's conduct since the alleged act or omission.

This diagram shows when this Division prevents an award of personal injury damages:



Damages Awards

The method of calculating damages can differ between a claim in negligence and a claim under the CCA, which contains the Australian Consumer Law (**ACL**), and has its own damages regime.⁸²⁶ The plaintiff must elect prior to judgment whether it will pursue damages calculated under the relevant law of negligence (which may be the common law provisions of state based legislation such as the *Civil Liability Act 2003* (Qld) (**CLA (Qld)**) and its regulation) or the ACL. Depending on jurisdiction, it may be more beneficial for a plaintiff to seek damages under the state based legislation.

Potential losses arising from product defects

Depending on the severity of the loss arising out of the product defect and the path the good or service has taken from inception to use, the magnitude of a product defect claim can be significant and far-reaching, and may include losses arising out of:

- personal injuries (if defect in product causes injury);
- property damage (if defect in product causes damage to its surrounds);
- business interruption;
- replacement of the defective product;
- lost sales for distributor of the product;
- penalties imposed on distributor for withdrawal of product from retailer;
- cost of remanufacture to remove defect;
- redistribution costs to replace defective product with alternative;
- advertising expenses to attempt to recover losses after defect resolved; and
- damage to brand reputation.

General damages⁸²⁷

1. Under the CCA, general damages are assessed by reference to the ‘*most extreme case*’, which attracts damages of approximately \$270,000 (after indexing).
2. A plaintiff is not entitled to general damages if the injury is less than 15% of the ‘*most extreme case*’.⁸²⁸ For injuries equal to or greater than 15% but less than 33% of the ‘*most extreme case*’, damages are calculated using a scale provided in the Act. For injuries equal to or greater than 33%, damages are calculated as a percentage of the ‘*most extreme case*’, or \$270,000 (after indexing). For example, if the injury is found to be 50% of the ‘*most extreme case*’, the plaintiff will be entitled to \$135,000.

A ‘*most extreme case*’ is defined as a case in which the plaintiff suffers non-economic loss ‘*of the gravest conceivable kind*’.⁸²⁹ Other than this broad definition, there is no guidance in the CCA for assessing injuries for the purpose of determining general damages.⁸³⁰ Such an assessment is to be carried out having regard to past court decisions.

⁸²⁶ *Competition and Consumer Act 2010* (Cth) pt VIB.

⁸²⁷ *Ibid* pt VIB div 3 ss 87L–87M.

⁸²⁸ *Ibid* ss 87L–87M.

⁸²⁹ *Ibid* s 87P.

⁸³⁰ *Ibid* as permitted by s 87T.

Importantly, for injuries that fall into the moderate to serious categories, damages under the CCA can be higher than damages under the state based legislation.

Economic loss⁸³¹

Under the CCA, damages for economic loss are limited to twice the amount of average weekly earnings,⁸³² which is defined as the amount published by the Australian Statistician as ‘*the average weekly earnings for all employees*’ for the relevant quarter.⁸³³ As an indication, in November 2014, the average weekly earnings for all employees was \$1,128.70, meaning the maximum weekly amount payable for economic loss under the CCA is approximately \$2,260 per week.

From a practical point of view, many claims may fall within the limit under the CCA. However, plaintiffs on high incomes may be entitled to higher awards for economic loss under the state based legislation.

In so far as discounting is concerned for future economic loss, the CCA prescribes a discount rate of 5%.⁸³⁴

Under the CCA, the award for superannuation may not exceed the amount payable under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**the SGAA**), which is presently 9.5% of an employee’s wages.⁸³⁵

Gratuitous care⁸³⁶

A threshold for damages to compensate for gratuitous care services is imposed at s 87W of the CCA. Under the CCA, a plaintiff will only be entitled to damages for gratuitous care if the services are provided, or are to be provided, for at least six hours per week for at least six months.⁸³⁷

Under the CCA, if services are provided for at least 40 hours per week, the damages for those services must not exceed the ‘*average weekly earnings*’.⁸³⁸ If services are provided for less than 40 hours per week, the amount per hour must not exceed 1/40 of the ‘*average weekly earnings*’. Section 87X limits damages for services an injured person was providing to another before they suffered injury (also known as *Sullivan v Gordon* damages at common law). A plaintiff will only be entitled to damages under this head of damage if the services are provided, or are to be provided, for at least six hours per week for at least six months.⁸³⁹

Under the CCA, damages are only payable if the incident results in death. The rates allowed under the CCA are also restricted in the same manner as for gratuitous care. In other words, the maximum rate payable is \$28 per hour.

⁸³¹ *Competition and Consumer Act 2010* (Cth) pt VIB div 3 ss 87U and 87Z.

⁸³² *Ibid* s 87U.

⁸³³ *Ibid* s 87V.

⁸³⁴ *Ibid* s 87Y.

⁸³⁵ *Ibid* s 87Z.

⁸³⁶ *Ibid* pt VIB div 5 ss 87W and 87X.

⁸³⁷ *Civil Liability Act 2003* (Qld) s 59; *Competition and Consumer Act 2010* (Cth) s 87W.

⁸³⁸ *Competition and Consumer Act 2010* (Cth) s 87W(3). As mentioned, in November 2014, the average weekly earnings for all employees was \$1,128.70.

⁸³⁹ *Civil Liability Act 2003* (Qld) s 59A; *Competition and Consumer Act 2010* (Cth) s 87X.

Interest⁸⁴⁰

The Commonwealth legislation provides that a court cannot order the payment of interest on an award for general damages or gratuitous care.⁸⁴¹ Under the CCA, interest is also not payable on awards for loss of a plaintiff's capacity to provide gratuitous care to other persons.

This provision also provides that the rate of interest payable on other heads of personal injury damages must be at Treasury bond rate on the day that the court determines the personal injury damages.

Discount rate⁸⁴²

The Commonwealth legislation provides that a discount rate of 5% should be applied to damages awarded for future economic loss for contravention of the above provisions in the CCA. The CCA also puts in place a regulation making power so that the discount rate may be varied.

Exemplary, punitive and aggravated damages⁸⁴³

Section 87ZB provides that a court cannot award exemplary or aggravated damages where a person claims damages for personal injury or death. However, exemplary and aggravated damages are still payable for damages awarded in respect of claims outside the application of pt VIB or that are not for personal injury and death.

Structured settlements⁸⁴⁴

Section 87ZC allows structured settlement damages to be awarded under the CCA. The provision defines a structured settlement as an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means. The court may, on the application of the parties, make an order under this section that approves a structured settlement, or the terms of a structured settlement, even though the payment of damages is not in the form of a lump sum. A court can also make an order under this section without application from a party.

Legal costs

There have been no legislative reforms at the federal level with regard to legal costs.

⁸⁴⁰ *Competition and Consumer Act 2010* (Cth) pt VIB div 6 s 87ZA.

⁸⁴¹ *Civil Liability Act 2003* (Qld) s 60A; *Competition and Consumer Act 2010* (Cth) s 87ZA.

⁸⁴² *Competition and Consumer Act 2010* (Cth) pt VIB div 6 s 87Y.

⁸⁴³ *Ibid* pt VIB div 6 s 87ZB.

⁸⁴⁴ *Ibid* pt VIB div 7 s 87ZC.

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