



## **CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) ACT 2002**

### **A Brief Retrospective**

Personal Injury Law Reform in New South Wales is far from a recent phenomenon.

The watershed year of 1987, with the introduction of the Transcover Scheme for motor accidents and a new Workers Compensation Scheme were responses to increasing costs and payout in an increasingly litigious society.

Unfortunately, these responses were reactive, with Governments being loathe to accept responsibility, despite the widely held belief that more effective monitoring and regulation could have avoided much of the turmoil and need for change.

### **Was there really an insurance crisis?**

There has been a dearth of empirical or, even less, statistical evidence to confirm the crisis, notwithstanding broad statements such as “Public Liability insurances unaffordable” abounding to justify the need for reform.

## **Drivers for Reform**

- Insurance equals liability

The virtual presumption of indemnity insurance and the standard of care being akin to almost strict liability, to meet the defendant's liability in personal injury cases has undoubtedly been a major factor in the expansion of liability.

- "Santa Claus" Judges

There has been a tendency for Courts to find extremely modestly in favour of an injured party who should properly fail. The judiciary ultimately sets the market in personal injury cases.

- Greedy Lawyers

The deregulation of legal costs of New South Wales from July 1994 substantially increased the costs of personal injury litigation.

## **The Ipp Report**

This report led to the nation's governments concluding that imposing severe restrictions on access to justice was the best way of solving the insurance crisis.

However, careful analysis of the causes of the insurance crisis was really nowhere to be found in the process that led to tort reform.

It could be said that Justice Ipp's national enquiry into the law of negligence was

merely an attempt to impose a veneer of respectability on pre-determined outcomes.

Ipp was not asked to examine the effects of the law on insurers but was told to assume that the cost of damages was no longer sustainable.

It is arguable that the relevant tort reform was the most fundamental change to the civil justice system in the nation's history. It is equally arguable that it was not handled expertly and in true consultation with all the protagonists.

The politics of the reform were dealt with by insurance ministers not attorney generals.

It is hard to escape the conclusion that the so-called insurance crisis which led to the tort reform primarily arose, not because of our increasing litigious society, generous Judges and greedy lawyers, but as a result of market forces, where the insurance industry in Australia and worldwide in the 90's was characterised by ever-softening premium rates and widening policy coverage leading to poor underwriting results (e.g. corporate collapse of Australia HIH), and ineffective Government regulation and monitoring.

### **A Question of Perspective**

With the introduced tort reform already coming under scrutiny, the Financial Review opined:

“Tort reform, while tough medicine, was essential. Nobody wanted to see the justice system made more inaccessible. Yet reluctantly that was the one big thing that this country could do to help ease the blow-out in insurance premiums that threatened to kill off Anzac Day parades, Surf Life Saving Clubs and other volunteer community activities”.

The Premier of New South Wales when introducing the *Civil Liability Amendment (Personal Responsibility) Act* in September 2002 said:

“The overwhelming principle behind the new laws is that people must take personal responsibility for their actions.

We need to restore personal responsibility and dismiss the culture of blame”.

Allan Fels, the then chairman of the Australian Competition and Consumer Commission, however, stated in early 2003:

“The reforms related to insurance that are being debated, and in some states introduced, include damage caps, easy liability waivers and a block on liability when there are obvious risks – even when those risks are the fault of a shoddy or reckless operator. These types of reforms transfer the cost of accidents and other damage from those best able to understand and cheaply control the risks to those least able to understand and control them. This is neither sensible or fair”.

Whatever the true motives of this tort reform, it has and will continue to have significant impact on civil litigation in New South Wales in terms of damages, costs and procedures.

As yet, it appears the substantial reductions in benefits payable under the various changes had not been matched by insurance premium reductions.

## **THE ACT ITSELF**

### **LIABILITY**

#### **Exemptions**

Provisions of the Act do not apply to damages and civil liability for:

- Intentional assaults.
- Dust diseases claims.
- Tobacco actions.
- Workers Compensation.
- Motor Accidents claim except with regards to provisions relating to negligence, superannuation benefits, mental harm, self defence, and good Samaritans.

#### **Duty of Care – Division 2**

The “Personal Responsibility” Act adopts the principles enunciated in the High Court Decision of *Wyang Shire Council v Shirt* (1980) 146 CLR 40.

Section 5B says a person is not negligent in failing to take precautions against a risk of harm, unless the risk was foreseeable, significant and one where a reasonable person would have taken those precautions).

Section 5B (2) details the tests which should be applied by the Court to determine whether a reasonable person would have taken precautions.

Section 5C deals with more common law principles for the Court to consider when determining the scope of duty of care e.g. the burden of taking precautions to avoid similar risks).

### **Causation – Division 3**

To establish causation, it is necessary to show firstly, the negligence was a necessary condition of the occurrence of the harm (factual causation) and it is appropriate for the scope of negligent person's liability to extend to the harm so caused (scope of liability).

It is relevant to determine what the plaintiff would have done if there had been no negligence on the part of the defendant and this is a subjective determination (Section 5D).

Any statement made by the plaintiff after the injury is inadmissible except to the extent that it is against his or her interest [5D(3)(6)].

Why should responsibility for the injury be imposed? [(Section 5D(4)].

The plaintiff always bears the onus of proof on the balance of probabilities as to causation (Section 5E).

#### **Assumption of Risk – Division 4**

An obvious risk would have been obvious to a reasonable person even though it has a low probability or it is not observable – common knowledge (5F).

A plaintiff is presumed to be aware of an obvious risk unless it is proven that he or she is not aware of the risk. It does not matter if the plaintiff was not aware of the precise risk (5G).

There is no proactive duty to warn of obvious risk unless a plaintiff requested advice or information or the defendant is required by a written law to warn the plaintiff of the risk, or the defendant is a professional (5H).

There is no liability for the materialisation of an inherent risk – one that cannot be avoided by the exercise of reasonable care and skill (5I).

#### **Recreation Activities – Division 5**

There is no liability for harm suffered from obvious risks in dangerous recreational activities whether or not the plaintiff was aware of the risk (5L).

There is no duty of care for recreational activity where a risk warning is given (5M).

A risk warning can be oral or written or by means of a sign (5N).

If the plaintiff is incapable the defendant may rely on a risk warning to accompanying parent or capable person (5M).

A risk warning is given if it is likely that the person received or understood the warning (5M).

The defendant is not entitled to rely on warning if:

- the harm resulted from contravention of a written law of the State (5M)
- the warning was contradicted by the defendant (5M)
- the plaintiff was required to engage in recreational activity (5M).

A risk warning is not of itself evidence of an obvious or inherent risk nor proves a duty of care exists (5M).

### **Professional Negligence – Standard of care for Professionals– Division 6**

There is no negligence if the professional's action is widely accepted in Australia by peers as competent (5O).



A Court can reject peer professional opinion that is irrational (5O).

Differing or minority peer professional opinions are acceptable by the Court (5O).

These provisions do not apply to failure to give a warning or advice by a professional (5P) (where that advice is associated with the provisions by a professional of his professional service).

### **A Non-delegable duties and vicarious liability**

Non-delegable duties entrusted to a defendant are to be treated like a vicarious liability (5Q).

### **Contributory Negligence – Division 8**

Contributory negligence applies also to taking precautions (5R).

The standard of care is: a reasonable person plus what that person knew or ought to have known (5R).

Contributory negligence can be up to 100% (5S).

Contributory negligence of the deceased person is relevant and Section 13 of the *Law Reform (Miscellaneous Provisions) 1965* does not apply (5T).

### **Mental harm – Part 3 – “consequential mental harm” and “pure mental harm”**

The claim can be based wholly or in part from mental harm or nervous shock (Section 29).

There is no entitlement to damages for pure mental harm unless the plaintiff witnessed the accident, was at the scene, OR the plaintiff is a close member of the family of the victim (Section 30).

Close member equals parent, spouse or partner, child, sibling (including step/half brothers, sisters) (Section 30).

Damages are reduced for contributory negligence of the victim (Section 30).

Pure mental harm must constitute a recognised psychiatric illness (Section 31).

Mental harm duty of care: reasonable care for a person of normal fortitude (Section 32).

No economic loss for consequential mental harm unless recognised psychiatric condition (Section 33) – thus need recognised psychiatric illness to get economic loss, even though still do not get non-economic loss, but for the pure mental harm can get both non-economic loss and economic loss.

## **Public Authorities – Part 5**

Public authorities equal the Crown, Government Departments, Public Health organisation, local Council, any public or local authority, any body exercising public functions (Section 41).

The Court may look at resources reasonably available to the authority and evidence of its compliance with applicable standards (Section 42).

Only unreasonable acts or omissions are breaches of duty of care (Section 43).

Function to issue a licence or permit does not give rise to liability if the licence or permit could not be issued (Section 44).

Non-feasance modified: no liability to repair unless the authority has actual knowledge (Section 45).

Exercising a function does not prove the duty of care exists (Section 46).

## **Intoxication – Part 6**

This part applies to personal injury and damage to property (Section 47).

Intoxication = under the influence of alcohol or drugs whether taken lawfully or unlawfully (Section 48).

The plaintiff not owed a duty of care merely because he/she is intoxicated. There is no increase in the extent of duty of care required for an intoxicated person (Section 49).

It is presumed that a drunk plaintiff is contributory negligent unless the Court is satisfied that the plaintiff's intoxication did not contribute in any way – the reduction is at least 25% or greater but does not apply where intoxication was not self induced (Section 50).

### **Self Defence and Recovery by Criminals – Part 7**

This part applies to personal injury, damage to property and breach of contract (Section 51).

No liability for tort if acting in self defence but only if:

- the plaintiff was acting illegally and
- the defendant believed the conduct was necessary to defend himself of his property  
and
- the conduct was a reasonable response.

Does not apply if the defendant uses forces with intentional or reckless infliction of death (Section 52).

Immunity for self defence where the perpetrators act is unlawful or would have been unlawful but for the fact that they were suffering from a mental illness.

The Court is not to award damages if the plaintiff was engaged in a serious offence at the time of the accident (Section 54).

Serious offences defined as one punishable by imprisonment of six months or more.

### **Good Samaritans and Volunteers – Parts 8 and 9**

No liability when assisting a person who is injured or at risk at being injured (Section 57).

A good samaritan is one who acts in good faith and without expectation of payment or other reward, coming to the assistance of a person who is apparently injured or at risk of being injured (Section 56).

Does not apply if the good samaritan is:

- intentionally negligent or
- caused the injury in the first place or
- is drunk and negligent or
- impersonating health care emergency worker or police (Section 58).

Volunteers are protected with regards to everything except defamation (Section 59).

A volunteer is a person doing community work but excludes work done under an order of the Court (Section 60).

A volunteer does not incur any civil liability person or civil liability (Section 61), except if:

- the conduct constitutes an offence, or
- the volunteer was drunk and negligent,
- or outside the scope of his activities
- or contrary to instructions or written law.

These provisions do not apply to CTP claims (Sections 65 and 66).

### **Apologies**

An expression of sympathy or regret is not relevant to liability and not admissible (Sections 68 and 69).

### **QUANTUM**

#### **Economic Loss**

Weekly gross future economic loss capped at three times the average weekly earnings in New South Wales (Section 12).

Plaintiff's prospects and any adjustments must be taken into account and specified in judgment (Section 13).

Discount rate for future loss is 5% (Section 14).

### **Superannuation**

Relevant percentage applicable is the maximum percentage required by law for employer contribution (Section 15A).

### **Gratuitous Attendant Care**

There must be a reasonable need (Section 15) and that need must be solely due to the injury.

There are thresholds of 6 hours per week for 6 months (Section 15) and there is no claim for interest on any amount awarded (Section 18).

### **Non-Economic Loss**

Earlier decisions or decisions of other Courts where awards of damages for non-economic loss may be brought to the Court's attention (Section 17A).

There is no interest on any award.

A percentage of a “most extreme case” (Section 16 table) is used to determine damages and there is no award for any injury, which results in a whole person impairment of less than 15%.