

TASMANIA

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**CIVIL LIABILITY AMENDMENT BILL 2003**

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# **CIVIL LIABILITY AMENDMENT BILL 2003**

*(Brought in by the Minister for Justice and Industrial Relations, the Honourable Judith Louise Jackson)*

## **A BILL FOR**

**An Act to amend the *Civil Liability Act 2002*, the *Fair Trading Act 1990* and the *Wrongs Act 1954***

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

### **Short title**

1. This Act may be cited as the *Civil Liability Amendment Act 2003*.

### **Commencement**

2. This Act commences on the day on which this Act receives the Royal Assent.

### **Principal Act**

3. In this Act, the *Civil Liability Act 2002*\* is referred to as the Principal Act.

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\*No. 54 of 2002

**Section 3 substituted**

4. Section 3 of the Principal Act is repealed and the following sections are substituted:

**Interpretation**

3. In this Act, unless the contrary intention appears –

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

“**damages**” includes any form of monetary compensation;

“**duty**” means –

- (a) a duty of care in tort; or
- (b) a duty of care under contract that is co-extensive with a duty of care in tort; or
- (c) another duty under statute or otherwise that is co-extensive with a duty of care referred to in paragraph (a) or (b);

“**non-economic loss**” means any one or more of the following:

- (a) pain or suffering;
- (b) loss of amenities of life;
- (c) loss of enjoyment of life;
- (d) curtailment of life expectancy;

(e) bodily or mental harm;

**“personal injury”** includes –

(a) pre-natal injury; and

(b) impairment of a person’s physical or mental condition; and

(c) disease.

### **Provisions relating to operation of Act**

**3A. (1)** This Act does not create or confer any cause of civil action for the recovery of damages.

**(2)** A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.

**(3)** This Act, other than Part 7, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of such an express provision.

**(4)** Subsection (3) extends to any provision of this Act even if the provision applies to liability in contract.

**(5)** This Act is not a codification of the law relating to civil claims for damages for harm.

### **Civil liability excluded from Act**

**3B. (1)** This Act does not apply to or in respect of civil liability –

- (a) in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct; or
- (b) relating to an award of damages for personal injury or death where the injury or death concerned resulted from smoking or other use of tobacco products.

**(2)** This Act, except Parts 2, 3 and 5, Divisions 1, 2, 3, 4 and 7 of Part 6 and Parts 7 and 8, does not apply to or in respect of civil liability relating to an injury to which Part III of the *Motor Accidents (Liabilities and Compensation) Act 1973* applies.

**(3)** This Act does not apply to civil liability relating to an injury to which Division 2 of Part X of the *Workers Rehabilitation and Compensation Act 1988* applies.

**(4)** This Act does not apply to liability for compensation under the *Workers Rehabilitation and Compensation Act 1988*, the *Criminal Injuries Compensation Act 1976* or the *Anti-Discrimination Act 1998* or a scheduled benefit under the *Motor Accidents (Liabilities and Compensation) Act 1973*.

**(5)** The regulations may exclude a specified class or classes of civil liability from the operation of all or any provisions of this Act.

**(6)** Regulations referred to in subsection (5) may make transitional provision with respect to claims relating to acts or omissions which occurred before the commencement of the regulations.

**Application of Act to non-delegable duty**

**3C.** This Act applies to a claim for damages for breach of a non-delegable duty.

**Section 4A inserted**

**5.** Before section 5 of the Principal Act, the following section is inserted in Part 2:

**Application of Part 2**

**4A.** This Part applies to civil liability of any kind for damages for personal injury or death or damage to property, except civil liability that is excluded from the operation of this Part by section 3B.

**Section 5A inserted**

**6.** Before section 6 of the Principal Act, the following section is inserted in Part 3:

**Application of Part 3**

**5A.** This Part applies to civil liability of any kind for damages for personal injury or death or damage to property, except civil liability that is excluded from the operation of this Part by section 3B.

**Section 6A inserted**

**7.** Before section 7 of the Principal Act, the following section is inserted in Part 4:

**Application of Part 4**

**6A.** This Part applies to civil liability of any kind, except civil liability that is excluded from the operation of this Part by section 3B.

**Section 7A inserted**

**8.** Before section 8 of the Principal Act, the following section is inserted in Part 5:

**Application of Part 5**

**7A.** This Part applies to civil liability of any kind for damages for personal injury or death, except civil liability that is excluded from the operation of this Part by section 3B.

**Part 6 substituted**

**9.** Part 6 of the Principal Act is repealed and the following Parts are substituted:

**PART 6 – BREACH OF DUTY**  
***Division 1 – Preliminary***

**Interpretation**

**9.** In this Part, “**harm**” means harm of any kind, including the following:

- (a) personal injury or death;
- (b) damage to property;
- (c) pure economic loss.

**Application of Part 6**

**10.** This Part applies to civil liability of any kind for damages for harm resulting from breach of duty, except civil liability that is excluded from the operation of this Part by section 3B.

***Division 2 – Standard of care*****General principles**

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

- (a) there was a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought reasonably to have known); and
- (b) the risk was not insignificant; and
- (c) in the circumstances, a reasonable person in the position of the person would have taken precautions to avoid the risk.

**(2)** In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things):

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the potential net benefit of the activity that exposes others to the risk of harm.

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

### **Other principles**

**12.** In a proceeding relating to liability for breach of duty –

- (a) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (b) the subsequent taking of action that (had the action been taken earlier) would have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute evidence of liability in connection with the risk.

### ***Division 3 - Causation***

### **General principles**

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

- (a) the breach of duty was a necessary element of the occurrence of the harm (“factual causation”);
- (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (“scope of liability”).

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

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

- (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
- (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

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

### **Onus of proof**

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

***Division 4 – Obvious risks*****Meaning of “obvious risk”**

**15. (1)** For the purpose of this Division, an “**obvious risk**” to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

**(2)** Obvious risks include risks that are patent or a matter of common knowledge.

**(3)** A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

**(4)** A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

**(5)** A risk is not an obvious risk merely because a warning about the risk has been given.

**Persons suffering harm presumed to be aware of obvious risks**

**16. (1)** If, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the existence of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the existence of the risk.

**(2)** For the purpose of this section, a person is aware of the existence of a risk if the person is aware

of the existence of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

### **No proactive duty to warn of obvious risk**

**17. (1)** A person (“the defendant”) does not owe a duty to another person (“the plaintiff”) to warn of an obvious risk to the plaintiff.

**(2)** Subsection (1) does not apply if –

- (a) the plaintiff has requested advice or information about the risk from the defendant; or
- (b) the defendant is required by a written law to warn the plaintiff of the risk; or
- (c) the defendant is a professional, other than a registered medical practitioner, and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service to the plaintiff by the defendant in the defendant’s professional capacity.

**(3)** Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

### ***Division 5 – Dangerous recreational activities***

#### **Application of Division**

**18. (1)** This Division applies only in respect of liability for breach of duty resulting in harm to a person from a dangerous recreational activity engaged in by that person.

(2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

### **Interpretation**

19. In this Division –

“**dangerous recreational activity**” means a recreational activity that involves a significant degree of risk of physical harm to a person;

“**obvious risk**” has the same meaning as it has in Division 4;

“**recreational activity**” includes –

- (a) any sport (whether or not the sport is an organised activity); and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure.

### **No liability for harm suffered from obvious risks of dangerous recreational activities**

20. (1) A person is not liable for a breach of duty for harm suffered by another person (“the plaintiff”) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk.

***Division 6 – Professional negligence*****Proactive and reactive duty of registered medical practitioner to warn of risk**

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

- (a) that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice; and
- (b) that the registered medical practitioner knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

**(2)** This section does not apply where a registered medical practitioner has to act promptly to avoid serious risk to the life or health of the patient and –

- (a) the patient is not able to hear or respond to a warning about the risk to the patient; and
- (b) there is not sufficient time for the registered medical practitioner to

contact a person responsible for making a decision for the patient.

**(3)** In this section, “**patient**”, when used in a context of asking for or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

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

**22. (1)** A person practising a profession (“a professional”) does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

**(2)** Peer professional opinion cannot be relied on for the purpose of this section if the court considers that the opinion is irrational.

**(3)** The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purpose of subsection (1).

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

**(5)** This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in relation to the risk of harm associated

with the provision by a professional of a professional service to a person.

### ***Division 7 – Contributory negligence***

#### **Standard of contributory negligence**

**23. (1)** The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent for the purpose of apportioning liability under section 4 of the *Wrongs Act 1954*.

**(2)** For the purpose of apportioning liability under section 4 of the *Wrongs Act 1954* –

- (a) the standard of care required of the person who suffered harm is that required of a reasonable person in the position of that person; and
- (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

### **PART 7 – ASSESSMENT OF DAMAGES FOR PERSONAL INJURY OR DEATH**

#### **Application of Part 7**

**24.** This Part applies in relation to an award of damages for personal injury or death resulting from a breach of duty, except civil liability that is excluded from the operation of this Part by section 3B.

**Damages for loss of superannuation entitlements**

**25. (1)** The maximum amount of damages that may be awarded for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based.

**(2)** In this section, “**relevant percentage**” means the percentage of earnings that is the minimum percentage required by law to be paid as employer superannuation contributions.

**Damages for loss of earning capacity**

**26. (1)** Where a person is entitled to damages in respect of loss of earning capacity, a court must not award those damages on the basis the person was, or may have been capable of, earning income at greater than 4.25 times the adult average weekly earnings as last published by the Australian Bureau of Statistics before damages are awarded.

**(2)** In this section, “**adult average weekly earnings**” means the dollar figure for full-time adult ordinary time earnings for persons set out under the heading “AVERAGE WEEKLY EARNINGS, Australia: Original” in catalogue number 6302.0 published by the Australian Bureau of Statistics, as amended from time to time.

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

**27. (1)** If the amount of non-economic loss is assessed to be not more than Amount A, no damages are to be awarded for non-economic loss.

**(2)** If the amount of non-economic loss is assessed to be more than Amount A but not more than Amount B, damages awarded for non-economic loss are calculated as follows:

Amount awarded = 1.25 x (amount assessed minus Amount A)

**(3)** If the amount of non-economic loss is assessed to be more than Amount B, damages awarded for non-economic loss are an amount equal to the amount assessed.

**(4)** For the purpose of this section –

(a) “**Amount A**” is –

- (i) for the financial year ending on 30 June 2004, \$4 000; and
- (ii) for the financial year commencing on 1 July 2004 and for each subsequent financial year, calculated in accordance with the following formula and rounded off in accordance with subsection (5):

$$A = A_0 \times \frac{C}{D}$$

where –

“**A**” is the value in dollars of Amount A for the relevant financial year;

“**Ao**” is \$4 000;

“**C**” is the value of the CPI figure for Hobart for the March quarter immediately preceding the financial year in which the threshold amount is to apply;

“**D**” is the value of the CPI figure for Hobart for the March quarter 2003; and

(b) “**Amount B**” is five times Amount A.

(5) If the value of Amount A, calculated in accordance with the formula specified in subsection (4)(a), is not a multiple of \$500, the amount is to be rounded off to the nearest multiple of \$500, with an amount that is \$250 more than a multiple of \$500 being rounded off to the next highest multiple of \$500.

(6) On or before 1 July 2004 and on or before 1 July in each subsequent year, the Minister is to publish a notice in the *Gazette* specifying the amounts that are Amount A and Amount B for the financial year commencing on that 1 July.

(7) Publication under subsection (6) is for public information only and a failure to publish or a delay or error in publication does not affect what is Amount A or Amount B for the year concerned.

(8) In this section, “**CPI figure for Hobart**” means the Consumer Price Index: All Groups Index Number for Hobart published by the Australian

Statistician under the authority of the *Census and Statistics Act 1905* of the Commonwealth.

**Tariffs for damages for non-economic loss (general damages)**

**28. (1)** In determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings.

**(2)** For that purpose, the parties to the proceedings or their counsel may bring the court's attention to awards of damages for non-economic loss in those earlier decisions.

**PART 8 – MENTAL HARM**

**Interpretation**

**29.** In this Part –

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

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

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

**Application of Part 8**

**30.** This Part (except section 31) applies to any claim for damages for mental harm resulting from a

breach of duty, except civil liability that is excluded from the operation of this Part by section 3B.

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

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

**Limitation on recovery for pure mental harm arising from shock**

**32. (1)** This section applies to the liability of a person (“the defendant”) for pure mental harm to a person (“the plaintiff”) arising wholly or partly from mental or nervous shock in connection with another person (“the victim”) being killed, injured or put in peril by the act or omission of the defendant.

**(2)** The plaintiff is not entitled to recover damages for pure mental harm unless –

- (a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril or the immediate aftermath of the victim being killed or injured; or
- (b) the plaintiff is a close member of the family of the victim.

**(3)** In this section –

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

- (a) a parent of the victim or other person with parental responsibility for the victim; or
- (b) the spouse of the victim; or
- (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility; or
- (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim;

**“spouse”** means –

- (a) a husband or wife; or
- (b) a de facto spouse –

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

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

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

### **Mental harm – duty of care**

**34. (1)** A person (“the defendant”) does not owe a duty to another person (“the plaintiff”) to take care not to cause the plaintiff mental harm unless a reasonable person in the position of the defendant

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

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

- (a) whether or not the mental harm was suffered as the result of a sudden shock;
- (b) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

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

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

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

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

## **PART 9 – LIABILITY OF PUBLIC AND OTHER AUTHORITIES**

### **Application of Part 9**

**36.** This Part applies to a claim of any kind for damages for personal injury or death or damage to property resulting from breach of duty, except civil liability that is excluded from the operation of this Part by section 3B.

### **Interpretation**

**37.** In this Part –

“**exercise**” a function includes perform a duty;

“**function**” includes a power, authority or duty;

“**public or other authority**” means –

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1993*); or
- (b) a council; or
- (c) a statutory authority; or
- (d) a State-owned company; or
- (e) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions); or

- (f) any person or body undertaking the exercise of public or other functions of a class prescribed by the regulations for the purpose of this Part;

**“State-owned company”** means a company incorporated under the Corporations Act that is controlled –

- (a) by the Crown, a Minister of the Crown, a Government Business Enterprise or a statutory authority; or
- (b) by another company that is so controlled;

**“statutory authority”** means a body or authority, whether incorporated or not, that is established or constituted by or under an Act or under the Royal Prerogative, being a body or authority which, or of which the governing authority, wholly or partly comprises a person or persons appointed by the Governor, a Minister or another statutory authority.

**Principles concerning resources, responsibilities, &c., of public or other authorities**

**38.** The following principles apply in determining whether a public or other authority has a duty or has breached a duty in proceedings to which this Part applies:

- (a) 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;
- (b) the reasonableness of the allocation of those resources by the authority is not open to challenge;
- (c) 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);
- (d) the authority may rely on evidence of its compliance with its general procedures and any relevant standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

**No duty of care for recreational activity where risk warning**

**39. (1)** A public or other authority (“the authority”) does not owe a duty to a person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to that person.

**(2)** If the person who engages in the recreational activity is an incapable person, the authority may rely on a risk warning only if –

- (a) the incapable person was under the care of or accompanied by another person

(who is not an incapable person and not the authority) and the risk was the subject of a risk warning to that other person; or

- (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the care of or accompanied by the parent).

**(3)** For the purpose of subsections (1) and (2), 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.

**(4)** The authority is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

**(5)** A risk warning can be given orally or in writing (including by means of a sign or otherwise).

**(6)** A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

**(7)** An authority is not entitled to rely on a risk warning unless it is given by or on behalf of the authority or has been adopted by the authority.

**(8)** An authority is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific

practices or procedures for the protection of personal safety.

**(9)** An authority is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the authority to the person.

**(10)** An authority is not entitled to rely on a risk warning to a person if the person was required to engage in the recreational activity by the authority.

**(11)** An authority is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm suffered resulted from an act done or omission made with reckless disregard for the consequences of the act or omission.

**(12)** The fact that a risk is the subject of a risk warning does not of itself mean –

- (a) that the risk is not an obvious or inherent risk of an activity; or
- (b) that an authority who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

**(13)** This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

**(14)** In this section –

**“incapable person”** means a person who, because of the person’s young age or a

physical or mental disability, lacks the capacity to understand the risk warning;

**“parent”** of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person;

**“recreational activity”** has the same meaning as in Division 5 of Part 6.

### **Proceedings against public or other authorities based on breach of statutory duty**

**40. (1)** This section applies to proceedings in respect of a claim to which this Part applies that are based on an alleged breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.

**(2)** For the purpose of any such proceedings in respect of a claim, 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.

**(3)** In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 41.

### **When public or other authority not liable for failure to exercise regulatory functions**

**41. (1)** A public or other authority is not liable in proceedings in respect of a claim to which this Part

applies to the extent that the claim 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 claimant.

(2) Without limiting what constitutes a function to regulate an activity for the purpose of this section, a function to issue a licence, permit or other authority in respect of an activity, or to register or otherwise authorise a person in connection with an activity, constitutes a function to regulate the activity.

### **Special non-feasance protection for failure to carry out road work**

**42. (1)** A public or other authority responsible for carrying out road work is not liable in proceedings in respect of a claim 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 facts creating the particular risk the materialisation of which resulted in the harm.

(2) This section does not operate –

- (a) to create a duty of care in respect of a risk merely because the public or other authority referred to in subsection (1) has actual knowledge of the risk; or
- (b) to affect any standard of care that would otherwise be applicable in respect of a risk.

**(3)** In this section –

**“carry out road work”** means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road;

**“road”** means any street, road, lane, thoroughfare, footpath, bridge, or place open to or used by the public, or to which the public have or are permitted to have access, whether on payment of a fee or otherwise.

### **Exercise of function or decision to exercise does not create duty**

**43.** In proceedings in respect of a claim to which this Part applies, the fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

## **PART 10 – VOLUNTEERS**

### **Interpretation**

**44. (1)** In this Part –

**“community organisation”** means –

- (a) a State Service Agency or statutory authority; or
- (b) an incorporated association under the *Associations Incorporation Act*

1964, a council or a body  
corporate –

that organises the doing of community work by  
volunteers;

**“community work”** means work organised  
by a community organisation to be  
done –

- (a) for a religious, educational,  
charitable or benevolent purpose;  
or
- (b) for the purpose of promoting or  
encouraging literature, science or  
the arts; or
- (c) for the purpose of sport, recreation  
or amusement; or
- (d) for the purpose of caring for,  
treating or otherwise assisting  
people who need assistance  
because of a physical or mental  
disability or condition; or
- (e) for the purpose of conserving or  
protecting the environment; or
- (f) for the purpose of promoting or  
preserving historical or cultural  
heritage; or
- (g) for the purpose of establishing,  
carrying on or improving a  
community, social or cultural  
centre; or
- (h) for the purpose of promoting the  
interests of a local community; or

- (i) for a political purpose; or
- (j) for a purpose prescribed by the regulations –

but does not include work of a kind that is prescribed by the regulations as work that is not to be regarded as community work for the purposes of this Act;

**“organised”** includes directed and supervised;

**“statutory authority”** has the meaning given by section 37;

**“volunteer”** has the meaning given by section 45.

(2) A reference in this Part to the doing of anything by a volunteer includes a reference to the omission by a volunteer to do anything.

### **Meaning of “volunteer”**

**45. (1)** In this Part, **“volunteer”** means a person who does community work on a voluntary basis but does not include a person who is –

- (a) taken to be a worker for the purposes of the *Workers Rehabilitation and Compensation Act 1988*; or
- (b) performing a function prescribed by the regulations.

(2) For the purpose of subsection (1), a person does community work on a voluntary basis if the person –

- (a) receives no remuneration for doing that work other than –
  - (i) remuneration that the person would receive whether or not the person did that work; or
  - (ii) the reimbursement of reasonable expenses incurred by the person in doing that work; or
- (b) receives remuneration that is not greater than the amount, if any, prescribed by the regulations.

**(3)** A person is not to be regarded as doing community work on a voluntary basis if the person is doing that work under an order imposed by a court.

### **Application of Part 10**

**46. (1)** This Part applies to civil liability for a thing done by a volunteer after the commencement of this Part.

**(2)** This Part does not limit the protection from liability given by another written law.

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

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

**(2)** Subsection (1) does not affect any right to recover damages in respect of defamation or in respect of the death of, or personal injury to, any

person directly caused by, or by the driving of, a motor vehicle if, at the time of the death or personal injury –

- (a) the vehicle was owned or being driven by a person who, but for the operation of subsection (1), would incur liability in respect of the death or personal injury; and
- (b) the vehicle –
  - (i) was a vehicle in respect of which a premium had been paid, or had been required to be paid, in accordance with Part V of the *Motor Accidents (Liabilities and Compensation) Act 1973*; or
  - (ii) was a “permitted out-of-State vehicle”, as referred to in section 2 of that Act, in respect of which a third party insurance policy was in force as required by section 19 of that Act.

**(3)** The protection given by subsection (1) does not apply to a volunteer –

- (a) who knew or ought reasonably to have known that at the relevant time he or she was acting –
  - (i) outside the scope of the community work organised by the community organisation; or
  - (ii) contrary to instructions given by the community organisation; or

- (b) whose ability to do the community work in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.

**(4)** In this section –

“**drugs**” means drugs that are taken voluntarily otherwise than for therapeutic purposes;

“**motor vehicle**” has the meaning given in section 2 of the *Motor Accidents (Liabilities and Compensation) Act 1973*.

### **Liability of community organisations**

**48. (1)** A community organisation incurs the civil liability that, but for the operation of section 47(1), a volunteer would incur for a thing done by the volunteer when doing community work organised by the community organisation.

**(2)** The operation of subsection (1) is subject to any protection from liability that would have applied to the community organisation if the thing done by the volunteer had been done by the community organisation.

**(3)** If more than one community organisation is involved in organising the community work referred to in subsection (1), that subsection applies to the community organisation that principally organises, or the community organisations that principally organise, that work.

**Certain indemnities, &c., have no effect**

**49.** An agreement, undertaking or arrangement has no effect to the extent that it provides for a volunteer to give a community organisation an indemnity against, or to make a contribution to a community organisation in relation to, a civil liability that –

- (a) the volunteer would incur but for the operation of section 47(1); and
- (b) the community organisation incurs under section 48(1).

**PART 11 – MISCELLANEOUS****Regulations**

**50. (1)** The Governor may make regulations for the purposes of this Act.

**(2)** Regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.

**(3)** The regulations may –

- (a) provide that a contravention of, or a failure to comply with, any of the regulations is an offence; and
- (b) in respect of such an offence, provide for the imposition of a fine not exceeding 50 penalty units and, in the case of a continuing offence, a further fine not exceeding 20 penalty units for each day during which the offence continues.

**(4)** The regulations may authorise any matter to be from time to time determined, applied or

regulated by any person or body specified in the regulations.

**(5)** The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.

**(6)** Regulations under subsection (5) may take effect on the day on which this Act commences or a later day as specified in the regulations, whether the day so specified is before, on or after the day on which the regulations are made.

### ***Fair Trading Act 1990* amended**

**10.** The *Fair Trading Act 1990* is amended as follows:

- (a) by omitting section 37 and substituting the following section:

#### **Actions for damages**

**37. (1)** A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of this Act may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

**(2)** A reference to loss or damage in subsection (1) does not, if the loss or damage arises from a contravention of Part 2 (section 15 excepted), include a reference to –

- (a) the death of a person; or
- (b) personal injury to a person (including any pre-natal injury, any impairment of the person's

physical or mental condition and any disease).

- (b) by inserting the following subsection after subsection (1) in section 41:

**(1A)** A reference in this section to loss or damage does not, if the loss or damage arises from a contravention of Part 2 (section 15 excepted), include a reference to –

- (a) the death of a person; or
- (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).

### ***Wrongs Act 1954* amended**

**11.** Section 4(1) of the *Wrongs Act 1954* is amended by inserting “up to 100%” after “extent”.

### **Application of amendments made by this Act**

**12.** The amendments made by this Act do not apply to a cause of action accrued before the commencement of this Act.