

Passed by both Houses



New South Wales

Civil Liability Bill 2002

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2002*



New South Wales

Civil Liability Bill 2002

Act No , 2002

An Act to make provision in relation to the recovery of damages for death or personal injury caused by the fault of a person; to amend the *Legal Profession Act 1987* in relation to costs in civil claims; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Civil Liability Act 2002*.

2 Commencement

This Act is taken to have commenced on 20 March 2002.

3 Definitions

In this Act:

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

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.

fault includes an act or omission.

injury means personal or bodily injury, and includes:

- (a) pre-natal injury, and
- (b) psychological or psychiatric injury, and
- (c) disease.

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

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

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

4 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

5 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

6 Notes

Notes included in this Act do not form part of this Act.

7 Savings and transitional provisions

Schedule 1 has effect.

8 Amendment of Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

Clause 9	Civil Liability Bill 2002
Part 2	Personal injury damages
Division 1	Preliminary

Part 2 Personal injury damages

Division 1 Preliminary

9 Application of Part

- (1) This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part.
- (2) The following awards of damages are excluded from the operation of this Part:
 - (a) an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct,
 - (b) an award to which Part 6 of the *Motor Accidents Act 1988* applies or to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988*),
 - (c) an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies,
 - (d) an award in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*,
 - (e) an award comprising compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or a benefit payable under the *Sporting Injuries Insurance Act 1978*,
 - (f) a sum required or authorised to be paid under an industrial instrument within the meaning of the *Industrial Relations Act 1996*,

- (g) a sum payable under a superannuation scheme or any life or other insurance policy,
 - (h) an award of damages of a class that is excluded by the regulations from the operation of this Part.
- (3) This Part extends to an award of personal injury damages even if the damages are recovered in an action for breach of contract or in any other action.

10 General regulation of court awards

A court cannot award damages, or interest on damages, to a claimant contrary to this Part.

11 Act does not give rise to any cause of action

This Act does not create or confer any cause of civil action for the recovery of damages in respect of an injury or death caused by the fault of a person.

Division 2 Fixing damages for economic loss

12 Damages for past or future economic loss—maximum for loss of earnings etc

- (1) This section applies to an award of damages:
- (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
 - (b) for future economic loss due to the deprivation or impairment of earning capacity, or
 - (c) for the loss of expectation of financial support.
- (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.
- (3) For the purposes of this section, the amount of average weekly earnings at the date of an award is:
- (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter

Clause 12	Civil Liability Bill 2002
Part 2	Personal injury damages
Division 2	Fixing damages for economic loss

occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award, or

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

13 Future economic loss—claimant’s prospects and adjustments

- (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future 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.
- (2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.
- (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.

14 Damages for future economic loss—discount rate

- (1) If an award of damages is to include any component, assessed as a lump sum, for economic loss that is referable to the future, the present value of that future economic loss is to be determined by adopting the prescribed discount rate.
- (2) The *prescribed discount rate* is:
 - (a) a discount rate of the percentage prescribed by the regulations, or
 - (b) if no percentage is so prescribed—a discount rate of 5%.
- (3) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages.

15 Damages for gratuitous attendant care services

- (1) In this section:
- attendant care services* means any of the following:
- (a) services of a domestic nature,
 - (b) services relating to nursing,
 - (c) services that aim to alleviate the consequences of an injury.
- gratuitous attendant care services* means attendant care services:
- (a) that have been or are to be provided by another person to a claimant, and
 - (b) for which the claimant has not paid or is not liable to pay.
- (2) No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:
- (a) there is (or was) a reasonable need for the services to be provided, and
 - (b) the need has arisen (or arose) solely because of the injury to which the damages relate, and
 - (c) the services would not be (or would not have been) provided to the claimant but for the injury.
- (3) Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided:
- (a) for less than 6 hours per week, and
 - (b) for less than 6 months.
- (4) If the services are provided or are to be provided for not less than 40 hours per week, the amount of damages that may be awarded for gratuitous attendant care services must not exceed:
- (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:
 - (i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been

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estimated by the Australian Statistician and is, at the date of the award, available to the court making the award—that quarter, or

- (ii) in respect of the whole or any part of any other quarter—the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award, or
 - (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.
- (5) If the services are provided or are to be provided for less than 40 hours per week, the amount of those damages must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (4) (a) or (b), as the case requires.
- (6) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.

Note. Section 18 provides that a court cannot order the payment of interest on damages awarded for gratuitous attendant care services.

Division 3 Fixing damages for non-economic loss (general damages)

16 Determination of damages for non-economic loss

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

Table

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%–100%	34%–100% respectively

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Part 2	Personal injury damages
Division 3	Fixing damages for non-economic loss (general damages)

- (4) An amount determined in accordance with subsection (3) is to be rounded to the nearest \$500.

Note. The following are the steps required in the assessment of non-economic loss in accordance with this section:

Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.

Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in a most extreme case. This amount is indexed each year under section 17.

Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the Table.

Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.

17 Indexation of maximum amount relating to non-economic loss

- (1) The Minister is, on or before 1 October 2002 and on or before 1 October in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of section 16 (2).
- (2) The amount declared is to be the amount applicable under section 16 (2) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in New South Wales over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (3) An amount declared for the time being under this section applies to the exclusion of the amount under section 16 (2).
- (4) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (2), the amount declared is to be determined in accordance with the regulations.
- (5) In adjusting an amount to be declared for the purposes of section 16 (2), the amount determined in accordance with subsection (2) is to be rounded to the nearest \$500.

Division 4 Other matters

18 Interest on damages

- (1) A court cannot order the payment of interest on damages awarded for non-economic loss or gratuitous attendant care services (as defined in section 15).
- (2) If a court is satisfied that interest is payable on damages (other than damages for non-economic loss or gratuitous attendant care services), the amount of interest is to be calculated:
 - (a) for the period from when the loss to which the damages relate was first incurred until the date on which the court determines the damages, and
 - (b) in accordance with the principles ordinarily applied by the court for that purpose, subject to subsection (3).
- (3) The rate of interest to be used in any such calculation is:
 - (a) such interest rate as may be determined by the regulations, or
 - (b) if no such rate is determined by the regulations—the relevant interest rate as at the date of determination of the damages.
- (4) For the purposes of subsection (3), the **relevant interest rate** is the rate representing the Commonwealth Government 10-year benchmark bond rate as published by the Reserve Bank of Australia in the *Reserve Bank of Australia Bulletin* (however described) and as applying:
 - (a) on the first business day of January of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 March until 31 August of that year), or
 - (b) on the first business day of July of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 September of that year until the last day of February of the following year).
- (5) Nothing in this section affects the payment of interest on a debt under a judgment or order of a court.

19 Third party contributions

- (1) This section applies when a person (***the claimant***) is entitled to an award of damages in respect of death or injury against a person (***the defendant***) and also against another person (***the third party***), and the

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award against the defendant is an award to which this Part applies but the award against the third party is not an award to which this Part applies.

- (2) A court determining the amount of the contribution (*the defendant's contribution*) to be recovered by the third party from the defendant must:
 - (a) determine the defendant's contribution as a percentage, being such percentage as the court thinks just and equitable (having regard to the extent of the responsibility of the defendant and the third party, respectively, for the claimant's damages), and
 - (b) determine the amount of damages to which the claimant is, or would be, entitled in accordance with this Part (as if the award of damages against the third party were not excluded from the operation of this Part), and
 - (c) fix the amount of the defendant's contribution by applying the percentage determined under paragraph (a) to the amount of damages determined under paragraph (b).
- (3) The amount of damages that may be recovered by the claimant from the third party is to be reduced by the difference between:
 - (a) the amount of the contribution to which the third party would have been entitled (but for this section) from the defendant, and
 - (b) the amount of the defendant's contribution calculated under subsection (2).
- (4) Subsection (3) does not limit any greater reduction (applicable under any other law) in the amount of damages that may be recovered by the claimant from the third party.

20 Contributory negligence—claims under the Compensation to Relatives Act 1897

- (1) In a claim for personal injury damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.
- (2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for personal injury damages.

21 Exemplary, punitive and aggravated damages

In an action for the award of personal injury damages where the fault that caused the injury or death concerned is negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.

22 Court may make consent order for structured settlement

- (1) This section applies where the parties to a claim for personal injury damages agree to settle the claim by making a structured settlement and apply to the court for an order approving of or in the terms of the structured settlement.
- (2) The court may make the order even though the payment of damages is not in the form of a lump sum award of damages.
- (3) For the purposes of this section, a *structured settlement* is 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.

Schedule 1 Savings and transitional provisions

(Section 7)

Part 1 Preliminary

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from:
 - (a) 20 March 2002 or a later date where this Act is the Act concerned, or
 - (b) where some other Act is the Act concerned, the date of assent to that Act or a later date.

Part 2 Provisions consequent on enactment of this Act

2 Application of Act to existing injuries and pending claims

- (1) Part 2 of this Act extends to an award of personal injury damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the commencement of this Act.
- (2) However, Part 2 of this Act does not apply to or in respect of:
 - (a) an award of damages in proceedings commenced in a court before the commencement of this Act, or
 - (b) an award of damages, or settlement or consent order in respect of damages, made before the date of assent to this Act.

3 Application of Act to health care claims

Despite the amendments made by this Act to the *Health Care Liability Act 2001*, that Act continues to apply (as if it had not been amended by this Act) to an award in respect of a health care claim (as defined in that Act) in proceedings commenced in a court before the commencement of this Act.

4 Application of Act to claims against the Crown notified before 20 March 2002

- (1) Part 2 of this Act does not apply to or in respect of an award of damages on a claim against the Crown if the Crown has been notified in writing of the claim before 20 March 2002 and:
- (a) the damages are awarded (or are the subject of a settlement or consent order made) before 1 September 2002, or
 - (b) proceedings on the claim are commenced in a court before 1 September 2002, or
 - (c) proceedings on the claim cannot be commenced before 1 September 2002 because the injury concerned has not stabilised.
- (2) This clause does not apply to an award in respect of a health care claim as defined in the *Health Care Liability Act 2001*.
- (3) In this clause:
- Crown** means the Crown within the meaning of the *Crown Proceedings Act 1988* and includes a State owned corporation within the meaning of the *State Owned Corporations Act 1989*.

Schedule 2 Amendment of Acts

(Section 8)

2.1 Health Care Liability Act 2001 No 42

[1] Part 2 Awarding of damages in health care claims

Omit the Part.

[2] Section 28 Determination of contribution to third party

Omit the section.

2.2 Legal Profession Act 1987 No 109

[1] Section 196 Regulations to provide for related costs

Insert as section 196 (1) (a2):

- (a2) fixing the costs payable for legal services provided in connection with any claim for personal injury damages (within the meaning of the *Civil Liability Act 2002*),

[2] Part 11 Legal fees and other costs

Insert after Division 5A:

Division 5B Maximum costs in personal injury damages matters

198C Interpretation and application

(1) In this Division:

defendant means a person against whom a claim for personal injury damages is or may be made.

party means plaintiff or defendant.

personal injury damages has the same meaning as in the *Civil Liability Act 2002*.

plaintiff means a person who makes or is entitled to make a claim for personal injury damages.

- (2) This Division does not apply to the following costs:
- (a) costs payable to an applicant for compensation under Part 2 of the *Victims Support and Rehabilitation Act 1996* in respect of the application for compensation,
 - (b) costs for legal services provided in respect of a claim under the *Motor Accidents Act 1988* or *Motor Accidents Compensation Act 1999*,
 - (c) costs for legal services provided in respect of a claim for work injury damages (as defined in the *Workplace Injury Management and Workers Compensation Act 1998*),
 - (d) costs for legal services provided in respect of a claim for damages in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*.

198D Maximum costs fixed for claims up to \$100,000

- (1) 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:
- (a) 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,
 - (b) 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.
- (2) The regulations may prescribe an amount to replace the amount of \$100,000 or \$10,000 in subsection (1) and may prescribe a percentage to replace the percentage of 20% in subsection (1).

When such a replacement amount or percentage is prescribed, it applies for the purposes of subsection (1) in place of the amount or percentage that it replaces.

- (3) The regulations may contain provisions of a savings or transitional nature consequent on the making of regulations under this section.
- (4) When the maximum costs for legal services provided to a party are fixed by this Division the following provisions apply (subject to sections 198E–198G):
 - (a) a solicitor or barrister is not entitled to be paid or recover for those legal services an amount that exceeds those maximum costs,
 - (b) a court or tribunal cannot order the payment by another party to the claim of costs in respect of those legal services in an amount that exceeds that maximum,
 - (c) in assessing the amount of those costs that is a fair and reasonable amount, a costs assessor cannot determine an amount that exceeds the maximum set by this section.
- (5) A reference in this Division to legal services provided to a party is a reference to legal services provided to the party by a solicitor or barrister (including by an agent or employee of the solicitor or barrister). Costs for legal services do not include costs charged as disbursements for services provided by any other person or other disbursements.
- (6) If proceedings are commenced on a claim, the amount sought to be recovered by the plaintiff is taken to be the amount sought to be proved by the plaintiff at the hearing of the claim.
- (7) Maximum costs fixed by this section apply despite regulations under section 196 (1) (a2) fixing those costs.

198E Maximum costs do not affect solicitor-client costs under costs agreements

- (1) This Division does not apply to the recovery of costs payable as between a solicitor or barrister and the solicitor's or barrister's client to the extent that recovery of those costs is provided for by a costs agreement that complies with Division 3.

-
- (2) The regulations may make provision for or with respect to requiring disclosure by a solicitor or barrister to the solicitor's or barrister's client of information in relation to the effect of a costs agreement in connection with the operation of this Division.
 - (3) The regulations may provide that a failure by a solicitor or barrister to comply with the requirements of the regulations under this section disentitles the solicitor or barrister to the benefit of this section, and in such a case this Division applies in respect of the claim concerned despite the terms of any costs agreement.

198F Costs can be awarded on indemnity basis for costs incurred after failure to accept offer of compromise

- (1) If a party to a claim for personal injury damages makes a reasonable offer of compromise on the claim that is not accepted, this Division does not prevent the awarding of costs against another party to be assessed on an indemnity basis in respect of legal services provided after the offer is made.
- (2) An offer of compromise on a claim by a party is *reasonable* if the court determines or makes an order or award on the claim in terms that are no less favourable to the party than the terms of the offer.
- (3) The regulations may make provision for or with respect to requiring disclosure by a solicitor or barrister to the solicitor's or barrister's client of information in relation to the operation of this section in respect of any refusal by the client to accept an offer of compromise.
- (4) If it appears to the court in which proceedings are taken on a claim for damages that a solicitor or barrister has failed to comply with any provision of the regulations under this section, and that the client of the solicitor or barrister has incurred an increased liability for costs as a result of refusing a reasonable offer of compromise in connection with the claim concerned, the court may of its own motion or on the application of the client make either or both of the following orders:
 - (a) an order directing the solicitor or barrister to repay to the client the whole or any part of those increased costs that the client has been ordered to pay to any other party,

- (b) an order directing the solicitor or barrister to indemnify any party other than the client against the whole or any part of the costs payable by the party indemnified in respect of legal services provided after the offer is refused.

198G Court may order certain legal services to be excluded from maximum costs limitation

A court hearing a claim for personal injury damages may by order exclude from the operation of this Division legal services provided to a party to the claim if the court is satisfied that the legal services were provided in response to any action on the claim by or on behalf of the other party to the claim that in the circumstances was not reasonably necessary for the advancement of that party's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim.

198H Apportionment of maximum costs between solicitors and barristers

- (1) If more than one person (solicitor or barrister) provides legal services to a party in connection with a claim, the maximum costs fixed by this Division are to be apportioned between them as agreed by them or (failing agreement) as ordered by the court hearing proceedings on the claim.
- (2) The maximum then applicable to a particular solicitor or barrister is the solicitor's or barrister's apportioned share of those maximum costs.

198I Meaning of "amount recovered" on a claim

- (1) A reference in this Division to the amount recovered on a claim includes any amount paid under a compromise or settlement of the claim (whether or not legal proceedings have been instituted).
- (2) In determining the amount recovered on a claim for personal injury damages, no regard is to be had to any part of the amount recovered that is attributable to costs or to the addition of interest.

Division 5C Costs in civil claims where no reasonable prospects of success

198J Solicitor or barrister not to act unless there are reasonable prospects of success

- (1) A solicitor or barrister must not provide legal services on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (2) A fact is *provable* only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
- (3) This Division applies despite any obligation that a solicitor or barrister may have to act in accordance with the instructions or wishes of his or her client.
- (4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.
- (5) Provision of legal services in contravention of this section constitutes for the purposes of this Division the provision of legal services *without reasonable prospects of success*.

198K Preliminary legal work not affected

This Division does not apply to legal services provided as a preliminary matter for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.

198L Restrictions on commencing proceedings without reasonable prospects of success

- (1) The provision of legal services without reasonable prospects of success does not constitute an offence but is capable of being professional misconduct or unsatisfactory professional conduct.

- (2) A solicitor or barrister cannot file originating process or a defence on a claim for damages unless the solicitor or barrister certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (3) Originating process or a defence on a claim for damages is not to be accepted for lodgment unless accompanied by the certification required by this section. Rules of court may make provision for or with respect to the form of that certification.

198M Costs order against solicitor or barrister who acts without reasonable prospects of success

- (1) If it appears to a court in which proceedings are taken on a claim for damages that a solicitor or barrister has provided legal services to a party without reasonable prospects of success, the court may of its own motion or on the application of any party to the proceedings make either or both of the following orders in respect of the solicitor or barrister who provided the services:
 - (a) an order directing the solicitor or barrister to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,
 - (b) an order directing the solicitor or barrister to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified.
- (2) The Supreme Court may on the application of any party to proceedings on a claim for damages make any order that the court in which proceedings on the claim are taken could make under this section.
- (3) An application for an order under this section cannot be made after a final determination has been made under this Part by a costs assessor of the costs payable as a result of an order made by the court in which the proceedings on the claim concerned were taken.

- (4) A solicitor or barrister is not entitled to demand, recover or accept from his or her client any part of the amount for which the solicitor or barrister is directed to indemnify a party pursuant to an order under this section.

198N Onus on solicitor or barrister to show facts provided reasonable prospects of success

- (1) If the court (*the trial court*) hearing proceedings on a claim for damages finds that the facts established by the evidence before the court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Division that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
- (2) If the Supreme Court (when the Supreme Court is not the trial court) is satisfied, either as a result of a finding of the trial court or otherwise on the basis of the judgment of the trial court, that the facts established by the evidence before the trial court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Division that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
- (3) A presumption arising under this section is rebuttable and a solicitor or barrister who seeks to rebut it bears the onus of establishing that at the time legal services were provided there were provable facts (as provided by section 198J) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success.
- (4) A solicitor or barrister may, for the purpose of establishing that at the time legal services were provided there were provable facts (as provided by section 198J) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success, produce information or a document despite any duty of confidentiality in respect of a communication between the solicitor or barrister and a client, but only if:
 - (a) the client is the client to whom the legal services were provided or consents to its disclosure, or

- (b) the court is satisfied that it is necessary for the solicitor or barrister to do so in order to rebut a presumption arising under this section.

[3] Section 208O Costs fixed by regulations

Insert “(a2),” before “(b)” in section 208O (1).

[4] Schedule 8 Savings, transitional and other provisions

Insert at the end of clause 1A (1):

Civil Liability Act 2002 (to the extent that it amends this Act)

[5] Schedule 8

Insert after clause 1A (2):

- (2A) A provision referred to in subclause (1) may, where the Act concerned is the *Civil Liability Act 2002* and if the regulations so provide, take effect from 20 March 2002 or a later date. Subclause (3) does not apply to such a provision.

[6] Schedule 8

Insert at the end of the Schedule with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Civil Liability Act 2002

Application of costs amendments

- (1) Division 5B (Maximum costs in personal injury damages matters) of Part 11 does not apply in respect of legal services provided before 7 May 2002 but extends to legal services provided on or after that date even if the legal services are provided in connection with a claim that arose before that date (and whether or not proceedings on the claim were commenced before that date).

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- (2) Division 5C (Costs in civil claims where no reasonable prospects of success) of Part 11 extends to legal services provided on or after 20 March 2002 even if the legal services are provided in connection with a claim that arose before that date (and whether or not proceedings on the claim were commenced before that date).
 - (3) However, section 198L (2) and (3) do not apply in respect of proceedings commenced before the date of assent to the *Civil Liability Act 2002*.
 - (4) An order may not be made under section 198M (and an application for such an order may not be made) before the date of assent to the *Civil Liability Act 2002*.

Apportionment of costs for legal services

- (1) In the application of Division 5B of Part 11 to a claim for personal injury damages that straddles 7 May 2002, the following provisions have effect in respect of the costs for legal services provided to a party in connection with the claim:
 - (a) the costs for legal services provided on or after 7 May 2002 are to be determined as a proportion of the total costs for legal services provided to the party (that is, for legal services provided before, on or after 7 May 2002),
 - (b) the proportion determined under paragraph (a) is to be applied to the maximum costs for legal services that would (apart from this clause) be applicable in respect of the claim under section 198D, so as to arrive at a **reduced maximum amount** for costs in respect of legal services provided on or after 7 May 2002,
 - (c) that reduced maximum amount becomes, for the purposes of section 198D, the maximum costs for legal services provided to the party in connection with the claim on or after 7 May 2002.

Note. Section 198D does not apply to costs for legal services provided before 7 May 2002.

- (2) After the date of assent to the *Civil Liability Act 2002*, a solicitor or barrister must not provide a legal service to a party in connection with a claim for personal injury damages that

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Schedule 2

Amendment of Acts

straddles 7 May 2002 unless the party has been notified in writing by the solicitor or barrister of the effect of Divisions 5B and 5C of Part 11.

- (3) A claim *straddles* 7 May 2002 if legal services are provided in connection with the claim both before and on or after 7 May 2002.