

Civil Liability Amendment (Personal Responsibility) Act 2002

By Bruce MacDermott



The *Civil Liability Amendment (Personal Responsibility) Act 2002* ("the Amendment Act") was passed by the NSW Parliament on 20 November 2002, assented to on 28 November 2002 and proclaimed

to commence, in large measure, from 6 December 2002.

Three provisions of the Amendment Act do not commence from 6 December 2002. First, the provision which introduces a new section 5N of the *Civil Liability Act 2002* ("the Principal Act") which deals with waiver of contractual duty of care for recreational activities. Second, the provision which introduces an amended section 22 and new sections 23 to 26 of the Principal Act which deal with structured settlements. Proclamation of these two provisions awaits passage through the federal Parliament of the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* and the *Taxation Laws Amendment (Structured Settlements) Bill 2002* respectively. Both these Bills are expected to be passed by the end of this year. Third, Part 4 of the Principal Act which deals with proportionate liability and Schedule 4.2 which omits section 109ZJ of the *Environmental Planning and Assessment Act 1979* dealing with apportionment of liability. Proclamation of these provisions awaits possible amendments to the *Trade Practices Act 1974* relating to proportionate liability.

The content of the Amendment Act passed by Parliament differs in several respects from the consultation draft released on 3 September 2002. The Amendment Act has adopted some of the recommendations of the Ipp Report to the federal Parliament but all inconsistencies between the Amendment Act and the Ipp Report have not been eliminated.

This *Bulletin* outlines some of the more important changes effected by the Amendment Act.

Dates of operation

The amendments to the Principal Act generally extend to civil liability arising before the commencement of the amendments but do not apply to proceedings already commenced.

However, two amendments to the Principal Act apply to **proceedings commenced on or after 3 September 2002** (except in respect of a decision of the court made before 6 December 2002). The two amendments are the new Part 7 of the Principal Act (sections 51-54) which deals with the defences of self-defence and conduct by a plaintiff constituting a "serious offence", and the new section 30 of the Principal Act which limits recovery for pure mental harm arising from shock.

Proceedings to which the amendments do not apply

The provisions of the Principal Act inserted by the Amendment Act do not apply to civil liability and awards of damages in respect of:

- Intentional acts done with intent to cause injury or death, or an act that is sexual assault or other sexual misconduct
- Dust diseases claims
- Claims where injury or death resulted from smoking or other use of tobacco products
- Motor accidents (including public transport accidents to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies)
- Workers' compensation (including payments under the *Victims Support and Rehabilitation Act 1996*, the *Anti-Discrimination Act 1977*, or the *Sporting Injuries Insurance Act 1978*)

but subject to the following exceptions:

- Part 7 of the Principal Act (self-defence and recovery by criminals) will apply in respect of civil liability for an intentional act done with intent to cause injury or death or which is sexual assault or other sexual misconduct
- The following provisions will apply to motor accidents:
 - Divisions 1-4 and 8 of Part 1A of the Principal Act (Negligence)
 - Section 15A (Damages for loss of superannuation entitlements)
 - Section 17A (Tariffs for damages for non-economic loss)
 - Division 7 of Part 2 (Structured settlements)
 - Part 3 (Mental harm)
 - Section 49 (Effect of intoxication on duty and standard of care)
 - Part 7 (Self-defence and recovery by criminals), and
 - Part 8 (Good Samaritans)

Foreseeability and causation

The amendments prescribe principles for courts to follow in determining whether a defendant has been negligent. The new section 5B of the Principal Act provides that a defendant is not negligent in failing to take precautions against a risk of harm unless:

- The risk was foreseeable (that is, it is a risk of which the defendant knew or ought to have known)
- The risk was not insignificant, and
- In the circumstances, a reasonable person in the defendant's position would have taken those precautions.

In determining the last of these issues, the court is to consider the following (“amongst other relevant things”):

- The probability that the harm would occur if care were not taken
- The likely seriousness of the harm
- The burden of taking precautions to avoid the risk of harm (which includes the burden of taking precautions to avoid similar risks of harm for which the defendant may be responsible)
- The social utility of the activity that creates the risk of harm (though “social utility” is not defined)
- 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 liability for the way in which the thing was done, and
- The subsequent taking of action that would, if taken earlier, have avoided a risk of harm does not of itself give rise to liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

In determining whether a negligent act caused a particular harm the new section 5D provides that a court must now not only find that the negligence was a necessary condition of the occurrence of the harm but also that it is appropriate, and why, for the scope of the defendant’s liability to extend to the harm so caused.

A consequence of these provisions may be that courts will address questions of liability, and of the consequences of liability, in a clearer fashion than previously, but this may result in generally longer hearings.

Risks and warnings

The amendments provide that a plaintiff is presumed to have been aware of a risk of harm if it was an “obvious risk” unless the plaintiff proves, on the balance of probabilities, that s/he was not aware of the risk.

An obvious risk includes a risk which has a low probability of occurring and a risk which is not prominent, conspicuous or physically observable. A defendant also is not liable in negligence for harm suffered as a result of the materialisation of an “inherent risk” which is defined as a risk which cannot be avoided by the exercise of reasonable care and skill. In relation to recent “footpath cases” the Court of Appeal appears already to have adopted principles along these lines.

A defendant generally owes no duty to warn a plaintiff of an obvious risk unless the plaintiff has requested advice or information about the risk from the defendant or the defendant is a professional and the risk concerns death or physical injury to the plaintiff from the provision of professional services by the defendant.

No defendant is liable in negligence for harm resulting from an obvious risk involved in a “dangerous recreational activity” engaged in by the plaintiff. Nor does a defendant owe a duty of care to a plaintiff (not being an incapable person) who engages in a recreational activity if the risk of that activity was the subject of a risk warning to the plaintiff unless the harm concerned resulted from contravention of a law dealing with personal safety practices. “Recreational activity” is defined to include any sport while

“dangerous recreational activity” means a recreational activity that involves a significant risk of physical harm.

A contract for supply of recreational services, unless the modification contravenes a law dealing with personal safety practices, may modify the amendments concerning recreational activities.

Professional liability

No longer will questions arise concerning the relevance of the opinions of peers in determining the standard of care owed by a defendant practising any profession. The new section 5O of the Principal Act provides that a professional does not incur a liability in negligence arising from the provision of a professional service if it is established that s/he acted in a manner that, at the time the service was provided, was widely, though not universally, accepted in Australia by peer professional opinion as competent professional practice.

However, such peer professional opinion cannot be relied upon if the court considers that the opinion is irrational.

Other changes

Other amendments include:

- The introduction of structured settlements (that is, agreements for the payment of damages in the form of periodic payments funded by an annuity or other means) and of the obligation on lawyers to provide written advice to plaintiffs in personal injury actions concerning structured settlements
- Capping of damages for loss of superannuation entitlements
- Admissibility of earlier awards of damages for non-economic loss
- Limitation on damages for pure mental harm arising from shock
- The replacement of the joint and several liability of concurrent wrongdoers by proportionate liability in claims for economic loss, or for damage to property, or for misleading and deceptive conduct
- Limitation of the liability of public and other authorities
- Limitation on recovery of damages by intoxicated persons
- Protection of good samaritans and volunteers
- Provision that apologies do not constitute admissions of liability
- Introduction of a limitation period in personal injury actions which is the first to expire of a “three-year post-discovery” period or a “twelve-year long-stop” period.

Risk management

The Principal Act when initially passed appeared to have as a prime purpose the reduction of awards of damages in personal injury actions. The Amendment Act appears to have as a prime purpose the reduction of the types of personal injury actions in which damages may be recovered. Both Acts also apply to civil actions for damages apart from personal injury actions.

Before commencing civil actions for damages on behalf of clients, solicitors would be well advised to provide written advice to the clients on the prospects of success on liability and quantum and on the consequences under the Acts of not succeeding.